NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING

CALIFORNIA REPORTER

Containing Cases Reported in
PACIFIC REPORTER

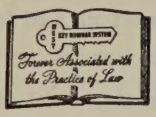
237 P.—239 P.

Cite by Volume and Page
of the
PACIFIC REPORTER

CALIFORNIA REPORTER

Covering Cases Reported in

PACIFIC REPORTER



237 P.—239 P.

Cite by Volume and Page

of the

PACIFIC REPORTER

Thus:

237 P. 25

ST. PAUL, MINN.
WEST PUBLISHING CO.
1956

COPYRIGHT, 1925, BY WEST PUBLISHING CO.
Pacific Reporter, Vol. 237, Nos. 1-5; Vol. 238, Nos. 1-5; Vol. 239, Nos. 1-6.

COPYRIGHT, 1956, BY WEST PUBLISHING CO.

Cal.Rep. 237-239 P.
2-1967

CASES REPORTED

Vols. 237–239 P.

	Vol.	P. Page
Acquistapace; Melone Co. v., App.	238	734
A. G. Col Co. v. Superior Court in and for Santa Clara County, Sup.	238	926
Ainsworth; Ransford v., Sup.	237	747
Alaska Packers' Ass'n; Willey v., App.	238	1087
Alexander v. Manton Joint Union School Dist. in Tehama and Shasta Counties, App.	238	742
Allen's Collection Agency v. Lee, App.	238	169
All Persons; East Bay Municipal Utility Dist. v., Sup.	239	38
Alturas State Bank; Sherlock v., App.	238	816
American Factors v. Goss, App.	238	121
American Fruit Growers of California v. Pacific Electric Ry. Co., App.	238	105
American Ice Mach. Co.; Reno v., App.	237	784
Amos; Hemry v., Sup.	239	1059
Amos v. Superior Court of California in and for San Diego County, Sup.	239	317
Anderson v. Palladine, App.	237	758
Anso v. Anso, App.	237	814
Archer v. Miller, two cases, App.	239	92
Ariss-Knapp Co. v. Sonoma County, App.	238	752
Bacigalupi v. Bacigalupi, App.	238	93
Bailey Trading Co. v. Levy, App.	237	408
Bank of Perris; Richman v., App.	238	754
Barker v. Morrell, App.	238	1047
Barnes; Farmer v., App.	238	723
Barrios & Co. v. J. R. Garrett Co., App.	238	155
Barton; People v., App.	237	767
Barton's Estate, In re, Sup.	238	681
Bassett's Estate, In re, Sup.	238	666
Bauer v. Bauer, Sup.	239	49
Bauer's Estate, In re, Sup.	239	49
Beck; Gordon v., Sup.	239	309
Bell v. Kelly, App.	238	719
Benton; Johnson v., App.	239	63
Benton; Johnston v., App.	239	60
Bercut; Burg Bros. v., App.	238	166
Berman v. Industrial Accident Commission of California, App.	238	1052
Bernard's Estate, In re, Sup.	239	404
Betz & Mabrey; Waterhouse-Wilcox Co. v., App.	238	763
Black; People v., App.	238	374
Blake v. Clark, Sup.	238	681
Blankman v. Parsons, App.	238	728
Board of Medical Examiners of California; Levin v., App.	239	410
Board of Police Com'rs of City and County of San Francisco; Curtin v., App.	239	355
Board of Police Com'rs of City and County of San Francisco; Sheehan v., Sup.	239	844
Board of Trustees of City of Colton; Ogden v., App.	239	855

P.

	Vol.	Page
Bollinger; People v., Sup.	237	25
Bomar; People v., App.	238	758
Boscou; Davis v., App.	237	401
Brainard v. Rogers, App.	239	1095
Bramston; Lawrence v., Sup.	237	738
Broderick v. Broderick, Sup.	238	1034
Broderick; Union Mut. Life Ins. Co. v., Sup.	238	1034
Brown; Riley v., App.	237	833
Brownrigg v. De Frees, Sup.	238	714
Broyles v. Mahon, App.	237	763
Bryson; Manion v., Sup.	238	666
Buck; People v., App.	237	63
Buonocore; People v., App.	238	812
Burg v. Harris, App.	237	399
Burg Bros. v. Bercut, two cases, App.	238	166
Byers; Shelley v., App.	238	177
California Bank; King v., App.	238	108
Cameron; Kelley v., App.	237	819
Campbell; Parry v., App.	238	127
Campbell; Parry v., App.	238	130
Carlson; Wollesen v., Sup.	238	74
Carr; Hansen v., App.	238	1048
Carson's Estate, In re, App.	239	364
Carter; People v., App.	238	1059
Cavanaugh v. Rea, Sup.	238	353
Cawston Ostrich Farm v. Salomon, App.	237	808
Cecil; People v., App.	237	568
Central Iron Works; Dyer Bros. Golden West Iron Works, v., App.	237	386
Chapman v. Ostergard, App.	238	1081
Chavez v. Times-Mirror Co., App.	237	1085
Cherney v. Johnson, App.	238	150
Chesney; People v., App.	237	793
Churchill Co.; Franklin v., App.	238	822
City and County of San Francisco; Fourcade v., Sup.	238	934
City Council of San Jose v. Goodwin, Sup.	237	548
City Inv. Co. v. Pringle, App.	239	302
City of Coalinga v. Shaw, App.	237	562
City of Fresno v. Fresno Irr. Dist., App.	237	772
City of Huntington Beach; Pacific Palisades Ass'n v., Sup.	237	538
City of Los Angeles v. Superior Court of Los Angeles County, Sup.	238	670
City of Sacramento; Futterer v., Sup.	237	48
City of San Gabriel; Purcell v., App.	238	114
Clark; Blake v., Sup.	238	681
Clark; Tomsky v., App.	238	950
Clifton; First Nat. Bank v., App.	238	371
Cohen v. Marshall, two cases, Sup.	239	1050
Col Co. v. Superior Court in and for Santa Clara County, Sup.	238	926
Collier; Lesem v., Sup.	239	717
Colver v. W. B. Scarborough Co., App.	238	1096
Colver; W. B. Scarborough Co. v., App.	238	1102
Colver v. W. B. Scarborough Co., App.	238	1104
Colver v. W. B. Scarborough Co., App.	238	1110
Conson; People v., App.	237	799
Contractors' Indemnity Exch. of California v. State Industrial Accident Commission, App.	237	404
Cooke v. Superior Court of City and County of San Francisco, App.	239	381

P.

	Vol.	Page
Cordero; People v., App.	237	786
Cordua Irr. Dist.; Stone v., App.	237	554
Cox; Newton v., App.	239	54
Crappa; People v., App.	238	731
Craven v. Dominguez Estate Co., App.	237	821
Crocker v. Riley, Sup.	237	1074
Cunningham v. Robinson, Sup.	239	313
Curtin v. Board of Police Com'rs of City and County of San Francisco, App.	239	355
Danford; Mason v., Sup.	238	76
Danford's Estate, In re, Sup.	238	76
Darling; Green v., App.	239	70
Daugherty; Dominguez Land Corporation v., Sup.	238	697
Daugherty; Dominguez Land Corporation v., Sup.	238	703
Daugherty; Leach v., App.	238	160
Davis v. Boscou, App.	237	401
Davis v. Stanislaus County Farmers' Union, App.	238	95
De Frees; Brownrigg v., Sup.	238	714
Delannoy v. Quetu, App.	239	71
Del Monte Light & Power Co. v. Jordan, Sup.	238	710
Delpech; Estes v., App.	238	1085
De Matei v. Superior Court in and for Lake County, App.	239	853
Dennis v. Miller Automobile Co., App.	238	739
Department of Public Works of California, Division of Water Rights, v. Superior Court in and for Siskiyou County, Sup.	239	1076
Department of Public Works of State of California, Division of Water Rights, v. Superior Court of State of California in and for Siskiyou County, Sup.	239	1080
Dillingham's Estate, In re, Sup.	238	367
Dimity v. Dixon, App.	238	1058
Dixon; Dimity v., App.	238	1058
Dixon v. Dixon, App.	239	383
Dodd v. Maddox, App.	238	130
Dominguez Estate Co.; Craven v., App.	237	821
Dominguez Land Corporation v. Daugherty, Sup.	238	697
Dominguez Land Corporation v. Daugherty, Sup.	238	703
Donahue v. Pochin, Sup.	239	404
Dunston; Libby v., App.	237	565
Dyer Bros. Golden West Iron Works v. Central Iron Works, App.	237	386
East Bay Municipal Utility Dist. v. All Persons, Sup.	239	38
Ehlers v. Langley & Michaels Co., App.	237	55
Eiseman, Ex parte, App.	238	124
Elberta Oil Co. v. Superior Court of California in and for Kings County, App.	239	415
Eldridge; People v., App.	237	770
England v. Winslow, Sup.	237	542
Enterprise Foundry Co. v. Polly, App.	238	722
Ephraim, Ex parte, App.	237	801
Ephraim; People v., App.	237	801
Erbel; People v., App.	237	769
Estes v. Delpech, App.	238	1085
Farmer v. Barnes, App.	238	723
Fauda v. Fauda, App.	237	563
Fickett; Weaver v., Sup.	238	87
Fike v. San Joaquin Light & Power Corporation, App.	239	344
Fink & Schindler Co. v. Gavros, App.	237	1083

	P. Vol.	Page
First Nat. Bank v. Clifton, App.	238	371
First Trust & Savings Bank v. Shay, Sup.	237	1079
Fisher, Ex parte, App.	239	1100
Fisher v. Southern Pac. Co., App.	237	787
Fiske v. Lowry, App.	237	790
Fleming v. Superior Court of Orange County, Sup.	238	88
Fourcade v. City and County of San Francisco, Sup.	238	934
Francisco; Swallow v., App.	239	95
Franklin v. Churchill Co., App.	238	822
Fresno County v. Shaw, App.	237	560
Fresno Irr. Dist.; City of Fresno v., App.	237	772
Fruit Distributors' Service Co.; Pryor v., App.	238	825
Fuller; People v., App.	238	809
Futterer v. City of Sacramento, Sup.	237	48
Gaffney v. Graf, App.	238	1054
Gaffny v. Michaels, App.	238	746
Galletta v. Justice Court of City and County of San Francisco, App.	238	133
Garbutt; People v., Sup.	239	1080
Garcia; People v., Sup.	238	367
Garrett; People v., App.	237	829
Garrett Co.; Barrios & Co. v., App.	238	155
Gavros; Fink & Schindler Co. v., App.	237	1083
General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v. Industrial Accident Commission, Sup.	237	33
Gibbs v. Hersman, App.	239	350
Gibson; People v., App.	237	53
Glavich, Ex parte, App.	239	707
Glavich, Ex parte, Sup.	239	708
Gohlke, Ex parte, App.	237	779
Gohlke, Ex parte, Sup.	238	1118
Gonzales; People v., App.	237	812
Goodrich; Macedo v., App.	237	389
Goodwin; City Council of San Jose v., Sup.	237	548
Gordon v. Beck, Sup.	239	309
Goss; American Factors v., App.	238	121
Graf; Gaffney v., App.	238	1054
Graham; Herbert v., App.	237	58
Granger v. Raje, App.	238	720
Great Western Power Co. of California v. Industrial Accident Commission of California, Sup.	238	662
Green v. Darling, App.	239	70
Greene v. Town of Lakeport, App.	239	702
Greeneich v. Knoll, App.	238	163
Greenwald; Haas v., Sup.	237	38
Gregg v. McDonald, App.	239	373
Gregory v. Hecke, App.	238	787
Grider; McCarthy v., App.	237	751
Grimes; Yoakum v., App.	238	727
Haas v. Greenwald, Sup.	237	38
Haberman v. Sawall, App.	237	776
Hall; O'Dell v., Sup.	239	35
Halley; La Mesa, Lemon Grove & Spring Valley Irr. Dist. v., Sup.	239	719
Halm v. Halm, Sup.	239	307
Halm's Estate, In re, Sup.	239	307
Hamil; People v., App.	238	1075
Hansen v. Carr, App.	238	1048

P.

	Vol.	Page
Harris; Burg v., App.	237	399
Hartford Accident & Indemnity Co. v. Industrial Accident Commission, Sup.	239	330
Harvey v. Machtig, App.	239	78
Hatzakorzian v. Rucker-Fuller Desk Co., Sup.	239	709
Hayes; People v., App.	237	390
Heape; People v., App.	237	66
Hecke; Gregory v., App.	238	787
Heller; Weinberg Co. v., App.	239	358
Hemry v. Amos, Sup.	239	1059
Henderson's Estate, In re, Sup.	238	938
Henry; Scott v., Sup.	239	314
Herbert v. Graham, App.	237	58
Hersman; Gibbs v., App.	239	350
Hindes v. Industrial Accident Commission, App.	239	339
Hoffman v. Superior Court in and for City and County of San Francisco, Sup.	237	548
Hogel; People v., App.	238	815
Holtham v. Savory, App.	238	136
Howard, Ex parte, App.	237	406
Howard; People v., App.	237	780
Hufschmidt; Umphray v., App.	238	749
Hunter v. McKenzie, Sup.	239	1090
Iburg's Estate, In re, Sup.	238	74
Industrial Accident Commission; General Accident, Fire & Life Assur. Corporation, Limited, of Perth, Scotland, v., Sup.	237	33
Industrial Accident Commission; Hartford Accident & Indemnity Co. v., Sup.	239	330
Industrial Accident Commission; Hindes v., App.	239	339
Industrial Accident Commission; International Indemnity Co. v., App.	238	1056
Industrial Accident Commission of California; Berman v., App.	238	1052
Industrial Accident Commission of California; Great Western Power of California v., Sup.	238	662
Industrial Accident Commission of California; Standard Varnish Works v., Sup.	239	1067
Industrial Accident Commission of State of California; Pacific Gas & Electric Co. v., Sup.	239	1072
Industrial Accident Commission of State of California; Stacey Bros. Gas Const. Co. v., Sup.	239	1072
International Indemnity Co. v. Industrial Accident Commission, App.	238	1056
Irwin's Estate, In re, Sup.	237	1074
Jacobs; People v., App.	238	770
Jaeger v. Jaeger, App.	238	139
Janss Inv. Co. v. Walden, Sup.	239	34
Jeffords v. Young, Sup.	239	1054
Jennings; Waxman v., App.	238	98
Johnson v. Benton, App.	239	63
Johnson; Cherney v., App.	238	150
Johnson v. Kaeser, Sup.	239	324
Johnson; People v., App.	238	814
Johnson v. Schimpf, Sup.	239	401
Johnson's Estate, In re, App.	237	816
Johnston v. Benton, App.	239	60
Johnston v. Jones, App.	239	862
Johnston's Estate, In re, Sup.	239	397
Jolly's Estate, In re, Sup.	238	353

P.

	Vol.	Page
Jones; Johnston v., App.	239	862
Jones v. Southern Pac. Co., App.	239	429
Jordan; Del Monte Light & Power Co. v., Sup.	238	710
Jordan; Moreno Mut. Irr. Co. v., Sup.	239	716
Jordan; People v., App.	237	757
J. R. Garrett Co.; Barrios & Co. v., App.	238	155
Juhl; Swim v., App.	237	552
Justice Court of City and County of San Francisco; Galletta v., App.	238	133
Kaeser; Johnson v., Sup.	239	324
Kane v. Ott, App.	238	126
Keena v. United Railroads of San Francisco, Sup.	239	1061
Kelley v. Cameron, App.	237	819
Kelly; Bell v., App.	238	719
King v. California Bank, App.	238	108
Kinsey; Sterling Lumber Co. v., App.	238	120
Knoll; Greeneich v., App.	238	163
Knox v. Trigonia Oil Co. of California, App.	239	861
Kruger v. Vernon, App.	238	1062
Lagomarsino; Rush v., Sup.	237	1066
La Mesa, Lemon Grove & Spring Valley Irr. Dist. v. Halley, Sup.	239	719
La Mesa, Lemon Grove & Spring Valley Irr. Dist. v. Superior Court, in and for Orange County, App.	238	117
Langley & Michaels Co.; Ehlers v., App.	237	55
La Plante; Whitten v., Sup.	237	744
Lathrop v. Title Insurance & Trust Co., App.	238	748
Laurel Hill Cemetery Ass'n, In re, App.	238	732
Laurel Hill Cemetery Ass'n v. Sargent, App.	238	732
Lawrence v. Bramston, Sup.	237	738
Lawrence's Estate, In re, Sup.	237	738
Leach v. Daugherty, App.	238	160
Lee; Allen's Collection Agency v., App.	238	169
Lemon v. Stuhldreher, App.	239	859
Lesem v. Collier, Sup.	239	717
Levin v. Board of Medical Examiners of California, App.	239	410
Levy; Bailey Trading Co. v., App.	237	408
Levy v. Superior Court of California in and for City and County of San Francisco, App.	239	1100
Lew Hoe; People v., App.	238	142
Libby v. Dunston, App.	237	565
Little v. Union Oil Co. of California, App.	238	1066
Los Angeles Ry. Corporation; Malone v., App.	238	110
Los Angeles Trust & Savings Bank v. Ward, Sup.	239	847
Lowry; Fiske v., App.	237	790
Luckehe v. Reclamation Dist. No. 2054, App.	238	760
Luthy Battery Co.; Murphy v., App.	239	341
Lyon Fireproof Storage Co.; McMullin v., App.	239	422
McCarthy v. Grider, App.	237	751
McCarthy; Rice v., App.	239	56
McDonald; Gregg v., App.	239	373
Macedo v. Goodrich, App.	237	389
McGuinness v. Superior Court in and for City and County of San Francisco, Sup.	237	42
Machtig; Harvey v., App.	239	78
McKenzie; Hunter v., Sup.	239	1090
McMullin v. Lyon Fireproof Storage Co., App.	239	422
Maddox; Dodd v., App.	238	130

P.

	Vol.	Page
Magoni; People v., App.	238	112
Mahon; Broyles v., App.	237	763
Malone v. Los Angeles Ry. Corporation, App.	238	110
Manion v. Bryson, Sup.	238	666
Mann; Washburn v., App.	238	721
Manton Joint Union School Dist. in Tehama and Shasta Counties; Alexander v., App.	238	742
Markart v. Zeimer, App.	239	856
Marshall; Cohen v., Sup.	239	1050
Marshall v. Marshall, Sup.	239	36
Mason v. Danford, Sup.	238	76
Mazzera v. Ramsey, App.	238	101
Mehra; People v., App.	238	802
Melone Co. v. Acquistapace, App.	238	734
Meraviglia; People v., App.	238	794
Merritt; Raney v., App.	238	767
Meyer v. Moore, App.	237	550
Michaels; Gaffny v., App.	238	746
Miles; People v., App.	237	772
Miller; Archer v., App.	239	92
Miller Automobile Co.; Dennis v., App.	238	739
Moore; Meyer v., App.	237	550
Moore; People v., App.	237	800
Moore v. Schneider, Sup.	238	81
Moreno Mut. Irr. Co. v. Jordan, Sup.	239	716
Morrell; Barker v., App.	238	1047
Mothorn; Strehlow v., Sup.	239	850
Mulcahy; Murphy-Cantrell Co. v., App.	237	557
Mulcahy; Yolland Ice & Fuel Co. v., App.	238	119
Murphy v. Luthy Battery Co., App.	239	341
Murphy; Reed v., Sup.	238	78
Murphy-Cantrell Co. v. Mulcahy, App.	237	557
Nason v. Shinjo, App.	237	559
Nay v. Superior Court of Napa County, App.	237	566
Nelson v. Yonge, App.	239	67
Nerney; Rodetsky v., App.	237	791
Newton v. Cox, two cases, App.	239	54
Nilsson; Poultry Producers of Central California v., Sup.	239	1086
Noble v. Noble, App.	239	51
Nunes; Roemer v., App.	238	820
O'Connell v. Rogers, App.	237	775
O'Dell v. Hall, Sup.	239	35
Ogden v. Board of Trustees of City of Colton, two cases, App.	239	855
Orosco; People v., App.	239	82
Ostergard; Chapman v., App.	238	1081
Ott; Kane v., App.	238	126
Pace; People v., App.	238	1089
Pacific Electric R. Co.; American Fruit Growers of California v., App.	238	105
Pacific Electric Ry. Co.; Renowden v., App.	238	785
Pacific Gas & Electric Co. v. Industrial Accident Commission of State of California, Sup.	239	1072
Pacific Palisades Ass'n v. City of Huntington Beach, Sup.	237	538
Paddon v. Superior Court of California in and for City and County of San Francisco, App.	238	1053
Palladine; Anderson v., App.	237	758
Parra; Webster v., App.	237	804

	P. Vol.	Page
Parry v. Campbell, App.	238	127
Parry v. Campbell, App.	238	130
Parsons; Blankman v., App.	238	728
Parsons' Estate, In re, Sup.	237	744
Patterson; Wetzler v., App.	238	1077
People v. Barton, App.	237	767
People v. Black, App.	238	374
People v. Bollinger, Sup.	237	25
People v. Bomar, App.	238	758
People v. Buck, App.	237	63
People v. Buonocore, App.	238	812
People v. Carter, App.	238	1059
People v. Cecil, App.	237	568
People v. Chesney, App.	237	793
People v. Conson, App.	237	799
People v. Cordero, App.	237	786
People v. Crappa, App.	238	731
People v. Eldridge, App.	237	770
People v. Ephraim, App.	237	801
People v. Erbel, App.	237	769
People v. Fuller, App.	238	809
People v. Garbutt, Sup.	239	1080
People v. Garcia, Sup.	238	367
People v. Garrett, App.	237	829
People v. Gibson, App.	237	53
People v. Gonzales, App.	237	812
People v. Hamil, App.	238	1075
People v. Hayes, App.	237	390
People v. Heape, App.	237	66
People v. Hogel, App.	238	815
People v. Howard, App.	237	780
People v. Jacobs, App.	238	770
People v. Johnson, App.	238	814
People v. Jordan, App.	237	757
People v. Lew Hoe, App.	238	142
People v. Magoni, App.	238	112
People v. Mehra, App.	238	802
People v. Meraviglia, App.	238	794
People v. Miles, App.	237	772
People v. Moore, App.	237	800
People v. Orosco, App.	239	82
People v. Pace, App.	238	1089
People v. Porter, App.	237	800
People v. Quarez, Sup.	238	363
People v. Reid, App.	237	824
People v. Rico, App.	238	814
People v. Russell, App.	238	1051
People v. Ryan, App.	239	419
People v. Sanders, App.	238	372
People v. Schiaffino, App.	238	725
People v. Schomig, App.	239	413
People v. Seawright, App.	237	796
People v. Snyder, App.	239	705
People v. Sokolis, App.	237	789
People v. Sprado, App.	237	1087
People v. Swaar, App.	239	412

P.

	Vol.	Page
People v. Sylvis, App.	237	802
People v. Warren, App.	237	1117
Perry v. Simeone, Sup.	239	1056
Pickerill v. Strain, Sup.	239	323
Platz; Riley v., Sup.	238	367
Pochin; Donahue v., Sup.	239	404
Pokonney; Vanasek v., App.	238	798
Polly; Enterprise Foundry Co. v., App.	238	722
Porter; People v., App.	237	800
Poultry Producers of Central California v. Nilsson, Sup.	239	1086
Powers v. Raymond, Sup.	239	1069
Presho v. Presho, Sup.	238	944
Presho's Estate, In re, Sup.	238	944
Pringle; City Inv. Co. v., App.	239	302
Prothero v. Superior Court of Orange County, Sup.	238	357
Pryor v. Fruit Distributors' Service Co., App.	238	825
Purcell v. City of San Gabriel, App.	238	114
Quadro v. Widemann, App.	237	756
Quarez; People v., Sup.	238	363
Quetu; Delannoy v., App.	239	71
Raje; Granger v., App.	238	720
Ramsey; Mazzera v., App.	238	101
Ramsey; Sanguinetti v., App.	238	105
Raney v. Merritt, App.	238	767
Ransford v. Ainsworth, Sup.	237	747
Raymond; Powers v., Sup.	239	1069
Rea; Cavanaugh v., Sup.	238	353
Reclamation Dist. No. 2054; Luckehe v., App.	238	760
Reed v. Murphy, Sup.	238	78
Reid; People v., App.	237	824
Reno v. American Ice Mach. Co., App.	237	784
Renowden v. Pacific Electric Ry. Co., App.	238	785
Rice v. McCarthy, App.	239	56
Richman v. Bank of Perris, App.	238	754
Rico; People v., App.	238	814
Riley v. Brown, App.	237	833
Riley; Crocker v., Sup.	237	1074
Riley v. Platz, Sup.	238	367
Riley; Steehler v., Sup.	239	718
Roberts v. Security Trust & Savings Bank, Sup.	238	673
Robinson; Cunningham v., Sup.	239	313
Rodetsky v. Nerney, App.	237	791
Roemer v. Nunes, App.	238	820
Rogers; Brainard v., App.	239	1095
Rogers; O'Connell v., App.	237	775
Rollins v. Smith, App.	238	171
Rucker-Fuller Desk Co.; Hatzakorzian v., Sup.	239	709
Rudy v. Slotwinsky, App.	238	783
Rush v. Lagomarsino, Sup.	237	1066
Russell; People v., App.	238	1051
Ryan; People v., App.	239	419
Rystrom v. Sutter Butte Canal Co., App.	238	954
Sacramento & San Joaquin Drainage Dist. v. Superior Court in and for Colusa County, Sup.	238	687
Sacramento & San Joaquin Drainage Dist.; Western Assur. Co. of Toronto v., App.	237	59

	Vol.	Page
Salomon; Cawston Ostrich Farm v., App.	237	808
Sanders; People v., App.	238	372
San Francisco Credit Clearing House v. Wells, Sup.	239	319
Sanguinetti v. Ramsey, App.	238	105
San Joaquin Light & Power Corporation; Fike v., App.	239	344
Sargent; Laurel Hill Cemetery Ass'n v., App.	238	732
Savory; Holtham v., App.	238	136
Sawall; Haberman v., App.	237	776
Scamell; State Compensation Ins. Fund v., App.	238	780
Scarborough Co.; Colver v., App.	238	1096
Scarborough Co. v. Colver, App.	238	1102
Scarborough Co.; Colver v., App.	238	1104
Scarborough Co.; Colver v., App.	238	1110
Schiaffino; People v., App.	238	725
Schimpf; Johnson v., Sup.	239	401
Schneider; Moore v., Sup.	238	81
Schomig; People v., App.	239	413
Schroeder v. Superior Court of California in and for Alameda County, App.	239	65
Scott v. Henry, Sup.	239	314
Seawright; People v., App.	237	796
Security Trust & Savings Bank; Roberts v., Sup.	238	673
Shaw; City of Coalinga v., App.	237	562
Shaw; Fresno County v., App.	237	560
Shay; First Trust & Savings Bank v., Sup.	237	1079
Shay's Estate, In re, Sup.	237	1079
Sheehan v. Board of Police Com'rs of City and County of San Francisco, Sup.	239	844
Shelley v. Byers, App.	238	177
Sherlock v. Alturas State Bank, App.	238	816
Shinjo; Nason v., App.	237	559
Silverman v. Thompson, Sup.	238	684
Simeone; Perry v., Sup.	239	1056
Sinn; Weatherbee v., App.	238	134
Slotwinsky; Rudy v., App.	238	783
Smith; Rollins v., App.	238	171
Snyder; People v., App.	239	705
Sokolis; People v., App.	237	789
Sonoma County; Ariss-Knapp Co. v., App.	238	752
Southern California Supply Co.; Steen v., App.	239	1098
Southern Pac. Co.; Fisher v., App.	237	787
Southern Pac. Co.; Jones v., App.	239	429
Southern Pac. Co. v. Swanson, App.	238	736
Spear; Taylor v., Sup.	238	1038
Spitzer's Estate, In re, Sup.	237	739
Sprado; People v., App.	237	1087
Stacey Bros. Gas Const. Co. v. Industrial Accident Commission of State of California, Sup.	239	1072
Standard Varnish Works v. Industrial Accident Commission of California, Sup.	239	1067
Stanislaus County Farmers' Union; Davis v., App.	238	95
State Compensation Ins. Fund v. Scamell, App.	238	780
State Industrial Accident Commission; Contractors' Indemnity Exch. of California v., App.	237	404
Steehler v. Riley, Sup.	239	718
Steehler's Estate, In re, Sup.	239	718
Steen v. Southern California Supply Co., App.	239	1098

	P. Vol.	Page
Sterling Lumber Co. v. Kinsey, App.	238	120
Stone v. Cordua Irr. Dist., App.	237	554
Strain; Pickerill v., Sup.	239	323
Stratton; Welch v., App.	239	380
Strehlow v. Mothorn, Sup.	239	850
Stuhldreher; Lemon v., App.	239	859
Stuhldreher's Estate, In re, App.	239	859
Sullivan v. Superior Court of California in and for Los Angeles County, App.	237	782
Superior Court in and for City and County of San Francisco; Hoffman v., Sup.	237	548
Superior Court in and for City and County of San Francisco; McGuinness v., Sup.	237	42
Superior Court in and for City and County of San Francisco; Urrutia v., Sup.	237	742
Superior Court in and for Colusa County; Sacramento & San Joaquin Drainage Dist. v., Sup.	238	687
Superior Court in and for Lake County; De Matei v., App.	239	853
Superior Court in and for Orange County; La Mesa, Lemon Grove & Spring Valley Irr. Dist. v., App.	238	117
Superior Court in and for Santa Clara County; A. G. Col Co. v., Sup.	238	926
Superior Court in and for Siskiyou County; Department of Public Works of California, Division of Water Rights, v., Sup.	239	1076
Superior Court in and for Tulare County; White v., App.	238	92
Superior Court of California in and for Alameda County; Schroeder v., App.	239	65
Superior Court of California in and for City and County of San Francisco; Levy v., App.	239	1100
Superior Court of California in and for City and County of San Francisco; Paddon v., App.	238	1053
Superior Court of California in and for Kings County; Elberta Oil Co. v., App.	239	415
Superior Court of California in and for Los Angeles County; Sullivan v., App.	237	782
Superior Court of California in and for Los Angeles County; Wigman v., App.	239	427
Superior Court of California in and for San Diego County; Amos v., Sup.	239	317
Superior Court of City and County of San Francisco; Cooke v., App.	239	381
Superior Court of Los Angeles County; City of Los Angeles v., Sup.	238	670
Superior Court of Napa County; Nay v., App.	237	566
Superior Court of Orange County; Fleming v., Sup.	238	88
Superior Court of Orange County; Prothero v., Sup.	238	357
Superior Court of State of California, in and for Siskiyou County; Department of Public Works of State of California, Division of Water Rights v., Sup.	239	1080
Sutter Butte Canal Co.; Rystrom v., App.	238	954
Swaar; People v., App.	239	412
Swallow v. Francisco, App.	239	95
Swanson; Southern Pac. Co. v., App.	238	736
Swim v. Juhl, App.	237	552
Sylvis; People v., App.	237	802
Taylor v. Spear, Sup.	238	1038
Thompson; Silverman v., Sup.	238	684
Times-Mirror Co.; Chavez v., App.	237	1085
Title Insurance & Trust Co.; Lathrop v., App.	238	748

P.

	Vol.	Page
Tomsky v. Clark, App.	238	950
Town of Lakeport; Greene v., App.	239	702
Trickett's Estate, In re, Sup.	239	406
Trigonia Oil Co. of California; Knox v., App.	239	861
Troy v. Troy, App.	238	143
Tuffin v. Warfield, App.	237	64
Umphray v. Hufschmidt, App.	238	749
Union Mut. Life Ins. Co. v. Broderick, Sup.	238	1034
Union Oil Co. of California; Little v., App.	238	1066
United Railroads of San Francisco; Keena v., Sup.	239	1061
Urrutia v. Superior Court in and for City and County of San Francisco, Sup.	237	742
Validation of East Bay Municipal Utility Dist. Water Bonds of 1925, In re, Sup.	239	38
Vanasek v. Pokonney, App.	238	798
Vernon; Kruger v., App.	238	1062
Walden; Janss Inv. Co. v., Sup.	239	34
Walker's Estate, In re, Sup.	237	1070
Ward; Los Angeles Trust & Savings Bank v., Sup.	239	847
Warfield; Tuffin v., App.	237	64
Warren; People v., App.	237	1117
Washburn v. Mann, App.	238	721
Waterhouse-Wilcox Co. v. Betz & Mabrey, App.	238	763
Waxman v. Jennings, App.	238	98
W. B. Scarborough Co.; Colver v., App.	238	1096
W. B. Scarborough Co. v. Colver, App.	238	1102
W. B. Scarborough Co.; Colver v., App.	238	1104
W. B. Scarborough Co.; Colver v., App.	238	1110
Weatherbee v. Sinn, App.	238	134
Weaver v. Fickett, Sup.	238	87
Webster v. Parra, App.	237	804
Weinberg Co. v. Heller, App.	239	358
Welch v. Stratton, App.	239	380
Wells; San Francisco Credit Clearing House v., Sup.	239	319
Western Assur. Co. of Toronto v. Sacramento & San Joaquin Drainage Dist., App.	237	59
Wetzler v. Patterson, two cases, App.	238	1077
White v. Superior Court in and for Tulare County, App.	238	92
Whitten v. La Plante, Sup.	237	744
Widemann; Quadro v., App.	237	756
Wigman v. Superior Court of California in and for Los Angeles County, App.	239	427
Wilbur v. Wilbur, Sup.	239	332
Willey v. Alaska Packers' Ass'n, App.	238	1087
Williams, Ex parte, App.	238	1044
Wilson, Ex parte, Sup.	238	359
Winslow; England v., Sup.	237	542
Wollesen v. Carlson, Sup.	238	74
Yoakum v. Grimes, App.	238	727
Yolland Ice & Fuel Co. v. Mulcahy, App.	238	119
Yonge; Nelson v., App.	239	67
Young; Jeffords v., Sup.	239	1054
Zeimer; Markart v., App.	239	856

CALIFORNIA REPORTER

237 PACIFIC REPORTER

196 Cal. 191

PEOPLE v. BOLLINGER. (Cr. 2727.)

(Supreme Court of California. May 26, 1925.)

1. Criminal law ⊜517(4) — Corpus delicti held under evidence sufficiently proved before evidence of confession admitted.

In murder prosecution, corpus delicti *held* under evidence to have been sufficiently proved before evidence of defendant's confession was admitted.

2. Criminal law ⊜531(3)—Evidence of voluntariness of confession held ample.

In murder prosecution, evidence of voluntariness of defendant's confession *held* ample.

3. Homicide ⊜253(1)—Evidence held to support conviction of first degree murder.

Evidence *held* to support conviction of murder of first degree with sentence of death.

4. Homicide ⊜314—Verdict of guilty of murder in first degree as charged in indictment held equivalent of finding that defendant suffer death penalty.

In view of Pen. Code, § 190, where, in murder prosecution, jury were instructed that, if in exercise of discretion they thought defendant should suffer death, merely to find him guilty of murder in the first degree, verdict finding defendant guilty of murder of first degree as charged in indictment *held* equivalent of finding that he should suffer death penalty.

5. Homicide ⊜311—Instruction as to how punishment should be expressed by jury held witnout error.

In murder prosecution, instruction, hypothetical in form, which instructed jury as to form of verdict if death penalty was determined on, and form of verdict if it was resolved to prescribe life imprisonment, *held* to be instruction on how punishment determined by jury should be expressed, not what punishment should be.

6. Homicide ⊜311—Instruction that jury in discretion could relieve defendant from death penalty held without error.

Instruction if jury found defendant guilty of first degree murder, and there were extenuating facts in case, it was within discretion to relieve defendant from extreme penalty, jury being vested with discretion limited to determining which of two punishments should be inflicted, and it was to be employed only when they were satisfied lighter penalty should be imposed, while opposed to Pen. Code, § 190, *held* not erroneous, although practice of giving such charge should be abandoned.

7. Criminal law ⊜761(11)—Instruction held not erroneous as assuming that homicide was proved.

In murder prosecution, reading jury Pen. Code, § 1105, providing on trial for murder, commission of homicide by defendant being proved, burden of proving circumstances of mitigation devolved on him, unless proof on part of prosecution showed that crime committed was manslaughter only, or that defendant was justifiable or excusable, *held* not to assume that commission of crime was proved.

8. Criminal law ⊜829(18)—Requested instruction that corpus delicti must be established to moral certainty and beyond reasonable doubt held sufficiently covered by others given.

Refusal of instruction in prosecution for murder that corpus delicti must be proved beyond reasonable doubt *held* not error, in view of other instructions on reasonable doubt which sufficiently informed jury that all essentials of offense must be established to moral certainty and beyond reasonable doubt.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Alfred Bollinger was convicted of first degree murder with sentence of death, and he appeals. Affirmed.

Frank A. Duryea and Alvin Weis, both of Marysville, for appellant.

U. S. Webb, Atty. Gen., J. Chas. Jones, Deputy Atty. Gen., and Ray Manwell, Dist. Atty., of Marysville, for the People.

LAWLOR, J. The defendant was charged by indictment with the crime of murder. He

pleaded not guilty to the indictment, was tried on the charge, and found guilty of murder in the first degree, the verdict carrying the death penalty. In due course a motion for a new trial was interposed by defendant and denied, whereupon judgment of death was pronounced upon him. The appeal is from said judgment sentencing him to death, and from the order denying defendant's motion for a new trial.

The evidence introduced at the trial tends to show that on May 27, 1924, C. J. McCoy, sheriff of Yuba county, was informed by an itinerant laborer named Dan McVey that a dead man was lying in a body of water called Nigger Jack or Simmerley slough situated near the cemetery north of Marysville; that said sheriff notified the county coroner; that the coroner repaired to said slough and found the dead body lying face downward, partly submerged; that a superficial examination at the time showed the deceased had been subjected to great violence—the skull was crushed in and several ribs broken; that decomposition had set in; that in the month of April, 1924, appellant and his wife were camping or stopping at an auto camp in Yolo county, across the river from Sacramento; that a man well along in years and known thereabouts only as "Alex" was also stopping at said auto camp at the same time; that appellant and his wife struck up an acquaintance with "Alex"; that when "Alex" first came to the auto camp he had with him a horse and rig, together with a supply of camping utensils; that while there he purchased or acquired another horse and rig; that subsequently, and about April 15, 1924, appellant, his wife, and "Alex" left the auto camp together—appellant, accompanied by his wife, driving one horse and rig and "Alex" the other; that upon their departure from said auto camp they proceeded along the road leading from Sacramento to Marysville; that 25 or 30 days later appellant and his wife were seen by C. Z. Berry driving along the Twelfth-street road toward Sacramento; that on this occasion appellant and his wife were each driving a horse and rig; that about June 15, 1924, appellant and his wife were at the city of Napa; that during their stay there appellant sold to Joseph A. Marshall a sorrel horse, a spring wagon and harness, to C. D. Butler, a brown mare, harness, and wagon—the latter containing wearing apparel, a yellow cat, and three pigeons; and to Louis Pasquini, the camping utensils, tents, tables, and everything of that sort. These purchasers testified at the trial, and described the property as above set forth.

Subsequent to the coroner's discovery of the body in the slough, appellant was arrested and made a confession, in which he told of the killing of "Alex" with an ax, stating therein that deceased had previously threatened his life. The confession assumed to set forth the movements of the trio following their departure from the camp grounds.

2 and 3. We will consider first appellant's second and third claims of reversible error, for, if those contentions have merit, it would not be necessary to consider the other points made on appeal. The second and third claims of reversible error are thus stated:

"(2) The ruling of the trial court holding that the prosecution had sufficiently proven the corpus delicti to admit proof of the so-called confession, statement, or admission of the defendant is reversible error.

"(3) The denial of defendant's motion for an instructed verdict is reversible error; * * * what we have said under previous headings of this brief and the cases cited under citation of error No. 2 apply here. * * *"

We will now set forth the substance of the evidence which had been received before the asserted confession was admitted.

Frank Bevan, coroner of Yuba county, testified that, on the evening of May 27, 1924, he found the body of a dead man in the waters of Nigger Jack or Simmerley slough; that the face was in the water as was the front part of the body; that the body was in a nude condition, with the exception that it had on a part of an undershirt and a torn and tattered blue denim working shirt; that he removed the body from the water, made a casual examination, and placed it in the receiving vault; that such casual examination as was made at that time revealed that the body had been immersed in water, "that the skull evidently was entirely caved in on the top"; that on the morning of June 4th a more thorough examination was made and an autopsy performed by Dr. Allen Gray—the witness and his assistant, Mr. Buchanan, being present; that this examination showed the body to be in the condition revealed by the prior examination except that it was in an advanced stage of decomposition, and the odor had become more pronounced; that it also showed the left eye and nose to be broken and decomposed, as were the lips; that the height of the deceased was estimated at about 5 feet, 6 inches, and his age between 50 and 60 years; that the bones of the upper and lower jaw revealed no signs of teeth; that the sheriff, the district attorney, and himself visited the slough in the morning of the 26th of June, 1924, and the sheriff then recovered from the bushes or trees certain bedding and a pillow which the witness identified on the stand as the bedding then found by the sheriff.

Doctor Allen E. Gray testified that, on the morning of June 4, 1924, he was called to the Marysville cemetery to, and that he did, perform an autopsy; that there were present at that time the coroner and his assistant; that the autopsy disclosed the body of a man about 5 feet, 6 inches in height, and apparently past 50 years of age; that the body

was badly decomposed, and parts of the skin and flesh were missing; that the top of the scalp, a part of the skull itself, and the brain were missing; that the top of the skull was badly fractured, and the fracture ran down toward the left orbit and the nose; that the eyes were missing and the flesh decomposed; the same being true of the skin and flesh of the nose; that there were no teeth and no signs of their recent removal; that there was a fracture of the third, fourth, and fifth rib on the left side, and that there was a bandage on one of his fingers; that there were no other bones broken or other marks of violence; that, in his opinion, "death came from a blow on the man's head"; that the man evidently had been dead three or four weeks or longer. On cross-examination he stated he could not say positively that these injuries were received before death; on redirect examination he declared that deceased did not have the appearance of a man that had been drowned.

C. C. Berry testified that during the month of April, 1924, he was running the camp ground in Sacramento, and had seen appellant and his wife there as campers; that they left the grounds about the 15th of April of that same year in company with an old man, who also had been staying there, and was known to him only as "Alex"; that "Alex" was about 5 feet, 6½ or 7 inches tall, and probably aged 65 years; that he thought "Alex" had no teeth; that "Alex" had stopped at the camp ground about a month and a half; that when he came he had a brown mare and a light buckboard rig; that during his ("Alex's") stay there he purchased another light, one-horse rig and a sorrel mare; that appellant, his wife, and "Alex" came to the camp grounds about the same time, and before leaving together they told him they were going to Knights Landing to go to work; that as they left appellant was driving one rig, and "Alex" the other; that each had a camping outfit—two separate tents—while there, which they took along when they left; that he recognized a "grub box" shown him as being one that belonged to "Alex"; that after they left he never again saw any of them.

C. Z. Berry testified that in the month of April, 1924, he worked in the grocery store in the camp grounds conducted by his brother, the preceding witness, at Sacramento; that he was acquainted with appellant, his wife, and "Alex"; that "Alex" was about 60 years of age, weighing 140 or 145 pounds, and probably 5 feet, 6 inches in height; that he never saw any teeth in his mouth; that "Alex" had with him while at said camp grounds a brown mare and a sorrel or chestnut; that the last time he ever saw "Alex" was about the 20th of April, 1924; that he also saw appellant at about the same time at the camp grounds; that he saw appellant and his wife about 25 or 30 days later on the Twelfth-street road going toward Sacramento; that each was driving a horse and wagon, the appellant being in the lead; that the horses "resembled the horses the old gentleman had"; that they appeared to have a camping outfit with them. On cross-examination he declared "Alex" had no teeth in front, as he saw none while talking with him in the store; that it was impossible to positively recognize the horses appellant and wife had with them on the last occasion on which he saw them as the horses that belonged to "Alex," but that they "looked the same color of horses."

Louis Pasquini testified that June 15, 1924, he saw appellant and his wife for the first time across the road from his blacksmith shop, one block north of the city limits of Napa; that they had with them at the time "two horses and two rigs, two complete single rigs, spring wagons, and camping utensils"; that on the following day appellant came to him and wanted to sell out everything he had, including two horses which he described as, "One was a bay and the other a sorrel"; that appellant told him his wife was sick, and he therefore desired to sell out everything he had so that he might take his wife to Oakland and to a hospital; that at that time he purchased from him "the cooking utensils and the camping utensils, tents, tables, everything of that sort; cooking utensils, camping outfit, tents, tables, and so forth"; that he (the witness) had no use for the horses and rigs, and therefore declined to purchase them; that he recognized two axes, a table, tent, box, bucket, and mattress shown him as being part of the outfit he bought from appellant.

Joseph A. Marshall testified that he saw appellant on the 16th of June, 1924, across the street from Pasquini's blacksmith shop; that at this time he bought a sorrel horse, spring wagon and harness from him.

C. D. Butler testified that he saw appellant in the city of Napa June 16, 1924, and that upon this occasion he purchased from him (appellant) a brown mare, harness, and wagon.

The coroner, being recalled, testified that the body he recovered from the slough did not have the appearance of one that had been drowned; that he was at the slough again on June 26, 1924, when C. J. McCoy, sheriff of Yuba county, recovered a bed; that the bed shown him was the bed found by the sheriff upon that occasion; that said bed was in the sheriff's office later when the appellant, the district attorney, the sheriff, and himself were present; that upon said occasion, so far as he was aware, no threats or inducements were made to appellant; that the sheriff asked appellant, "Is that the old man's bed or bedding?" that he hesitated a few seconds, and finally answered, "Yes."

Sheriff McCoy, of Yuba county, testified that he saw appellant for the first time in

Sacramento on June 25, 1924, and that since that time he had been in the custody of his office; that the first talk he had with appellant was in an automobile coming from his residence to the county jail in Sacramento, and then at the county jail in said city in the presence of Deputy Sheriff Robbins and the district attorney; that the next conversation with him was in the home of Joseph E. Pipher in Sacramento on the evening of the same day; that the next in chronological order was on the 26th of June, and the next on the 8th of July; that, so far as he was aware, no other officers had any conversations with appellant in his absence; that he, nor any one to his knowledge, did not, upon any of these occasions, hold out any threats, promises, rewards, or inducements to the appellant; that upon the occasion of the conversation in the home of Joseph E. Pipher no threats or promises were made to the appellant, and that the statements there made by appellant were freely and voluntarily made by him; that said conversation took place about 8 p. m. on the evening of June 25, 1924, and there were present Deputy Sheriffs Robbins and Wilcoxson, appellant, Joseph E. Pipher, district attorney, and himself; that, upon this occasion, the district attorney asked appellant "if he would be willing to have his statement taken down in shorthand by a reporter"; that he said, "Yes"; that he was then taken to Joseph E. Pipher's house, and the district attorney questioned him.

Joseph E. Pipher testified that he was a shorthand reporter of the Sacramento superior court; that on the 25th day of June, 1924, he saw appellant at his (Pipher's) house; that there were present at this time the district attorney, the sheriff, Deputies Wilcoxson and Robbins, the appellant, and himself; that they gathered about 7:10 o'clock in the evening; that no threats were made or promises held out to appellant, and that his statement was freely and voluntarily made.

[1] The rule requiring proof of the corpus delicti before the admission of extrajudicial confessions is thus stated in 8 Cal. Jur. p. 234, § 303:

"*Proof of Corpus Delicti and of Admissions and Confessions.*—Logically, the first point to which the evidence of the people should be directed is the corpus delicti. This should be established before the introduction of evidence tending to connect the defendant with the offense. The rule, however, does not go so far as to exclude, in showing the corpus delicti, proof of the defendant's connection with the crime, where the circumstances of the case are such that proof of the crime involves proof of defendant's guilt.

"*Admissions or Confessions.*—Proof of the corpus delicti should be made before the introduction of evidence of extrajudicial statements or admissions, and confessions. But in the absence of any showing of prejudice, irregularity in the order of proof is of no consequence, if the commission of the crime is ultimately established independently of the alleged admissions of the defendant.

"To authorize the reception and consideration by the jury of evidence of an extrajudicial confession or admission of a defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction. It is sufficient if there is some proof, or prima facie proof, or even slight proof of the corpus delicti. The uncorroborated testimony of a witness is sufficient to establish the corpus delicti for this purpose, even when the statute requires corroboration before a conviction can be had. Indeed, the confession of the defendant will furnish sufficient corroboration. But proof by hearsay testimony is insufficient. Since the criminal agency of the defendant is not an element of the corpus delicti, it is not necessary that the evidence of the corpus delicti should itself connect or tend to connect the defendant with its perpetration in order to make evidence of the confession admissible."

Applying this rule, we think that the trial court, in denying the motion to advise the jury to acquit on this ground, correctly summarized the evidence and disposed of the legal question involved. We quote:

"The motion is denied, the corpus delicti was sufficiently proven before any testimony of any statement of the defendant was introduced. The law as to that is very clear; the body was found, the man was dead; the body exhibited external marks of violence, skull crushed in, the brains gone, evidently the body of a man who had been dead some time, decomposition had set in. The doctor expressed the opinion that the cause of death was the injury to the skull and head which was necessarily fatal. There was no evidence of any drowning or poison or any other mode of death; it was very apparent from the description of the wounds that they could not have been self-inflicted; the man was evidently killed by somebody. Here is a man with marks of fatal wounds on his body, he is dead, his body is found; there you have evidence of the corpus delicti unless it is apparent the wound may have been self-inflicted, and this was impossible from the description of the wounds, so he was killed by some agency. The evidence does not show there was any agency that could have done that except some blow from some external force, and the nature of the wound and evidence of the physical surroundings would indicate a crime had been committed and not suicide. Then there was independent evidence showing that a man answering very accurately the description of the body found by the coroner was seen in company with the defendant and his wife in Sacramento, that they left there together; that the dead man had been the owner of two traveling rigs, horses and wagons, and that they left at the same time, the deceased in one rig, and the defendant and his wife in another. They stated they were going to Knights Landing on one road between Marysville and Sacramento; that afterwards the defendant and his wife were seen at Sacramento in these rigs, and that the defendant sold a lot of camping utensils in Napa, and the horses and wagons,

I think there was sufficient proof of the corpus delicti the moment Dr. Gray testified. There is most abundant proof of the agency; then all this proof of the people being seen to leave Sacramento together, the disappearance of the third party, and the disposition of the property by the defendant, and on top of that we have the clear-cut confession of the defendant as to the manner in which he dealt the death blow to the deceased. It would be the height of absurdity to give the jury any such direction. The motion is denied."

[2] It is apparent from the foregoing that the evidence of the voluntariness of the confession was ample. The evidence having been held to be sufficient to justify the admission of the extrajudicial confession, we will now set forth the substance thereof: That he had been married a little over a year; that on April 24, 1924, or the latter part of April, he and his wife were camped in the Berry camp grounds outside of Sacramento; that at that time "Alex" was also camped there; that they had been camped there "about two weeks, I think it was—not over three, at the most"; that they just had a tent and camp outfit; that they bought a horse and buggy from "Alex"; that "Alex" then bought another horse and rig; that he became acquainted with "Alex" through bandaging his sore arm on several occasions; that he thought "Alex" was between 55 and 60 years of age; that after "Alex" bought that second rig, the trio started towards Marysville; that he and his wife rode in the rig said to have been purchased from "Alex"; that "Alex" kept right behind them in the other rig; that they were on the road three nights before reaching Marysville; that they reached Marysville and camped near the cemetery; that he had worked in the district 10 country before—that is, about three years previously; that they pulled off of the road that goes down to the left near "Nigger slough"; that he and his wife "went to bed powerful early;" that "Alex" went to bed about 75 feet from where they were; that he woke up about daylight; that he hit "Alex" on the top of the head with an ax lying near the latter's bed; that "Alex" was attired only in his union suit and work shirt; that he then took him down to the slough and "drug him out in the water there a little ways"; that it could not have been over 75 yards distant from the public road where he left "Alex" in the slough; that he then returned and removed from "Alex's" clothes a $100 bill and two $5 bills; that he and his wife came back to Sacramento; "Did you say anything to your wife, or tell her to get up, or pack up, or anything? A. Why, she wanted to pack up and come on back. * * * Q. And did she ask you any questions about what became of the old man? A. Well, she asked me what I had done. Q. She didn't see you do this, did she? A. No"; that he sold "Alex's" outfit at Napa for $15; that at his wife's suggestion he threw "Alex's" personal belongings in the Sacramento river off the Natomas boulevard; that when they got to Sacramento with the money he had gotten, he purchased a suit of clothes; that "Alex's" hair was getting tolerable gray, but he could not say whether or not he was baldheaded or had any teeth, but thought he was smooth shaved; that he would judge "Alex" was about five-ten in height, and weighed about 140 pounds; that "Alex" on three different occasions made threats against him—"My wife told me of one occasion, and then I heard two other—two other occasions;" that the reason he did not sever his connections with him was because he "owed him a little bit on the outfit; besides he wanted to stay right with us all the time"; and that certain inconsistent statements as to where they separated from "Alex" and the road taken were made because "my conscience brought the words out; that was all."

Appellant did not appear as a witness on the trial. His wife, Eva Bollinger, testified, however, that the man who was with them ("Alex") on the trip from Sacramento in April, 1924, told her that he would "get" her husband yet; that she told her husband of his threat out by the cemetery near Marysville. On cross-examination she admitted that he made these threats because "he thought my husband neglected me and had me working, that is, the words he spoke about my husband"; and, that, in a conversation with the sheriff, she stated there was "no truth" in her husband's statement that the old man had made threats against him at two named places, adding "* * * but my husband was very jealous of the old man, but I told my husband if I was going to have anything to do with a man I wouldn't have anything to do with an old man, but I would pick a young man." It is proper to state in this connection that the jury was, at the request of appellant, elaborately charged on the subject of self-defense or justifiable homicide within the meaning of sections 197 and 198 of the Penal Code and the decisions thereunder, although the only evidence bearing on said question was that given by Eva Bollinger, as above stated, and the extrajudicial declarations of appellant.

[3] As we read appellant's brief it is not claimed that the evidence presented on the trial is insufficient to sustain the verdict. But in the statement of the grounds on appeal (section 1247, Pen. Code) it is declared: "(3) That the verdict is against law. (4) That the verdict is contrary to the evidence." Touching these contentions, and assuming they are before us, it is sufficient to point out that the evidence we have summarized abundantly supports the verdict rendered, and we fail to find in the record that such evidence was in any real sense controverted.

[4] 1. In the first assignment of error it is contended that the judgment is void, for the reason that the jury in its verdict failed to

fix the penalty as provided in section 190 of the Penal Code. The verdict rendered reads as follows:

"We, the jury in the above-entitled cause, find the defendant, Alfred Bollinger, guilty of murder of the first degree as charged in the indictment."

Section 190 of the Penal Code reads:

"Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same. * * *"

It is true the jury alone shall determine in a case of murder in the first degree whether the punishment shall be death or confinement in the state prison for life, and that the jury after exercising such discretion shall by its verdict, either by its terms or when read in the light of the instructions, plainly indicate the punishment fixed. It is clear that the verdict in this case, considered in the light of the following instruction, calls for the death penalty, and that the judgment is not void because of the failure of the verdict to specify therein, in terms, the punishment to be inflicted. The instruction reads:

"If you find the defendant guilty of murder in the first degree it is at your discretion to fix his punishment; that is to say, whether the defendant shall suffer death or confinement in the state prison for life. If, in the exercise of such discretion, you think the defendant should suffer death, *you will merely find him guilty of murder in the first degree;* but, if on the other hand you fix his punishment at confinement in the state prison for life, you will specify the same in your verdict." (Italics added.)

In conformity with the said instruction, the jury, having determined on the extreme penalty, simply brought in a verdict of guilty of murder in the first degree without specifying in terms the punishment to be inflicted. This follows the instruction, for it indicated that, if the death penalty was determined upon, the punishment should not be specified in the verdict; the only reference to be made to the punishment in the verdict was in the event the jury resolved on life imprisonment:

"But if, on the other hand, you fix his punishment in the state prison for life, *you will specify the same in your verdict.*"

The silence of the verdict as to the punishment must, therefore, in the light of the instruction, be taken as the equivalent of a finding that appellant shall suffer the death penalty. People v. Perry et al. (Cal. Sup.) 234 P. 890.

[5] 4. Having shown that the verdict is sufficient, we will next consider appellant's fourth assignment of error that the quoted instruction itself was erroneous, in that it constituted an interference by the court with the discretion exclusively reposed in the jury to fix the punishment to be inflicted in murder of the first degree. We do not perceive in said instruction any attempt to interfere with the exercise of the discretion of the jury in fixing the punishment in the event they should find appellant guilty of murder in the first degree. The instruction is hypothetical in form, "If you find the defendant guilty of murder in the first degree," and it then proceeds to instruct the jury as to the form of verdict to be rendered if the death penalty is determined upon, and the form of verdict if it is resolved to prescribe life imprisonment. It is clearly an instruction as to how the punishment determined by the jury shall be expressed, not what the punishment shall be. It is not necessary, therefore, to pursue the contention further or to consider the authorities cited by appellant, for, in addition to this instruction being free from criticism, the instructions reviewed in those authorities assumed to direct the jury as to how the discretion in the matter of punishment should be exercised.

[6] 5. Appellant's next contention is thus stated:

"The giving of the following instruction was reversible error, to wit, 'If the jury in this case should find the defendant guilty of murder in the first degree, and they also shall find the further fact that there is some extenuating fact or circumstance in the case, it is within their discretion to pronounce such a sentence as will relieve the defendant from the extreme penalty of the law. The jury in a criminal case for murder is vested with a discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows the defendant to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment.' "

It is contended that the instruction is erroneous "for the reasons and under the authorities cited and discussed under the heading 'Error 1' in this brief, and we think it is unnecessary to further discuss that phase of the case." The authorities referred to are Winston v. United States, Strather v. United States, and Smith v. United States, 172 U. S. 303, 19 S. Ct. 212, 43 L. Ed. 456. These cases involved the act of Congress of January 15, 1897, chapter 29, 29 Stat. 487 (U. S. Comp. St. § 10504) which reads in part:

"In all cases where the accused is found guilty of the crime of murder * * * the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

The juries in those cases were instructed in effect that their discretion was not an arbitrary one, and that the qualification should be added to the verdict only in those

cases showing palliating or mitigating circumstances. In condemning the instructions and reversing the judgments, the court said:

"The right to qualify a verdict of guilty, by adding the words 'without capital punishment,' is thus conferred upon the jury in all cases of murder. The act does not itself prescribe, nor authorize the court to prescribe, any rule defining or circumscribing the exercise of this right; but commits the whole matter of its exercise to the judgment and the consciences of the jury. The authority of the jury to decide that the accused shall not be punished capitally is not limited to cases in which the court, or the jury, is of opinion that there are palliating or mitigating circumstances. But it extends to every case in which, upon a view of the whole evidence, the jury is of opinion that it would not be just or wise to impose capital punishment. * * *

"The instructions of the judge to the jury, in each of the three cases now before this court, clearly gave the jury to understand that the act of Congress did not intend or authorize the jury to qualify their verdict by the addition of the words 'without capital punishment,' unless mitigating or palliating circumstances were proved.

"This court is of opinion that these instructions were erroneous in matter of law, as undertaking to control the discretionary power vested by Congress in the jury, and as attributing to Congress an intention unwarranted either by the express words or by the apparent purpose of the statute. * * *"

We have already quoted the pertinent part of section 190 of the Penal Code. Before the amendment of that section in 1873–74 (Stats. 1873–74, p. 457), it read as follows: "Every person guilty of murder in the first degree shall suffer death. * * *" It is clear beyond question that, by the language of the amended section "Every person guilty of murder in the first degree shall suffer death, or confinement in the state prison for life, at the discretion of the jury trying the same; * * *" two changes were made in the law as to the punishment for murder in the first degree—first, that the punishment may be either death or life imprisonment; and, second, that the discretion of determining which punishment shall be imposed was vested in the jury alone. For, as declared in the above federal cases, the law places no restriction upon the jury's exercise of such discretion, nor does it attempt to confine its exercise to cases presenting palliating or mitigating circumstances. In our opinion, the trial court should never instruct the jury as to how the discretion should be exercised. The Legislature has "confided the power to affix the punishment within those two alternatives to the absolute discretion of the jury. * * *" People v. Leary, 105 Cal. 486, 496, 39 P. 24. The question is not a new one in this state, and, while in no instance has it been held that the giving of such an instruction is erroneous under the decisions, yet no case has declared that such an instruction comes within the meaning of section 190 of the Penal Code.

In People v. Bawden, 90 Cal. 195, 27 P. 204, which involved three instructions whose import is almost identical with the one now under discussion, this court said:

"If the question here presented were a new one, there would be strong reasons for holding that by section 190 of the Penal Code the Legislature intended to give to the jury the entire power of fixing the punishment in such a case, uninfluenced by the court; and that there is no warrant in the code for any distinction, in this regard, between one kind of murder in the first degree and another. But these instructions are literal copies of instructions given and approved by this court in People v. Brick, 68 Cal. 190. The same rule was also substantially stated in People v. Jones, 63 Cal. 168; and in People v. Murback, 64 Cal. 369, the language of the instructions approved was almost identical with that used by the court in the case at bar, although it may be said that in the Murback Case the opinion of the court was hardly in consonance with the instructions approved. The same rule seems to have been approved in People v. Olsen, 80 Cal. 128.

"Similar instructions have no doubt been given in other cases now on their way here by appeal; for it is to be observed that whenever a doubtful instruction has been approved by this court, it has generally been seized upon and injected into future cases. Great confusion would therefore occur if we should enter into a new examination of this question, and should come to a conclusion opposite to that heretofore reached. Moreover, as was said by the court, on another subject, in People v. Myers, 20 Cal. 520, 'we do not think this question has practically so much importance as is sometimes attributed to it'; for a juror, exercising the responsibility of choosing between the imprisonment of a defendant and his death, will act upon his own discretion, and not upon that of another. Therefore we decline to reopen the question, and hold that the instructions, under the authorities, were not erroneous. It is to be hoped, however, that trial courts will not make further excursions into this doubtful domain."

Notwithstanding this concluding suggestion, the court has been called upon to consider the question in the following cases: People v. Leary, supra; People v. Rogers, 163 Cal. 476, 483, 126 P. 143; People v. Wolfgang, 192 Cal. 754, 761, 221 P. 907; People v. Casade (Cal. Sup.) 230 P. 9; People v. Craig (Cal. Sup.) 235 P. 721; People v. Perry et al. (Cal. Sup.) 234 P. 890.

While we are satisfied that the giving of such instructions is opposed to the provisions of section 190 of the Penal Code, we are not prepared to depart from the decisions on this point. In other words, we consider as settled that the giving of such instructions is not error. We have, however, gone into the subject in the hope, if not the expectation, that the practice of giving such instructions may be abated, thus giving assurance that the penalty reflects the decision of the jury alone, and at the same time sparing this court the

necessity of repeatedly passing on such assignments of error. And considering the numerous occasions this court has held that section 190 of the Penal Code confers on the jury alone the discretion of determining the punishment in cases of guilt of murder in the first degree, trial courts, especially where a human life is at stake, should not interfere with the discharge of that solemn duty by the jury.

[7] 6. The next contention is that the court committed error in reading to the jury section 1105 of the Penal Code, which provides:

"Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

It is contended that:

"This instruction assumes that the commission of the homicide by the defendant has been proved. It is equivalent to instructing the jury that such proof has been made. It is an instruction upon a question of fact. The jury, under such instruction, were told by the court that the question of fact, to wit, whether or not the homicide had been committed by the defendant, had been proved, and that they were no longer to consider that question as in doubt. * * * This same instruction was given in the case of People v. Tapia, 131 Cal. 647, 63 P. 1001, supra, and was there held by this court to be prejudicial error."

The giving of the instruction was doubtless prompted by appellant's claim that the deceased told Mrs. Bollinger he would "get" her husband, and that she repeated the threat to appellant at the cemetery near Marysville. Appellant's objection is similar to that made in People v. Grill, 151 Cal. 592, 595, 91 P. 515, 516, and what was said in that case completely disposes of the contention. We quote:

"The court in its instructions read to the jury section 1105 of the Penal Code. * * * The phrase objected to was not inserted in the instruction as a statement by the court that the commission of the homicide by the defendant had been proved. It was meant as an expression of a condition or event, upon which the succeeding part of the instruction would become applicable, and that is its true rhetorical meaning when considered in connection with the text. Its signification is the same as if the sentence began thus, 'When, upon a trial for murder, the commission of the homicide by the defendant has been proved,' etc. Thus understood, it does not constitute a statement of the fact by the court. In People v. Tapia, 131 Cal. 647, * * * this instruction was given with some additions declaring the extent of the burden of proof cast upon the defendant. It was criticized in that case upon the ground that the jury might have understood the above-quoted phrase as a declaration that the fact referred to had been proved. The defendant in that case did not attempt to mitigate, justify, or excuse the homicide, but denied that he had committed the act. Consequently, it was said, 'the instruction should not have been given, for it was entirely inapplicable.' * * *

"In the present case the instruction could not have been so understood by the jury. Other instructions repeated frequently the proposition that the jury were the exclusive judges of the facts. * * * In view of these instructions it would be impossible for any jury of ordinary intelligence to have supposed that the instruction complained of was intended to state to them that the fact that the defendant had committed the homicide had been proven."

[8] 7. Under this assignment of error it is asserted that the court erred in refusing an instruction "that in a murder case the burden is on the prosecution to establish the corpus delicti to a moral certainty and beyond a reasonable doubt." It appears that the court gave several instructions upon the necessity of the prosecution proving the corpus delicti, and, though none of them expressly stated the measure of proof required of the prosecution to prove that element of the crime, the court, after defining the term "corpus delicti," its essential ingredients, and declaring that the burden was on the prosecution to establish it, gave the following instruction:

"The corpus delicti may be established by direct or circumstantial evidence. But it cannot be established by the extrajudicial admissions or confessions of the defendant, or, as the rule is frequently expressed, a conviction cannot be had on the extrajudicial admissions or confessions of the defendant unless corroborated by proof, outside of such admissions or confessions, of the corpus delicti. It is a rule of evidence that admissions or confessions of a party are never sufficient to convict unless and until the corpus delicti is proved. After proof of the corpus delicti, then, and then only, admissions or confessions, if any have been established by the evidence to a moral certainty and beyond a reasonable doubt, may be used by the jury in determining whether or not the defendant is guilty as charged in the indictment."

From this and the instructions given to the jury on "reasonable doubt" and kindred subjects, we think the jury was instructed that the corpus delicti as well as every other essential of the offense must be established to a moral certainty and beyond a reasonable doubt.

8. Appellant's final specification of error is thus stated: "For the reasons given under the previous assignments and the cases there cited, we think it was error for the court to refuse defendant a new trial." In view of the disposition we have made of the preceding points, it must be held that this contention is without merit.

The judgment and order denying appellant's motion for a new trial are affirmed.

We concur: SHENK, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; WASTE, J.

196 Cal. 179

GENERAL ACCIDENT, FIRE & LIFE ASSUR. CORPORATION, LIMITED, OF PERTH, SCOTLAND, v. INDUSTRIAL ACCIDENT COMMISSION et al. (S. F. 11239.)

(Supreme Court of California. May 21, 1925.)

1. Insurance ⊜136(2)—Finding that delivery of policy by compensation insurer to its agent was a delivery thereof to employer seeking insurance held not sustained by evidence.

Insurance brokers *held* agents for employer, for the limited purpose of ascertaining cost of workmen's compensation insurance only, and agents of insurer, for collection of premium and delivery of policy to employer, so that finding of Industrial Accident Commission that forwarding of policy to broker was a delivery to such employer was not supported by the evidence, where employer had not bound himself to accept the policy.

2. Insurance ⊜670—Compensation insurer held entitled to finding by commission on question whether employer obtained policy by fraudulent concealment of fact that accident to employee had happened prior to issuance of policy.

Under the evidence, and in view of Civ. Code, §§ 2527, 2531, 2561, 2562, 2563, 2565, 2569, 2577, *held*, that compensation insurer was entitled to finding by the Industrial Accident Commission on the question whether, at time employer paid premium and gained possession of compensation insurance policy, he fraudulently concealed from insurer fact that accident had already happened under circumstances imposing duty of disclosure.

3. Insurance ⊜152(3)—Statute held part of every insurance contract.

Civ. Code, §§ 2527, 2531, 2561, 2562, 2563, 2565, 2569, 2577, form a part of every contract of insurance to become effective by virtue of the laws of California.

4. Insurance ⊜253—Representations presumed to refer to time that insurance completed.

The time that a contract of insurance is completed is fixed by Civ. Code, § 2577, as the time to which a representation is presumed to refer.

5. Insurance ⊜256(1), 261, 310(1)—Intentional concealment of material fact or false representations held fraud, avoiding policy at option of insurer; forfeiture may be set up in action.

Material facts intentionally concealed, or false representations, made with intent to mislead insurer, is fraud, which, at his option, avoids policy, and rescission is not an exclusive remedy, but insurer may set up concealment in action on policy.

6. Insurance ⊜310(1)—Notice of repudiation and seasonable return of premium sufficient to inform insured that insurer does not recognize validity of contract.

Notice of repudiation of insurance contract, obtained by concealment of material fact, and seasonable return of premium to insured was sufficient to inform him that insurer did not recognize contract as valid or binding, where policy, being in insured's possession, could not be canceled by insurer.

7. Fraud ⊜16—Concealment of material fact "fraud."

Concealment of a material fact like a misrepresentation as to such fact, amounts to "fraud."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fraud.]

8. Insurance ⊜311(1)—Employee's dependents without right of action against compensation insurer on policy void as to employer.

The dependents of an employee can have no cause of action against compensation insurer on an insurance contract, which is void or voidable as to the employer.

9. Master and servant ⊜397—Commission has power to determine question of validity of insurance policy.

Under Const. art. 20, § 21, Workmen's Compensation Ins. and Safety Law, §§ 1, 55, 63, Industrial Accident Commission has power to hear and determine issues as to validity of compensation insurance policy and question of alleged fraud on part of employer in its procurement.

In Bank.

Certiorari to Industrial Accident Commission.

Certiorari by the General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, against the Industrial Accident Commission and Frank Vessels, employer, to review award made by the Commission in favor of Alice Lilenquist and another, dependents of Harold A. Lilenquist, deceased, employee. Award set aside, and proceeding remanded.

Alfred C. Skaife, of San Francisco, and Joe Crider, Jr., of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

SEAWELL, J. This is a petition for a writ of certiorari to review an award made by the Industrial Accident Commission in favor of the dependents of a deceased employee. Harold Lilenquist, an oil worker, died on August 12, 1922, from injuries received on that day while engaged in an attempt to install a heavy stationary steam boiler by means of a jack or screw. The injuries were received and death occurred near Santa Fé Springs, county of Los Angeles. One Frank Vessels was the employer of the decedent. At the time of his death Lilenquist was of the age of 23 years, and the husband of Alice Lilenquist and the father of Harold A. Lilenquist, a minor, both of whom are joined as respondents herein. It is stipulated that said injuries were the proximate cause of the death of said Harold

Lilenquist, and that they arose out of and were received while he was performing services in the due course of his employment, and therefore compensable under the provisions of the Workmen's Compensation, Insurance and Safety Act (Laws 1913, p. 279) of this state. The only question that was presented to the Commission, or raised here, is whether or not the petitioner, General Accident, Fire & Life Assurance Corporation, Limited, of Perth, Scotland, was, on the day of the fatal accident, the insurance carrier of said Vessels.

Vessels, the employer, was a contractor. His residence was at Huntington Beach, and the scene of his employment at the time of the accident was Santa Fé Springs, distant about 23 miles from Huntington Beach, where he had workmen employed in installing machinery to be used in the production of oil. He made daily trips by automobile from his residence to the place where the accident occurred. He was impressed with the importance of industrial accident coverage, but, being hard-pressed for finances, he was considering whether he would be able to pay the premium on a policy of insurance. He was also apprehensive that a declining oil market might at any moment cause a suspension of the industry upon which he depended for employment, thereby rendering an outlay of money for an insurance policy an unnecessary expenditure. However, on or about the 26th day of July, 1922, he visited the office of Huston, Suter & Huston, insurance agents, brokers, and solicitors, doing business at Huntington Beach, with the apparent purpose of making inquiry as to the cost of a policy of insurance. This entire business transaction was conducted with E. A. Suter, a member of said firm. The general agent of the petitioner was Geo. T. Mahana & Co., whose offices were at Los Angeles. A business connection existed at that time, and for some time prior thereto had existed, between Geo. T. Mahana & Co. and the firm of Huston, Suter & Huston. While the latter did not write policies covering industrial hazards, it accepted and forwarded applications for this line of insurance to Geo. T. Mahana & Co., and received a commission on all policies issued through its procurement. On Vessel's first visit to the offices of Huston, Suter & Huston, July 26, 1922, the subject of taking out a policy was discussed by him and Suter. The latter did not then know the amount of the premium that would be required to carry the policy Vessels had in mind. Suter, with the assistance of Vessels, filled out a form of declaration, unsigned, which corresponds with the applications used in ordinary insurance business. The letter which accompanied the declaration was written by Suter, and was as follows:

"George T. Mahana Co., Pacific Finance Bldg., Los Angeles, Cal.—Gentlemen: As per the inclosed declaration which we have made out roughly, we desire to have a compensation policy, or rather the party desires to know what the rate as well as the minimum premium deposits will be.

"Kindly let us know by return mail, at the same time let us know if anything else is necessary to be filled in on the application.

"Yours truly, Huston, Suter & Huston,
"by E. A. Suter.

"P. S. Please return copies of the inclosed form for our files, so that in case he desires us to write the insurance that we can have him sign up. Eas. Eas/A Encs."

On July 28, 1922, a policy complete in form and detail was received by Suter from the general office at Los Angeles. The premium payable thereon was $60 per annum. Suter at once notified Vessels of the receipt of the policy, and the latter visited the offices of Huston, Suter & Huston, but did not consent to accept the policy. It was understood that the policy should be held by Suter for a few days to give Vessels further time for making a decision as to whether he would pay the premium and accept the policy. It was explained that the policy was forwarded without a request from any one to do so, with the view of saving time and labor in the event that Vessels should decide to accept it. On August 10, 1922, Suter wrote the following letter to his principal, Geo. T. Mahana & Co., for further instructions:

"Since the time you mailed the policy to me Mr. Vessels was in and says that business has fallen off so owing to the recent cuts in the price of oil that he did not know whether he would have work for the men, and asked me if I would hold the policy for a few days, which I agreed to do; however, since he has not been in, I thought that I had better write the circumstances and have you advise us."

On the following day Geo. T. Mahana & Co. replied as follows:

"Answering your favor of the 10th, we wish to advise that it is all right for you to hold the above policy in your office for a period of not exceeding sixty days so the assured may make up his mind whether or not he wants to continue the same.

"You understand the premium is based upon a pay roll and if the assured expects to have $1,000 worth of pay roll any time during the policy period he might as well take the policy now and pay the premium for it. * * *"

On the afternoon of the following day, August 12, at about the hour of 3:40 o'clock, Lilenquist received the injuries from which he died. On the afternoon of the same day that Lilenquist received said injuries Vessels presented himself at the office of Huston, Suter & Huston, and paid the $60 premium by check. Suter then and there delivered to him the policy of insurance. The conversation had at this visit was brief; no mention was made of an accident having occurred.

Two days after the accident, to wit, August 14, 1922, Vessels appeared at the office of

Huston, Suter & Huston, and notified Suter of the accident. Suter remarked to him that it "was pretty close figuring." Nothing further of consequence was said. On August 26, at the request of petitioner, Suter drew a check in favor of Vessels for $60, the amount of the premium, and mailed it to Vessels. A copy of the letter which accompanied the check is not in the record, but the testimony is that it was to the effect that peitioner denied or repudiated any liability, by reason of the accident having occurred prior to the acceptance of the policy, and returned the premium. This check was never returned by Vessels or presented for payment. It appears that Vessels sent the check to Mrs. Lilenquist. The record does not disclose what disposition she made of it.

It was the claim of petitioner, and evidence was offered tending to support this contention, that the premium was not paid nor was the policy accepted or agreed to be accepted by Vessels until after Lilenquist had sustained the injuries which resulted in his death, and that Vessels had actual knowledge at the time he gained possession of said policy that the injuries had been previously suffered, and petitioner was without such knowledge, and had no opportunity to inform itself on the subject. It is contended that it was the duty of Vessels to communicate to petitioner the existence of said facts which were known to him, but that he fraudulently concealed the same from petitioner and its agent. It is further contended that, inasmuch as the injuries occurred before the premium was paid or the policy was delivered or accepted, the subject-matter of the contract had ceased to exist, or at least had been materially affected by said casualty. Other objections were made, but they are necessarily included in the main contentions just stated.

In addition to making a finding to the effect that the employer, Vessels, and the employee, Lilenquist, were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of this state, and that the respondent wife and child were his dependents, all of which was stipulated to by counsel, the Commission found that petitioner was the insurance carrier of said employer at the time the injuries were inflicted, and grounded its findings as to liability on the theory that the delivery of the policy to Suter, on or about July 28, 1922, was a delivery to Vessels. The sole finding upon which liability is imputed to petitioner as the insurance carrier is as follows:

"2. On or about the 27th day of July, 1922, the defendant, General Accident, Fire & Life Assurance Corporation, executed a certain policy of Workmen's Compensation Insurance in favor of the defendant Frank Vessels, at the special instance and request of said Frank Vessels, communicated to said General Accident, Fire & Life Assurance Corporation by Huston, Suter & Huston, who were at said time agents of said Frank Vessels, and not agents of said defendant, General Accident, Fire & Life Assurance Corporation, and prior to the 12th day of August, 1922, the said General Accident, Fire & Life Assurance Corporation delivered said policy to Frank Vessels, by delivering said policy to said Huston, Suter & Huston, who were at the time of said delivery agents of defendant Frank Vessels, and not agents of defendant General Accident, Fire & Life Assurance Corporation. At the time of the sustaining of said injury by the employee, therefore, the employer's insurance carrier was General Accident, Fire & Life Assurance Corporation, and the employer and the employee were subject to the provisions of the Workmen's Compensation, Insurance and Safety Act of 1917."

[1, 2] No finding was made, although the issue was pressed by petitioner before the Commission, as to whether the accident occurred prior to the payment of the premium, and, if so, whether the accident was known to Vessels prior to said payment and that fact was by him concealed from Suter. Clearly the finding to the effect that the delivery of the policy to Huston, Suter & Huston, was a delivery to Vessels is not supported by any evidence in the case. This is the sole finding upon which petitioner's liability is predicated. The firm of Huston, Suter & Huston was the agent for Vessels only for the purpose of obtaining information as to the cost of the insurance. Beyond this it was not authorized to go. Vessels at no time before the accident occurred assumed liability for the payment of the premium. He did not sign the declaration that was forwarded to petitioner. It cannot be contended that Vessels, so long as the premium remained unpaid, could have compelled delivery of said policy. No such contention is made. His whole course of conduct is conclusive of the fact that the policy in the hands of Suter was regarded by him as being in the possession of petitioner. He studiously avoided binding himself by any agreement or promise, either oral or in writing, to accept the policy or pay the premium thereon. No claim was or could be made that credit was to be extended. The policy, by the instructions of petitioner, was to be held in the office of Suter until payment of the premium was made. The finding to the effect that a delivery to Huston, Suter & Huston was an absolute delivery to Vessels cannot be sustained without doing violence to the plain intent and understanding of all the parties to the transaction. No agency having been shown to exist between Huston, Suter & Huston and Vessels, except for the limited purpose of ascertaining the cost of insurance, and it clearly appearing that Huston, Suter & Huston was the agent of petitioner for the collection of the premium and the delivery of the policy in the event that it should be accepted, the finding of the Commission that the forwarding of the policy to

Suter under the specific instructions of the insurer, which were to control delivery, and which were not complied with by Vessels, was a delivery to Vessels is not supported by the evidence. This being true, it follows that the Commission should have found upon the issue whether or not the policy was obtained by fraudulent concealment of a material fact on the part of Vessels under such circumstances as the law makes it the duty of a person similarly situated to disclose to the other who has no knowledge of such fact or reason to believe that it exists. If the Commission should find the facts to be as contended for by petitioner, such finding would constitute a valid ground of defense to the demand of claimant as against petitioner. Vessels, however, would be liable.

The several sections of the Civil Code pertinent to the issues of the case provide:

"Insurance is a contract whereby one undertakes to indemnify another against loss, damage, or liability, arising from an unknown or contingent event." Civ. Code, § 2527.

"Any contingent or unknown event, whether past or future, which may damnify a person having an insurable interest, or create a liability against him, may be insured against, subject to the provisions of this chapter." Civ. Code, § 2531.

"A neglect to communicate that which a party knows, and ought to communicate, is called a concealment." Civ. Code, § 2561.

"A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance." Civ. Code § 2562.

"Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are or which he believes to be material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." Civ. Code, § 2563.

"Materiality is to be determined not by the event, but solely by the probable and reasonable influence of the facts upon the party to whom the communication is due, in forming his estimate of the disadvantages of the proposed contract, or in making his inquiries." Civ. Code, § 2565.

"An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, entitles the insurer to rescind." Civ. Code, § 2569.

"The completion of the contract of insurance is the time to which a representation must be presumed to refer." Civ. Code, § 2577.

[3] The foregoing sections form a part of every contract of insurance to become effective by virtue of the laws of this state. They furnish sufficient authority to sustain petitioner's right to have the issue raised by it determined by the Commission.

Applying the test as to the materiality of the facts, which the foregoing code sections require must, in good faith, be communicated by one of the parties of a contract to the other, to the facts of this proceeding, little room is left for doubt as to the influence the accident would have had upon the mind and consequent actions of the insurer had it been informed by Vessels that a compensable injury had occurred to one of his employees immediately prior to his offer to complete the contract.

[4] The time that a contract of insurance is completed is fixed by the terms of section 2577, Civil Code. In Security Life Ins. Co v. Booms, 31 Cal. App. 119, 159 Pa. 1000, which was an action to recover upon a policy of life insurance, the same general principle of law which we are now considering was before the District Court of Appeal for determination. The rule making it the duty of an applicant for insurance to disclose material changes which may have occurred pending negotiations and the materiality thereof as affecting the other party is thus stated:

" 'The completion of the contract of insurance is the time to which a representation must be presumed to refer.' Civ. Code, § 2577. 'It is well settled that the obligation rests upon an applicant for life insurance to disclose such changes in his physical condition as occur pending the negotiation as would influence the judgment of the company as to the advisability of accepting the risk.' Thompson v. Travelers' Ins. Co., 13 N. D. 44 (101 N. W. 900). The decisions generally are to the same effect. See note in 8 L. R. A. (N. S.) p. 983. Since, in accordance with the section of the Civil Code quoted above, the representations contained in the application must in this case be deemed to refer to the time when the premium was paid and the policy delivered, it follows that the assured at that time represented that she had not had any of the diseases to which she returned a negative answer and had not any illness or disease other than as specifically stated by her. To say that these representations may be ignored in the instance of a person who receives a life insurance policy immediately following upon an attack of typhoid fever would be to deny one of the most important rights of the contracting party. The inherent probability that the plaintiff would have hesitated to issue a policy upon the life of Mrs. Young at that particular time raises to very substantial importance its right to have been informed of the facts."

[5] Section 2563, supra, was applied by this court in Hart v. British, etc., Ins. Co., 80 Cal. 440, 22 P. 302, an action to recover upon a policy for marine insurance upon a barge and a cargo of wheat. The applicant for insurance had information concerning the probable loss of the barge, but failed to communicate this information to the insurance company. As a matter of fact, the barge was lost at the time the policy was issued. No inquiry was made by the insurance company as to the safety of the barge and cargo, but the court nevertheless held that the failure on the part of the insured to communicate the information in his possession to the insurer constituted a concealment of a material fact which the assured was bound to communicate, and this failure entitled the

insurance company to rescind the contract of insurance. The English rule is that an applicant is bound to disclose a fact material to the risk, even though no specific inquiry is made on that subject, and the weight of authority in this country favors the English rule. Bacon on Life and Accident Ins. (4th Ed.) § 270, p. 500. The statutes of this state commit our courts to the rule approved by the weight of authority. Material facts intentionally concealed or false representations made in reference to them with intent to mislead the insurer is fraud, which, at his option avoids the policy; and, where it is provided that a concealment will warrant the rescission of a contract of insurance, rescission is not an exclusive remedy, as contended by respondent Commission, and the insurer may set up the concealment in an action on the policy. 32 C. J. p. 1271. In California Co. v. New Zealand Ins. Co., 23 Cal. App. 611, 138 P. 960, it was held:

"Rescission is not the exclusive remedy of one who has become entitled to avoid a contract by reason of acts or omissions of the other party to it which are fraudulent in their nature. He may cancel the contract by its rescission; or he may seek affirmative relief in a court of equity for any injury sustained by the wrongful act or omission of the other; or he may set up the fraud by way of defense to an action brought to enforce the apparent liability. Toby v. Oregon Pac. R. R. Co., 98 Cal. 490 (33 P. 550); Field v. Austin, 131 Cal. 379 (63 P. 692); More v. More, 133 Cal. 489 (65 P. 1044); Mabry v. Randolph, 7 Cal. App. 421 (94 P. 403)."

[6] Notice of "repudiation" of the contract and a seasonable return of the premium as made by petitioner to Vessels was sufficient to inform the latter that petitioner did not recognize the contract as valid or binding. The policy being in the hands of Vessels, no cancellation could have been made by petitioner.

[7] Respondent Commission attempts to point out a distinction between a concealment of a material fact and a misrepresentation as to such fact. The legal effect in each instance amounts to the same thing, fraud.

Respondent has cited a number of cases bearing upon various phases of the law of insurance, but, as the facts in those cases are not the facts of the instant case, it is unnecessary to analyze them. As many of the cited cases turn upon the question of a preliminary parol agreement or memorial of a contract, it is proper to specifically state that there is no evidence in the record upon which that issue is sustainable, and for that reason the case must be decided upon the provisions of our statutes heretofore cited.

[8] It is the contention or suggestion of respondent Commission that the dependents of the employee have an enforceable right against petitioner under the alleged policy, even though the employer be cut off from any remedy against petitioner. We are unable to understand what principle of law would give the dependents of the employee a cause of action against petitioner upon a contract which is void or voidable as to the employer. It was said in the case of Employers' L. A. Corp. v. Ind. Acc. Com., 177 Cal. 771, 171 P. 935:

"We may assume that any defense available to the insurance company as against Johnson, the employer, would be equally available against the employee or his dependents."

Whether the foregoing quotation be regarded as doctrine or dicta, it would seem to express an unimpeachable principle of law. 32 C. J. 1314.

[9] There can be no doubt but that the Commission is vested by constitutional and legislative power to hear and determine every issue raised by the parties to this controversy, including the validity of the policy and the question of fraud alleged in its procurement, and that the parties are not required to invoke either a court of law or equity in the determination of said questions. Article 20, § 21, Const.; Workmen's Compensation, Insurance and Safety Law, §§ 1, 55, and 63 (Laws 1913, pp. 279, 307, 308); Employers' L. A. Corp. v. Ind. Acc. Com., 177 Cal. 771, 171 P. 935.

The sole finding of the Commission is not sustained by any evidence in the proceeding. Petitioner is entitled to a finding by the Commission on the question of whether or not the accident to the employee occurred prior to the time that Vessels paid the premium and gained possession of the policy, and whether the accident was then known to Vessels and not known to petitioner, and was by said Vessels concealed from petitioner. If these facts be found against the employer, it would be a bar to a recovery as against the petitioner. If, however, the accident occurred after the payment of the premium and delivery of the policy, claimants would be entitled to a finding to that effect and judgment accordingly.

It follows that the award made must be and it is hereby set aside. The proceeding is remanded to the Commission for further proceedings agreeable to the views herein set out.

We concur: LAWLOR, Acting C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.; HART, J. pro tem.; LENNON, J.

196 Cal. 236

HAAS v. GREENWALD et al. (S. F. 10602.)

(Supreme Court of California. May 29, 1925. Rehearing Denied June 25, 1925.)

1. Pleading ⊂=34(3)—No intendment indulged that pleader did not state case as strongly as possible.

No intendment can be indulged, under most liberal construction permitted by Code Civ. Proc. § 452, that pleader, omitting essential allegation, did not state case as strongly as possible.

2. Brokers ⊂=42—Attorney without real estate broker's license cannot negotiate for purchase of property by and loan to another "real estate broker."

Under Real Estate Broker's Act, § 20, attorney at law, joining with licensed brokers in negotiating for purchase of realty by and loan to another, which section 2 defines as acts constituting business of real estate broker, cannot recover commission, where not licensed as required by section 1, though acts constituted single transaction not in course of business as real estate broker.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Real Estate Broker.]

3. Courts ⊂=107—Supreme Court, taking note of particular provision in stating contents of act, presumed to have approved it in sustaining constitutionality of act as whole.

Where Supreme Court, in stating contents of Real Estate Brokers' Act, took note of provision of section 2 that single act of selling, etc., should make person a real estate broker, required to obtain license, it must be concluded that it had in mind and approved such feature in sustaining constitutionality of act as whole.

4. Constitutional law ⊂=89(1)—Licenses ⊂=7(1)—Act, requiring broker's license to perform single act of selling, etc., for compensation, held not unconstitutional.

Real Estate Brokers' Act, § 2, providing that single act of selling, etc., for compensation shall make one a real estate broker, required to obtain license, *held* not unconstitutional as interfering with freedom of contract, in view of provisions that act shall not apply to persons performing such acts with reference to their own property or under power of attorney from owner.

5. Brokers ⊂=42—Contract by three brokers, one of whom was unlicensed, held void in entirety.

Contract by attorney at law, not licensed as real estate broker, and two licensed brokers, to negotiate for purchase of realty by and loan to another, *held* void in entirety, under Civ. Code, § 1608, as in violation of section 1667 in respect to such attorney.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by H. C. Haas against L. Greenwald and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Sullivan & Sullivan and Theo J. Roche, all of San Francisco, for appellant.

William F. Humphrey, Lent & Humphrey, and Robert Mack Light, all of San Francisco, for respondents.

RICHARDS, J. This appeal is by the plaintiff from a judgment entered upon an order sustaining the defendants' demurrer to the plaintiff's amended complaint without leave to amend. The action was one commenced by the plaintiff on his own behalf, and also as the assignee of one A. M. Johnson, who prior thereto had assigned and transferred to said plaintiff all of his right, title, and interest in the claim and demand which formed the basis of said action. The amended complaint, after alleging the corporate character of the Santa Marina Company and its ownership of the tract of land with reference to which the transaction occurred out of which the claim and demand sued upon arose, and after also alleging the corporate character of the Hibernia Savings & Loan Society, connected with said transaction, proceeds to allege that:

"On and prior to the 14th day of November, 1921, the above-named defendant L. Greenwald was desirous of purchasing said real property hereinabove particularly described, together with the improvements thereon, from said the Santa Marina Company, a corporation, for the sum of $650,000 net to said the Santa Marina Company, and in order to permit said purchase to be made by him to negotiate a loan from said Hibernia Savings & Loan Society, a corporation, for $450,000, the repayment of which loan should be secured by a first mortgage upon said real property hereinabove described when so purchased by said defendant L. Greenwald, $50,000 of which was to be repaid by said L. Greenwald to said Hibernia Savings & Loan Society in 60 installments of $833.33 per month, and the remaining $400,000 to be repaid on or before five years from the date of such loan, said $450,000 to bear interest at the rate of 6 per cent. per annum until paid. On or about the 14th day of November, 1921, the above-named defendant L. Greenwald employed the above-named plaintiff, H. C. Haas, A. M. Johnson and the defendant Walter W. Stevens, to negotiate on his behalf with said the Santa Marina Company, a corporation, for and to effect a sale by said the Santa Marina Company, a corporation, to said defendant L. Greenwald, of said real property hereinabove described, together with the improvements thereon for said sum of $650,000 net to said the Santa Marina Company, a corporation, and to negotiate and procure from said Hibernia Savings & Loan Society, a corporation, said loan of $450,000 bearing the interest hereinabove set forth and payable in the manner hereinabove specified, the repayment of which was to be secured by a first mortgage upon said real property hereinabove described, and in

consideration of the services to be thereafter rendered by said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens in negotiating and effecting said sale of said real property to said defendant L. Greenwald, for said sum aforesaid, and negotiating and procuring said loan aforesaid, agreed that if said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens negotiated and effected said sale by said corporation, Santa Marina Company, to said defendant of said real property, together with the improvements thereon, for said sum of $650,000, net to it and negotiated and procured from said Hibernia Savings & Loan Society, a corporation, said loan of $450,000 aforesaid, he would, when said services were completed, and in consideration thereof, pay to said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens the sum of $20,000, or execute and deliver to them his promissory note or notes for said sum of $20,000. Thereafter and prior to November 21, 1921, said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens, negotiated with said the Santa Marina Company, a corporation, for the sale of said real property to said L. Greenwald, and as a result of said negotiations prior to and on said November 21, 1921, said the Santa Marina Company, a corporation, was willing and agreed to sell said real property, together with said improvements, to said defendant L. Greenwald for said sum of $650,000 net to it. On said 21st day of November, 1921, said the Santa Marina Company, a corporation, was able, ready and willing to sell to said defendant L. Greenwald said real property, together with said improvements, for said sum of $650,000 net to it. Prior to said 21st day of November, 1921, said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens negotiated with said Hibernia Savings & Loan Society, a corporation, for said loan of said $450,000 upon said terms aforesaid, and prior to said November 21, 1921, had arranged with said Hibernia Savings & Loan Society for, and had procured from it for said defendant L. Greenwald, said loan of $450,000, the repayment of which loan was to be secured by a first mortgage upon said real property hereinabove described, together with the improvements thereon, when so purchased by said defendant L. Greenwald, $50,000 of which was to be repaid by said defendant L. Greenwald to said Hibernia Savings & Loan Society in 60 installments of $833.33 per month, and the remaining $400,000 to be repaid on or before five years from the date of such loan, said $450,000 to bear interest at the rate of 6 per cent. per annum until paid. Said loan so negotiated and procured by said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens and the terms thereof were acceptable to and accepted by said defendant L. Greenwald. Thereafter and on said 21st day of November, 1921, said defendant L. Greenwald repudiated said agreement so entered into by him with said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens as aforesaid, and refused to proceed further with the purchase of said real property or to accept said loan, and without any cause or justification therefor notified said plaintiff and said A. M. Johnson and said defendant Walter W. Stevens that he would refuse to further proceed with the purchase of or purchase said real property or any part thereof, and would refuse to accept or consummate said loan aforesaid, and repudiated his said agreement with said plaintiff and said A. M. Johnson and said Walter W. Stevens. Ever since said 21st day of November, 1921, said defendant L. Greenwald has refused to purchase said real property and said improvements or any part thereof, and has refused to accept or consummate said loan aforesaid. Said defendant L. Greenwald has refused, and still refuses, to pay to said plaintiff and said A. M. Johnson and said defendant Walter W Stevens, or any of them, said sum of $20,000, or to make, execute or deliver to them, or any of them, his said note or notes for the sum of $20,000 or any other sum. The said defendant Walter W. Stevens is made a defendant in this action for the reason that he refuses to join in said action with said plaintiff. On the 8th day of December, 1921, said A. M. Johnson assigned, transferred and set over to the above-named plaintiff, H. C. Haas, all of his right, title and interest in said claim against said defendant L. Greenwald, arising out of the rendition of said services and the making of said agreement by said defendant L. Greenwald as aforesaid, and all moneys due thereon. At all of the times herein mentioned the above-named plaintiff, H. C. Haas, and the above-named defendant Walter W. Stevens were and are real estate brokers, and each of them was and is a real estate broker engaged in the business of buying and selling real property in the city and county of San Francisco and elsewhere in the state of California, and at all of the times herein mentioned were and are, and each of them was and is duly and regularly licensed to engage in said business under the laws of the state of California. At all of the times herein mentioned said A. M. Johnson was, he ever since has been, and still is an attorney at law, duly licensed to practice, and practicing his profession as such in the state of California, all of which facts at all of said times were and still are known to defendants. Said A. M. Johnson is not now, and never has been, engaged in business as a real estate broker, and never has been and is not now a real estate broker or engaged in the business of buying, selling, exchanging or handling real property, all of which facts at all of said times were and still are known to defendants."

We have set forth the averments of said amended complaint thus literally in order that exact application may be made of the provisions of the statute under the inhibitions of which it was successfully contended in the trial court that said complaint failed to state a cause of action. The gravamen of this contention centers upon A. M. Johnson, who, as the amended complaint alleges, was one of the three persons who jointly engaged in the negotiations upon which the claim sued upon is predicated and, who, it is contended, comes within the inhibitions of said statute with regard to his participation in such negotiations. The statute in question is known as the "Real Estate Brokers' Act" (Stats. 1919, p. 1252). By section 1 of said act it is provided:

"Section 1. It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor."

Section 2 of said act reads as follows:

"A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, or offers for sale, buys, or offers to buy, or negotiates the purchase or sale or exchange of real estate, or who, for compensation, negotiates loans on real estate, leases, or offers to lease, rents, or places for rent, or collects rent from real estate, or improvements thereon, for others as a whole or partial vocation. A real estate salesman within the meaning of this act is one who for a compensation is employed by a licensed broker to sell, or offer for sale, or to buy, or to offer to buy, or to negotiate the purchase or sale or exchange of real estate, or to negotiate a loan on real estate, or to lease, or offer to lease, rent, or place for rent, any real estate, or improvements thereon, as a whole or partial vocation. The provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to property owned by such person, copartnership or corporation; nor shall the provisions of this act apply to persons holding a duly executed power of attorney from the owner, nor shall this act be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law; nor shall it be held to include any receiver, trustee in bankruptcy, or any person acting under order of any court, nor to a trustee selling under a deed of trust. One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, or negotiating said loan, or so renting or placing for rent or collecting said rent a real estate broker within the meaning of this act."

By section 20 of said act it is provided:

"No person, copartnership or corporation engaged in the business of acting in the capacity of a real estate broker or a real estate salesman within this state shall bring or maintain any action in the courts of this state for the collection of compensation for the performance of any of the acts mentioned in section two thereof without alleging and proving that such person, copartnership or corporation was a duly licensed real estate broker or real estate salesman at the time the alleged cause of action arose."

[1] Under the provisions of the section last above quoted it would seem to be clear that if A. M. Johnson, as one of the three persons who are alleged in said amended complaint to have been combined in conducting the negotiations for, and on behalf of, the defendant Greenwald, out of which both the plaintiff's original and assigned claim and demand arose, comes as to the acts done by him within the definitions and inhibitions embraced in the earlier sections of the act above quoted, this action, in so far at least as it involved his assigned claim, must fail. The said A. M. Johnson is alleged in said amended complaint to be, and during all of the time covered by said negotiations to have been, an attorney at law. By the terms of section 2 of said act the provisions thereof are not to "be construed to include in any way the services rendered by an attorney at law in performing his duties as such attorney at law." If the amended complaint herein had alleged that any services rendered by said A. M. Johnson to the defendant in the course of the negotiations, which are fully detailed in said complaint in his capacity as an attorney at law or in the performance of his duties as such attorney at law, or had even alleged that said A. M. Johnson, during the course of said negotiations, represented either said Greenwald or any other person, who was a party to such negotiations, as or in the capacity of an attorney at law, a different question would be presented. But the amended complaint herein is barren of any such allegation, and giving to such pleading the most liberal construction permitted by section 452 of the Code of Civil Procedure no intendment can be indulged in that the pleader has not stated his case as strongly as it was possible so to do. Nason v. Lingle, 143 Cal. 363–366, 77 P. 71; Cal. Navigation Co. v. Union, etc., Co., 122 Cal. 641, 55 P. 591; Glide v. Dwyer, 83 Cal. 477, 23 P. 706; Hays v. Steiger, 76 Cal. 555, 18 P. 670.

[2] The particular negotiations which the plaintiff and his two associates, A. M. Johnson and Walter W. Stevens, are alleged to have conducted were twofold in character. First, a negotiation on behalf of the defendant Greenwald for the purchase by the latter of certain real estate from the Santa Marina Company; second, a negotiation on behalf of said Greenwald for a loan to him by the Hibernia Savings & Loan Society of a sum of money, as and for a large portion of the purchase price of said property, and to be secured by a mortgage thereon. These twofold negotiations come expressly within the terms of the opening clauses of section 2 of said act defining the doing of what acts shall constitute a person, firm, or corporation "a real estate broker." It could not be, and in fact is not, questioned, but, on the other hand, expressly affirmed, that the plaintiff, Haas, was, as to his part in said negotiations, acting as a real estate broker and by virtue of his license issued under the terms of said act so to do. The same is true as to his associate, W. W. Stevens, who held and was acting under and by virtue of a similar license. If the part which these two associates took in the conduct of such negotiations

was thus taken in the capacity of real estate brokers, and not otherwise, it is difficult to perceive why the precisely identical part which A. M. Johnson, united with his said two associates in undertaking in relation to these negotiations, was not also undertaken in the capacity of a real estate broker and not otherwise, notwithstanding he was also an attorney at law, especially in view of the fact that the amended complaint is barren of any averment that his said part therein was undertaken or performed in his capacity as an attorney at law. It would seem to follow irresistibly that in the equal part which A. M. Johnson took with his associates in the conduct of these negotiations he was acting in the capacity of a real estate broker, and not of an attorney at law.

It is, however, contended by the appellant herein that conceding that A. M. Johnson did act in the part he took in said negotiations in the capacity of a real estate broker, his action in so doing was only in a single though twofold transaction, and not in a course of business as a real estate broker, and hence that the inhibitive provisions of said act do not apply to him. This argument, with the authorities which are cited in support of it, might have some cogency but for the express and unmistakable terms of the statute to the contrary. The language of the concluding clause of section 2 of the act is as follows:

"One act, for a compensation, of buying or selling real estate of or for another, or offering for another to buy or sell or exchange real estate, or negotiating a loan on or leasing or renting or placing for rent real estate, or collecting rent therefrom shall constitute the person, copartnership or corporation making such offer, sale or purchase, exchange or lease, or negotiating said loan, or so renting or placing for rent or collecting said rent a real estate broker within the meaning of this act."

[3] The particularity with which this clause in said act is phrased leaves no room for any other interpretation than that which its plain terms import, and which are not rendered uncertain by any other phrase or clause which said section of said act or which act as a whole contains. The authorities cited in support of the appellant's position in this regard do not sustain it for the reason, as is well illustrated by the case of Miller v. Stevens, 224 Mich. 626, 195 N. W. 481, mainly relied upon by appellant, that the statute under review in said decision omitted this very provision which our statute contains, rendering a single act of the character defined, for a compensation, sufficient to constitute the person performing it a real estate broker. The appellant discusses this phase of the case chiefly under his next contention, which is that the act, in so far as it seeks to prohibit one individual from employing another to purchase, sell, or negotiate the sale of property, or to secure a loan thereon, or to handle any single transaction in regard to such property, is an unconstitutional exercise of power on the part of the Legislature. In making this contention the appellant concedes that this court in the case of Riley v. Chambers, 181 Cal. 591, 185 P. 855, 8 A. L. R. 418, upheld the general features of the Real Estate Brokers' Act in so far as said act undertakes to regulate the business or vocation of handling real estate transactions, and to that extent determined the constitutionality of the act. An examination of that case, however, shows that this court went much further than the appellant's concession, since in its statement of the contents of said act this court took note of the language therein providing "that a single act of selling, etc., shall make a person a real estate broker."

[4] It must be concluded therefore that in its discussion of the purposes and policy of said act, and in sustaining its constitutionality as a whole, this court had in mind this particular feature thereof, and approved it in approving the act as a whole. But, aside from this reasoning as to what has already been decided, we are of the opinion that the act, in designating the several particular acts mentioned in the concluding clause of section 2 of said act as within its inhibitions, violated no constitutional right of the parties to the transactions involved herein or any of them, in so far as the principle of freedom of contract is concerned. It is to be noted that, in the preceding clauses of section 2 of said act, the right of two or more persons to engage in doing any of the acts enumerated in said section as constituting one or more of said persons "a real estate broker" is perfectly preserved by the provision therein that:

"The provisions of this act shall not apply to any person, copartnership or corporation who shall perform any of the acts aforesaid with reference to property owned by such person, copartnership or corporation; nor shall the provisions of this act apply to persons holding a duly executed power of attorney from the owner."

It is only when persons, firms, or corporations are acting in a purely representative capacity in undertaking to conduct negotiations of the kind specified in said act, and when such persons or entities have not come into that particular relationship to the owner of the property involved in such negotiations, as finds expression in a power of attorney, that the safeguards of the statute are sought to be thrown around the principals to the transaction in question through the requirement that the agent or agents undertaking to conduct or consummate the same shall have that approved character, which the possession of the required license assures. No particular or convincing reason can be urged why the participants in a single ne-

gotiation of the sort defined in said act should not be subjected to the same supervision as those engaging in a series of similar transactions, since at the last analysis every transaction of the kind coming within the purview of the statute is an isolated transaction whether conducted singly or as a series of transactions carried on in the course of a business or vocation, and since the lawmakers have seen fit to embrace the participants in each single transaction within the purview, requirements, and inhibitions of the act in question, we can see no adequate reason for holding that in so doing they have violated the constitutional right of freedom to contract any more than they would have done by confining the scope of the statute to those carrying on such transactions in the course of a business or vocation. The cases upon which the appellant relies are as applicable to the one as to the other situation, and are sufficiently answered, we think, by the comprehensive treatment of the subject in the case of Riley v. Chambers, supra.

[5] The only remaining question involved in this case is that for the first time suggested upon this appeal, viz.: That, conceding the contract for the services in question to have been unenforceable on behalf of A. M. Johnson for the foregoing reasons, it was valid as to the plaintiff and his associate Stevens, since each of the two persons held a real estate broker's license. The difficulty with this contention is that the plaintiff herein has in the single count in his amended complaint set forth the contract for services upon which he seeks to recover both on his own behalf and on that of his assignor, A. M. Johnson, as one in the execution of which he and his said associates were jointly enlisted, and in which the services of all made possible the recovery of each. This constituted the consideration for the agreement. If any part thereof was unlawful, the entire contract was void (Civ. Code, § 1608). The portion of said agreement which related to the employment and service of A. M. Johnson was, as we have seen, unlawful, because in violation of an express provision of law (Civ. Code, § 1667). In commenting upon these sections of the Civil Code this court, in the case of Teachout v. Bogy, 175 Cal. 481, 486, 166 P. 319, 321, aptly quoted from the Ency. of Law and Procedure the following words:

"If any part of a single consideration for one or more promises be illegal, or if there are several considerations for one promise, some of which are legal and others illegal, the promise is wholly void, as it is impossible to say which part or which one of the considerations induced the promise." 9 Cyc. 566.

We conclude from the foregoing considerations that the agreement for the joint and equal services of Haas, Johnson, and Stevens in the capacity of real estate brokers, being unenforceable as to Johnson under the terms of the Real Estate Brokers' Act, the entire agreement was void, and hence that the trial court was not in error in sustaining the demurrer to the amended complaint, and in its judgment in favor of the defendant Greenwald based upon said order.

The judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.

196 Cal. 222

McGUINNESS et al. v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11159.)

(Supreme Court of California. May 29, 1925.)

1. Divorce ⟸165(2) — Prohibition ⟸15 — Legatees held entitled to contest motion by decedent's widow to vacate final divorce decree and to maintain prohibition proceeding against hearing such motion.

Legatees under decedent's will had legal capacity to contest motion by decedent's widow to vacate final divorce decree obtained by decedent without her knowledge or consent, and to maintain prohibition proceedings against hearing of such motion.

2. Divorce ⟸170—Mandamus ⟸51—Entry of final decree is ministerial act, which court must perform on motion of either party.

Under Civ. Code, § 132, entry of final divorce decree after expiration of one year from interlocutory decree is ministerial act, which court must perform on motion of either party ex parte whenever facts are shown entitling movant to final decree, and mandamus may be invoked to compel court to perform such duty.

3. Divorce ⟸165(3) — Final decree obtained by husband without notice to wife held extrinsic fraud which court had inherent power to vacate.

Where, after interlocutory divorce decree, parties became reconciled and resumed marital relations, husband's act in procuring final divorce decree without notice to or knowledge by wife, and without informing court of reconciliation, was extrinsic fraud, for which court had inherent power to vacate decree even after expiration of time prescribed by Code Civ. Proc. § 473.

4. Judgment ⟸386(7) — Court has inherent power to vacate judgment obtained by fraud after expiration of statutory time.

Court of general jurisdiction has inherent power to vacate judgment obtained by fraud after expiration of period prescribed by Code Civ. Proc. § 473, provided motion therefor is made within reasonable time; what is reasonable time being matter of sound legal discretion in court in which motion is made.

5. Divorce ⟸83 — Court retains its inherent jurisdiction to correct records after death of husband.

Though divorce action abated on death of husband in so far as issue of marital relations

was concerned, court retained its inherent power and jurisdiction to entertain motion to vacate final decree obtained by husband's extrinsic fraud, notwithstanding property rights were not involved in action, nor mentioned in decrees.

In bank.

Application for prohibition by Henry McGuinness, as executor of the will of James S. White, and individually as legatee under said will, and another, to be directed to the Superior Court in and for the City and County of San Francisco and E. P. Mogan, Judge thereof. Writ denied.

Chenoweth & Leininger, of Redding, and Maxwell McNutt, of San Francisco, for petitioners.

R. A. Rogers, of San Francisco, for respondents.

RICHARDS, J. The petitioners seek by this proceeding to have this court issue a writ of prohibition which will have the effect of restraining the respondents, superior court in and for the city and county of San Francisco and the judge thereof, from taking further proceedings in a certain action entitled "Josie White, plaintiff, versus James S. White, defendant," and numbered therein 69960, and which had theretofore been pending in said court. The matter came on for hearing upon a demurrer and also an answer to the petition, the denials in which were not insisted upon at the hearing or upon the rehearing; the only matters presented being the questions of law raised by the demurrer. The conceded facts in the case are that in the year 1915 Josie White commenced an action in said superior court wherein she sought a divorce upon the ground of extreme cruelty. In the complaint therein there was no allegation as to property rights, nor did the answer of the defendant raise any such issue. Upon the trial and submission of the cause the court, on December, 14, 1915, duly gave, made, and entered its interlocutory decree in favor of the plaintiff, adjudging her to be entitled to a divorce upon the specified ground, but being silent upon the subject of the property rights, if any, of the parties to the action. Succeeding that date and decree the record in the case was silent until the 3d day of July, 1923, when it appears that upon motion of the defendant a final decree was entered dissolving the marriage relation between the parties to said action, but which final degree was also silent as to any mention or adjudication of property rights. Thereafter, and on the 17th day of October, 1923, James S. White, the defendant in said action, died, leaving a last will and testament in which Josie White, his divorced wife, was omitted from any mention or bequest. Said will was offered for and admitted to probate in the probate department of said court, and the petitioner herein, who was named in said will as the executor thereof, was duly appointed to serve and is serving as such executor. Thereafter, and on January 24, 1924, Josie White filed in said superior court and in said divorce action a notice of motion to set aside said final decree of divorce, wherein she set forth as the basis of said motion the alleged fact that during the several years elapsing between the making and entry of the interlocutory decree and the aforesaid final decree the parties to said action had lived together as husband and wife, and were so living at the time of the making and entry of said final decree of divorce upon the defendant's motion; and that said final decree had been so entered without her knowledge or consent. The petitioner herein, Henry McGuinness, in his capacity as executor of said will, and also as a legatee thereunder, and the petitioner herein, John Maher, also as a legatee under said will, appeared specially in response to said notice of motion, and objected to the hearing or granting of the same upon the ground that the said superior court had lost jurisdiction therein and in said action, and that it had no jurisdiction over said action other than to decline to hear and either to grant or deny said motion. Upon the hearing, upon said motion and these special appearances and objections thereto the said superior court, through the judge thereof, who is also respondent herein, decided that it had and has jurisdiction to entertain said motion, and set the hearing thereon for the 22d day of May, 1924. Thereupon, and on May 20, 1924, the petitioners herein applied to this court for and were granted an alternative writ of prohibition restraining said superior court from further proceeding in said action and upon said motion, except to dismiss or deny the same until the hearing upon said writ. Upon said hearing the petitioners insisted, and still insist, that the respondent superior court and the judge thereof is without any jurisdiction to hear or pass upon the said motion of Josie White for an order setting aside the final decree in said divorce action for the reasons set forth in their said petition. The respondents, on the other hand, insist that, since it appears upon the face of the notice of motion to set aside said final decree, as the ground thereof, the entry of said final decree in said action was procured by extrinsic fraud on the part of said James S. White, the defendant therein, consisting in his concealment of the asserted fact that for the several years elapsing between the making and entry of the interlocutory decree in said action and the date of said final decree the said parties to said action had been and still were living together in the relation of husband and wife; and that the said court, being deceiv-

ed and misled by such concealment, had been fraudulently induced to sign and enter said final decree, the said court, notwithstanding the intermediate death of said James S. White, had and has power and jurisdiction either upon motion of the plaintiff in said divorce action or upon its own motion to act in the matter of investigating said alleged acts of extrinsic fraud, and, in the event of finding its existence, to purge its records of the decree obtained through its exercise. The respondents herein, the said superior court and the judge thereof, in their answer herein allege the fact to be that the said court is engaged upon its own motion in conducting an investigation as to whether or not such fraud was committed upon said court in the procurement of said final decree, and that it has not yet directly or indirectly intimated what the judgment of the court will be as a result of such investigation.

[1] The first contention which the respondents herein make upon the threshold of this proceeding is that the petitioner, Henry McGuinness, in his capacity as executor of the will of James S. White, deceased, and that both of the petitioners herein in their capacity as legatees under said will, have no legal capacity to appear either in said divorce action or in this proceeding in opposition of the effort of Josie White to have set aside the final decree of divorce therein. We think this contention is without merit, since, assuming that the power and duty of an executor to intervene in an action which involved only the personal status of his testator in a divorce action has been doubted in the case of Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064, the executor and petitioner herein appears, not alone in the capacity of executor, but he and his associate petitioner, Maher, herein also appear in the capacity of legatees under the will of the deceased defendant in the divorce action; and, since whatever the purpose which the plaintiff has in that proceeding the obvious effect of her success therein would be that of re-establishing the status existing between herself and her deceased husband prior to the entry of said final decree as the undivorced wife of said deceased, and since the re-establishment of this status would entitle her to assert certain wifely rights in relation to the property of said estate in which as legatees they each have an interest and which, if so asserted, they would admittedly have a right to resist, they claim to have an equal right to appear at the very inception of the plaintiff's effort to obtain standing ground for the assertion of such rights and to oppose such effort. No authorities are cited contravening this reasoning and we are satisfied none exist.

This brings us to the only remaining inquiry herein which is as to whether the trial court in the divorce action, or the judge thereof, the respondents herein, retains or has any jurisdiction either upon the motion of the plaintiff in said action or upon its own motion to consider or decide the question as to whether the final decree of divorce therein was caused to be made and entered by the fraud of the defendant in said action practiced upon it and whereby it was misled into granting and entering said final decree. The petitioners herein assert that the trial court in said action retains and has no such jurisdiction, basing their contention in that regard upon two several reasons: First, that said final decree of divorce being valid upon its face, the trial court has no jurisdiction to set it aside either upon the plaintiff's motion or upon its own motion after the expiration of the six months' period prescribed in section 473 of the Code of Civil Procedure; second, that, the defendant in said divorce action having died subsequent to the entry of said final decree, the action was thereby abated, and is no longer pending in said court, for the reason that the marriage relation between the parties has been dissolved by the defendant's decease. For the purpose of passing upon each of these objections it must be assumed in the state of the record before us that the averments made by the wife as to the basis of her application for the relief in the divorce court are true; that a reconciliation had taken place between the parties to said divorce action shortly after the entry of the interlocutory decree therein; that they had reassumed their marital relations, and thereafter continued living together as husband and wife for several years, and were so living together in that relation when the husband, unknown to the wife, procured the entry of the final decree of divorce; that in so doing he had committed a fraud upon her and upon the court through his action in procuring said decree and through his fraudulent concealment from the court, at the time of his application for and of the entry of said final decree, of the fact of such reconciliation and consequent resumption and existence of marital relations between himself and his wife; and that the court by such concealment was deceived and misled into granting and entering said final decree of divorce. These facts being thus, for the purposes of this proceeding taken to be true, the primary question arises as to whether they constitute intrinsic or extrinsic fraud. If the former, it would seem to be settled under the authorities that, the time for appeal from said decree having expired, and the time for seeking relief under section 473 of the Code of Civil Procedure having elapsed prior to the application of the plaintiff in that action to have said decree set aside, the trial court had lost jurisdiction over said action to grant

relief under said section. People v. Mooney, 178 Cal. 525, 530, 174 P. 325.

[2, 3] We do not think, however, that the facts of this case as above outlined constitute this a case of intrinsic fraud, as that term is defined in the case of People v. Mooney, supra, or in the case of Pico v. Cohn, 91 Cal. 129, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159, or in the case of Flood v. Templeton, 152 Cal. 148, 92 P. 78, 13 L. R. A. (N. S.) 579, or in the case of United States v. Throckmorton, 98 U. S. 61, 66, 25 L. Ed. 93, upon the reasoning in which latter case the former three cases were decided. In each of the three former cases the fraud which was held to be or defined as intrinsic fraud was such as occurred in the course of an adversary proceeding; such as the production of perjured testimony or forged documents during a trial wherein the adversary party had the opportunity to make the truth appear. In the case of United States v. Throckmorton, supra, the Supreme Court of the United States, after instancing situations in which the fraud practiced upon the adversary party or the court would be intrinsic fraud, points out the line of demarcation between these instances and those wherein by reason of something done by the successful party to a suit there was in fact no adversary trial or decision of the issue in the case, as "where the unsuccessful party has been prevented from fully exhibiting his case by fraud or deception practiced upon him by his opponent, as by keeping him away from court by a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where an attorney regularly employed corruptly sells out his client's interest to the other side—these and similar cases which show that there has never been a real contest in the trial or hearing of the case"; such are, in the view of that tribunal, instances of extrinsic fraud. In the recent case of Simonton v. Los Angeles Trust and Savings Bank, 192 Cal. 651, 221 P. 368, it was held by this court that the fraudulent concealment or omission through mistake of an executrix to account for personal property belonging to the estate of the decedent with the result that such property was appropriated by such executrix for her own personal use and benefit constituted extrinsic fraud, and this court in that case cited numerous other cases in this and other courts supporting the principle illustrated in the Throckmorton Case. It seems to us that the facts of this case bring it by clear analogy within the doctrines thus laid down defining cases of extrinsic fraud. In the case in hand there was no adversary proceeding attending or embracing the action of the court in the divorce action at the time of the application for and entry of the final decree. Section 132 of the Civil Code provides that, when one year has expired after the entry of an interlocutory judgment in a divorce action, the court, "on motion of either party, or upon its own motion, may enter the final judgment granting the divorce." Such final decree may be entered ex parte, and its entry by the court is in the nature of a ministerial act which the court must, on motion of either party, perform whenever the facts are shown entitling the movant to such final decree and which mandamus may be invoked to compel the court to perform in a proper case. It was so held by this court in the case of Olson v. Superior Court, 175 Cal. 250, 165 P. 706, 1 A. L. R. 1589. In the instant case the wife not only had no knowledge of her husband's action in seeking and obtaining the entry of such final decree, and hence no opportunity to appear and resist such action, but by the reconciliation and resumption of marital relations between herself and her husband and by long years of cohabitation she had apparently been led to regard the divorce proceedings between them as obliterated and their marital union as completely restored. That her husband, having resumed and while occupying these relations toward her, should have covertly sought the divorce court, ex parte, and without any notice or knowledge imparted to her, have there caused to be entered a decree of final divorce apparently in her favor, but which would have the effect of rendering the relations between himself and his former wife meretricious, was, upon the face of the showing thus far made in this proceeding, a fraud of the most despicable quality, and was a fraud which was essentially extrinsic in character, since it was such a fraud as she had no opportunity to combat or protect herself against in the proceeding by which ex parte and through an imposition practiced upon the court he obtained the entry of said final decree. It was also extrinsic fraud in so far as the court itself granting such decree was concerned, since it was effected through concealment from the court in an ex parte proceeding of facts which the defendant in said action was bound to disclose, and which, if disclosed, would have rendered improper the granting and impossible the procurement of such final decree. In the case of Olson v. Superior Court, supra, it was pointed out that one of the great purposes of the law enforcing the delay of one year before the absolute severance of marriage ties was to provide a period during which the parties might become reconciled, and thus avoid the unhappy consequence of a final decree of divorce; and that, where such reconciliation had occur-

red, and the parties were living together in their restored marital relationship, it would be a grave reproach upon our jurisprudence that a final decree of divorce could be forced upon a blameless and nonconsenting wife after such reconciliation. Yet this is precisely what would be accomplished in this case if the fraud practiced upon both the plaintiff and the court were held to be intrinsic, and thus beyond the power of the court to avoid its consequence after the time for appeal and for application under section 473 of the Code of Civil Procedure had expired.

[4] The petitioners, however, contend that whether the fraud be extrinsic or intrinsic is immaterial, since the final decree is valid upon its face, and that a judgment, no matter how much tinctured with either form of fraud if not void upon its face, is only assailable in the court in which it is rendered under and within the time provided in section 473 of the Code of Civil Procedure. The cases cited by the petitioners in support of this contention do not support it. In the case of People v. Dodge, 104 Cal. 487, 38 P. 203, the ground for the relief sought was not fraud, but was an alleged defective service of summons. The case of People v. Davis, 143 Cal. 673, 77 P. 651, was a similar case, involving no question of fraud in the procurement sought to be set aside. The case of Suttman v. Superior Court, 174 Cal. 243, 162 P. 1032, while it arose out of an action for divorce, and involved the erroneous action of the trial court in setting aside an interlocutory decree without notice to the adversary party thereto, involved no issue of fraud. The case of Bancroft v. Bancroft, 178 Cal. 359, 173 P. 579, was a proceeding wherein one of the parties to a previous action for divorce was seeking relief in an independent action in equity from a decree of divorce obtained through a collusive agreement between the parties to such divorce action, and the language of the court cited by counsel was used in commenting upon certain other cases wherein relief had been sought under section 473 of the Code of Civil Procedure, and is to be confined in its application to the particular cases to which it referred. On the other hand, this court, in the case of Ex-Mission L. & W. Co. v. Flash, 97 Cal. 610, 32 P. 600, has held that a motion to set aside a judgment upon the ground of fraud in its procurement is not subject to the six-month limitation provided in section 473 of the Code of Civil Procedure; and in the opinion in that case it is pointed out by the court that said section of the Code, while providing for relief in cases of "mistake, inadvertence, surprise or excusable neglect," does not include "fraud" among the grounds upon which relief from a void or voidable judgment may be sought under its terms. In the case of Williams v. Reed, 43 Cal. App. 425, 185 P. 515, it was held that the trial court has inherent power to set aside a judgment obtained through a fraud upon the court, and that its right to so act or grant relief is not derived from section 473 of the Code of Civil Procedure. It is true, as the petitioners assert, that this holding may have been obiter in that case. It is also true that it rests for its authority upon the case of Stierlen v. Stierlen, 18 Cal. App. 609, 124 P. 226, 228, wherein similar language is employed, and that certain broad language in the latter case was disapproved by this court upon its denial of a petition for rehearing therein, but the Stierlen Case was, as to its facts, a case wherein the motion made in the trial court was one to set aside a judgment in an action for divorce obtained through fraud committed both upon the court and the adverse party; and, while certain language of the appellate court in dealing with this phase of the case was so broad as to apply to all void judgments and hence was properly subject to the criticism made upon rehearing, the unmodified portion of the opinion in that case correctly states the rule to be that "the power to vacate upon motion a judgment obtained by fraud is inherent in courts of general jurisdiction, and that the same may be exercised after the lapse of the statutory time which limits the entertainment of applications based upon surprise, inadvertence, and so forth, provided that such motions are made within a reasonable time. What is a reasonable time is a matter of sound legal discretion in the court in which the motion is made." We are therefore of the opinion that there is no merit in the petitioners' contention that the plaintiff in the divorce action had lost the right to make her motion to set aside said final decree in the trial court upon the ground of fraud committed upon herself and upon the court in its procurement, because her said motion was not made within the time prescribed in section 473 of the Code of Civil Procedure.

[5] This brings us to the second and most serious contention of the petitioners herein, which is that, the divorce action being one brought solely to sever the marriage relation between the parties thereto, and in which no property rights of the parties were involved, and both the interlocutory and final decrees in said action being confined to such purpose, the said action abated upon the death of the party defendant subsequent to the entry of said final decree, and the trial court thereby lost jurisdiction to take any action whatever in said case. The petitioners in making this contention rely strongly upon the cases of Begbie v. Begbie, 128 Cal. 154, 60 P. 667, 49 L. R. A. 141, and of Kirschner v. Dietrich, 110 Cal. 502, 42 P. 1064, as fully sustaining their said con-

tention. The case of Begbie v. Begbie, supra, was one in which the court dismissed an appeal taken in a divorce action upon the ground that, the defendant having died after the entry of the decree of divorce, and the divorce action being one brought solely for the purposes of establishing her personal status as the wife of the plaintiff, the action had abated upon her death, and this court had thereby become deprived of the right to review the action of the trial court upon appeal. No question as to the right of the trial court to entertain a proceeding to purge its record of a decree of divorce fraudulently obtained was presented in that case. The court in its ruling relied upon its earlier decision in the case of Kirschner v. Dietrich, supra. The facts of the latter case and the relief sought therein differ, however, essentially from those of the case at bar. In that case there had been a judgment of divorce obtained by the wife upon service of summons by publication. The judgment in the plaintiff's favor was entered July 13, 1893. The plaintiff died February 22, 1894. An administrator was appointed in her estate. On June 8, 1894, the trial court made an order on motion of the defendant in the divorce action directing the substitution of the administrator of the deceased wife as a party plaintiff in her stead, and directing that the action be continued in the name of such administrator. Thereafter the defendant, on notice to such administrator, moved the court under section 473 of the Code of Civil Procedure to vacate the judgment of divorce, and that he be allowed to answer the complaint upon the ground that the summons had not been personally served upon him, and that the judgment was void, because procured by false testimony. The court denied his said motion. The defendant appealed. Under the foregoing state of facts this court held, and we think properly, that, since the purpose of the defendant in making his said motion was to reopen and litigate the question as to whether the plaintiff was entitled to a decree of divorce, the plaintiff's death by severing the marital relation between the parties had abated the action which had that as its sole purpose, and hence deprived the court in which said action had been pending of all power to review its action and determine her right to a divorce. But the case at bar presents an essentially different situation. The plaintiff by her motion made in the divorce action is not seeking to reopen said action for the purpose of further litigating the question as to whether she, or the defendant either, is entitled to a divorce. That question has been settled by the defendant's death, and as to it or any further litigation regarding it in said action it has been abated. But the plaintiff, notwithstanding the abatement of the action in so far as the issues therein are involved, is seeking to invoke the power of the court over its own records, by suggesting and offering to show to the court that it has been imposed upon by the extrinsically fraudulent acts and concealments of the defendant while living with the plaintiff as his wife into the making and entry of a decree which it had neither the right nor power to make. This is the principal purpose of her said motion; and, if the declared purpose of the trial court as affirmed in its response to this writ is to be taken as true, this is the purpose which the said court and the judge thereof has in view in proceeding to the hearing upon the plaintiff's said motion which the petitioners by their application for this writ seek to prohibit. To such a purpose the death of the defendant in said action is merely incidental, and is in no wise controlling upon the power of the court to purge its records of orders and decrees which the court has been wrongfully misled into making through the fraudulent imposition of a party to an action pending, at the time of such imposition, before it. To hold that the party having accomplished such imposition could by dying deprive the court of the right when properly advised to so purge its own records would be to abridge to the point of denial one of the most salutary of the inherent powers of the court.

In the case of Rehfuss v. Rehfuss, 169 Cal. 86, 145 P. 1020, this court directed attention to the fact that actions for divorce differ from ordinary suits between private parties in the degree of solicitude which the law as well as public policy imposes upon the courts in the interest of preserving the integrity of the marriage relation. The court says:

"That relation is the basis of the family, the foundation of society. It cannot be destroyed by the mere consent, whim, or caprice of the parties to the marriage, nor can it be stipulated away in judicial proceedings. The relation can be dissolved only by consent of the state, and upon statutory grounds, presented in good faith to a court of competent jurisdiction. * * * It is the duty of the court, representing the state, in accordance with the letter and policy of the law, to guard strictly against fraud, collusion, or imposition when the husband or wife seeks to dissolve the bonds that bind them together. * * * Where it becomes manifest to the court before it loses jurisdiction of the case, that a judgment decreeing a divorce has been obtained by collusive agreement between the parties, or through fraud practiced upon the court, the court has the inherent power to set aside the judgment. This it may do on its own motion," citing many cases.

The petitioners lay, we think, undue stress upon the phrase in the foregoing quotation, "before it loses jurisdiction of the case," as indicating that the court had in mind either

the limitation of time imposed by section 473 of the Code of Civil Procedure or the loss of jurisdiction caused by the death of one of the parties to the divorce action; but that the court did not refer to a loss of jurisdiction in the trial court from either of these causes would seem to be made clear, not only by reference to its earlier decision in the case of Williams v. Reed, supra, holding that applications for this form of relief were not governed by section 473 of said Code, but also by reference to certain of the cases cited in support of its above ruling in the Rehfuss Case; as in the Matter of Boyd's Appeal, 38 Pa. 241, wherein it was held that the court of common pleas had power to vacate and annul a decree of divorce obtained through fraud and imposition on the court after the death of one of the parties to the action. In Long on Domestic Relations, § 141, p. 289, the rule is stated that a decree of divorce which has been obtained by either party to the marriage by fraud may be set aside by the court in which the decree was rendered upon application of the party aggrieved; and the fact that the party who procured the divorce is dead does not necessarily defeat a proceeding to vacate the decree. The author cites in support of this doctrine Lawrence v. Nelson, 113 Iowa, 277, 85 N. W. 84, 57 L. R. A. 583, and Johnson v. Coleman, 23 Wis. 453, 99 Am. Dec. 193, and also cites 2 Bishop on Marriage, Divorce, and Separation, §§ 1549, 1554, and 1556, wherein it is stated that the death of the defrauding party, without unreasonable delay by the other, will not prevent the vacating of a decree of divorce in cases where a fraud has been practiced on the court by one of the parties to the action to the injury of another who is innocent, and that in such cases the proceeding for annulling the decree must be in the same court and cause wherein it was rendered and where remains the record which is to be vacated.

We are therefore satisfied that, notwithstanding the fact that the divorce action had abated in so far as any further trial or determination of the issue as to the marital relations of the parties to it is concerned, the court retained its inherent power and jurisdiction to conduct the investigation into the integrity of its records which the plaintiff's motion suggests and which the court of its own motion is proposing to undertake. What was said by this court in the case of Kirschner v. Deitrich, supra, while correct in its application to that case, has no application to the proceeding which the petitioners herein seek to prohibit.

The application for a writ of prohibition is denied.

We concur: SHENK, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

196 Cal. 248

FUTTERER v. CITY OF SACRAMENTO et al. (Sac. 3767.)

(Supreme Court of California. May 29, 1925.)

1. Dedication ⟸57—Deed of land in subsequently incorporated city held to vest discretion in public officials thereof to devote land to public uses according to changing conditions.

Deed conveying land in newly founded city, to present and future owners of town lots therein, for such public uses as "future incorporated authorities of said city from time to time declare and determine," *held* intended to commit choice and extent of such public uses to discretion of public officials of subsequently incorporated municipality, to be exercised according to changing conditions.

2. Dedication ⟸58—Devotion of land to school purposes held to work no derogation of power to devote it to other purposes.

That land conveyed for such public uses as municipal authorities should declare, without limitation as to particular use, was devoted to school purposes for time, worked no derogation of such officials' power to devote it to other and more comprehensive uses, including erection of municipal auditorium thereon.

3. Dedication ⟸57—Devotion of land to erection of municipal auditorium held within scope of powers granted municipal officials by deed.

Devotion of land, conveyed for public purposes determined by municipal authorities, to erection of municipal auditorium for public assembly and convention purposes, *held* within scope of powers granted to such officials, though not contemplated by grantor at time of deed.

4. Dedication ⟸57—Deed of land for "public use" or "public purposes," held not to preclude use of municipal auditorium thereon by private persons giving concerts, etc., for which admission fees are charged.

Deed of land within city to present and future owners of town lots for such public uses as municipal authorities determined *held* to have granted such owners no other rights therein than those of general public, so that such authorities were not precluded from permitting use of municipal auditorium thereon by private persons, giving concerts, exhibitions, etc., for which admission fees were charged, when not being used for public assemblages.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Public Purpose; Public Use.]

5. Dedication ⟸57—Permitting private persons to use municipal auditorium for concerts, etc., for which admission fee is charged, not precluded by deed conveying land on which erected for public use or public purposes.

Public uses, to which city block or structures thereon could be put under deed to lot owners for public uses declared by municipal authorities, *held* not limited to such as would allow general public free access thereto at all times,

so as to preclude public officials from allowing private persons, paying license fees, to use municipal auditorium thereon for concerts, etc., for which admission fee is charged, or permitting societies of limited membership to use portions to exclusion of nonmembers, when not required for public use, especially in view of St. 1903, p. 413, § 8, requiring that all moneys derived from hire of public assembly halls be deposited in city treasury to credit of public hall fund, etc.

In Bank.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by H. J. Futterer for a declaratory judgment against the City of Sacramento and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Chas. A. Bliss, of Sacramento, for appellant.

R. L. Shinn, of Sacramento, for respondents.

RICHARDS, J. This appeal is from a judgment of the superior court in and for the county of Sacramento in an action brought by the plaintiff, who asserts himself to be a citizen of the United States and a resident and taxpayer of the city of Sacramento, for a declaratory judgment declaring the rights of the plaintiff and all other residents, citizens, and taxpayers of said city with respect to a certain block of land lying between Fifteenth and Sixteenth and I and J streets therein, and upon which block of land the city of Sacramento through its proper officials has declared its intention of erecting a public assembly and convention hall, otherwise designated as a "municipal auditorium" and for the purpose of which erection the people of the said city have heretofore and at a duly held election voted bonds in the sum of $750,000. The averments of the plaintiff's complaint were in the main admitted in the answer, and as to certain disputed matters in the pleadings the findings of the trial court were in accord with the averments of the defendants' said answer, and as to these the plaintiff makes no assault upon the findings on this appeal. The findings of fact of the trial court may therefore be taken as setting forth the conceded facts of the case.

These findings, briefly summarized, show that on or about the 2d day of January, 1849, John A. Sutter, Jr., who was then the owner of the lands in question, and in fact of most, if not all, of the property upon which the then newly founded city of Sacramento was rising, executed a deed by the terms of which he conveyed and quitclaimed "unto the present and future owners of town lots and town property in Sacramento City, in the territory of California, all my right, title and interest in and to certain portions of said city described as follows and under the conditions following." Then follows the description covering all the streets and alleys in said city, with certain reservations, and also certain blocks or squares in said city designated therein including the lands involved in this litigation. The deed proceeds as follows:

"The said several squares are hereby conveyed unto the present and future proprietors of town property in said city for the public use of the inhabitants of said city, to be applied to such public purposes as the future incorporated authorities of said city from time to time declare and determine. To have and to hold the aforesaid premises unto the present and future owners of town property in said city, their heirs and assigns, forever."

The findings further show that the said conveyance and the trusts embodied therein were accepted by the city of Sacramento, and that ever since the incorporation of said city the said land has been under the control of and its use administered under the authority of the governing body of said city, pursuant to the provisions of said deed; that from and after the 26th day of August, 1872, the said lands were devoted to public school purposes under a certain ordinance of said city, which was repealed in 1923; and that on June 30, 1924, the board of education abandoned said premises and ceased to use the same for public school purposes. The findings then proceed to adopt the averments of the complaint as to the holding of said bond election, and as to the result thereof, which show that at the time of said election and in the favorable vote for said bonds the place for the erection of the building for which the funds to be derived from the sale of said bonds were to be devoted was not designated, but that thereafter, and on the 21st day of May, 1923, the said city, by resolution duly adopted by its city council, designated the location of said assembly and convention hall and auditorium to be that of the lands here in question. The court proceeds to find:

"That it is the intention of the city of Sacramento, when said public assembly and convention hall, otherwise designated as the 'municipal auditorium,' is finished, to rent the same from time to time, at times when the said auditorium is not being used for public assemblages or conventions, for compensation to private persons who will give concerts, exhibitions, plays, and performances therein and charge an admission fee thereto, and exclude therefrom all persons who may not pay for such admission.

"That in addition to renting the said auditorium to private persons, as aforesaid, the city of Sacramento intends to rent the same to associations and societies of limited membership, at times when said auditorium is not being used for public assemblages or conventions, which associations will use the same and give performances therein, and exclude therefrom all persons who are not members of such societies or associations.

"That the revenue derived from said renting by the city of Sacramento will be placed in the

city treasury of the city of Sacramento, to be used for the public purposes prescribed by law.

"That unless the defendant city of Sacramento has the right to erect said auditorium on said site, and use the same in accordance with its intention as above set out, it will not construct said auditorium on said site, but will locate the same elsewhere."

As conclusions of law from the foregoing findings of fact the court finds:

"That the legal title to the block or square situated in said city of Sacramento, state of California, and being the block or square between Fifteenth and Sixteenth and I and J streets, is vested in plaintiff and others, by virtue of their ownership of lots in said city of Sacramento, subject, however, to the trust that said square should be for the public use of the inhabitants of said city, and to be applied to such public purposes as the governing authorities of said city shall from time to time determine.

"That the construction and maintenance of a public assembly and convention hall is a public use and purpose, and is within the public purposes referred to in the said deed by John A. Sutter, Jr., and that the defendants have the right to utilize the said block or square for said purpose, with full power to control and operate the said public assembly and convention hall, when constructed, including the right to hire or rent the same, at times when said public assembly and convention hall is not being used for public assemblages or conventions, to private persons, associations, or societies, for concerts, exhibitions, plays, performances, and like activities, admission to which will be restricted to persons paying a fee, or being members of such association or society, and from which all persons except those who pay the admission fee, or are members of such society or association, may be excluded."

The judgment of the court was in accord with the foregoing conclusions of law, and from such judgment the plaintiff prosecutes this appeal.

The appellant shows and the respondents admit that the above-mentioned deed of John A. Sutter, Jr., was before this court for interpretation in the case of Mayo v. Wood, 50 Cal. 171, in which case the plaintiff therein claimed title to a certain other of the blocks or squares of land described in said original deed of Sutter under a subsequent deed from Sutter, and under such claim of title, and also under the claim that said original deed of Sutter was void, for the reason that there was no sufficient designated grantee therein, sued a defendant in possession of said block or square of land in ejectment. The court said:

"1. The instrument executed by John A. Sutter, Jr., on the 2d day of January, 1849, dedicated the land in controversy to public use, to be applied 'to such public purposes as the future incorporated authorities of said city [may] from time to time declare and determine.' It purported in terms to convey whatever title he had, to 'the present and future owners of town lots and town property in Sacramento City.' It recognized the fact that there were such 'present' owners, and that Sacramento was then known as a city, though not at that time formally incorporated as such. Aside from the question of dedication, the instrument was operative as a conveyance to vest the title in the then 'present' owners of the town lots and property. This was a sufficient designation of the grantees to uphold it as a conveyance, and thereafter Sutter, Jr., had no title to this property which could pass by his deed to Mesick."

[1] While this court has thus declared the said original deed of John A. Sutter, Jr., to be valid as containing sufficiently identified grantees in the then existing owners of "town lots and town property" in the then actual, though unincorporated, city of Sacramento, it has not heretofore been called upon to define the rights of such "present" grantees or of their successors in the future ownership of property in that city in respect to the property in question here. Nor has it been heretofore required to interpret said deed as to the nature, extent, or limitations upon the trust for public purposes which was thereby created, either in the grantees of said deed or in the public officials of said city upon its due incorporation as such. The deed itself does not leave room for much, if any, doubt that it was the intention of the grantor therein that the public purposes to which said property was to be applied were to be broadly and not narrowly defined, since they were to be such as lay, not so much within the present conception or intent of the grantor, or even of his immediate grantees, but were to be such as "the future incorporated authorities of said city from time to time declare and determine."

[2] The contemporaneous history of the civil and political institutions of California, which were in the first and primitive stages of formation during the years 1848 and 1849, the fact that the turbulent social conditions of our golden prime had not yet settled into those of an ordered or organized state, and that, at the date of this instrument, and in fact for nearly a year thereafter, no constitutional or statutory authority existed for the organization of municipal corporations, or for any definition of the powers or of the public purposes or uses to be ascribed to such organizations, lends support to our conclusion that it was the intent of the grantor of this instrument to commit the choice and extent of the public purposes or uses to which the lands in question were to be devoted to the public officials of a municipality which had not as yet officially been born, and which discretion was to be exercised by such officials according to the changing conditions of the city of the future which the grantor forevisaged in his gift. This is not a case wherein the grantor has circumscribed his grant with such limitations as that the prop-

erties conveyed shall be used for a public park, or public playground, or zoological garden, or for any of the various purposes of public education; nor is it such a grant as the officials of the city, exercising their function at any particular period in its history, might have limited by the adaptation of the property to a particular or limited use. The fact, therefore, that this property was for a time devoted to school purposes has worked no derogation of the powers of the present officials of the municipality to devote it to other and more comprehensive uses.

[3] It is not seriously contended by the appellant herein that such is the case, nor is it within the appellant's insistence that the city of Sacramento may not legally devote the said property and the whole thereof to having erected thereon a building or buildings to be devoted to public assembly and convention purposes and to be designated and used as a "municipal auditorium." We hold, therefore, that such purposes, while probably not within the conscious mind of the grantor at the time of his grant are fully within the scope of the powers which the city of his vision was to exercise through its officials from time to time during the future years.

[4] It is, however, the contention of the appellant herein that, while it may be conceded or held that the city of Sacramento has power to devote said property and the structures to be erected thereon to such uses as "a public assembly and convention hall," or as a "municipal auditorium," it has no power to place such limitations upon the entire freedom of use at all times by the general public of such property or the buildings thereon as are attempted or threatened to be imposed by the present city council of said city in the occasional use thereof, when not being used for public assemblages, by private persons for such uses as the giving of concerts, exhibitions, plays, or performances for which admission fees are to be charged as the price or condition of admission thereto. The appellant urges this contention, both in his capacity as a citizen and resident of Sacramento, and hence a member of its body politic, and also in his capacity as a successor in interest of one of the original grantees of said deed by virtue of the latter's ownership of a portion of a town lot in said prospective city at the date of Sutter's said deed. Dealing first with said latter claim, we are of the opinion that, while the predecessor of said plaintiff, in common with all the other owners or proprietors of town lots in said primitive and as yet inchoate municipality were given by said deed a sufficiently definite status as grantees therein to render the same valid, as was held in the case of Mayo v. Wood, supra, they were granted thereby no rights in said property or in the uses or usufruct thereof other than those which were to be exercised by the general public under the trusts for such public uses as the "future incorporated authorities of said city" were "from time to time to declare and determine."

[5] The appellant has cited us to no authority which would uphold any other interpretation of this grant, and it therefore follows that the appellant must rest his contention solely upon his membership of the body politic of the city of Sacramento. His contention as thus limited, then, would be that the only public purposes or public uses to which the said block or square of land in said city, or the structures erected or to be erected thereon, could ever be put, would be such as would permit the general public at all times and upon all occasions, when such property or the buildings thereon were being put to any use, free access thereto and to the untrammeled enjoyment of such use. We are not willing to go thus far with the appellant in this case, nor do we think that either the terms of said grant, and of the trusts and uses covered thereby, or the purposed devotion of the property in question to the specific purposes declared by the public authorities of said city, require us so to do. The utilization of the structures proposed by the city council of Sacramento upon said block or square of land for a public assembly and convention hall, or for a so-called municipal auditorium, is unquestionably a laudable and proper public use and purpose, viewed in the light of the almost universal civic and social needs and usages of modern cities. To these uses and purposes the property in question, with the structures proposed to be placed upon it and the whole thereof, are generally to be put upon all occasions when the same shall be required for such uses and purposes; and it is only when such properties are not being required or not being used for such wholly public purposes that the authorities and agents of said municipality are to be permitted to allow private persons the temporary and licensed permission to use such of said properties as may be required for concerts, exhibitions, plays, and performances, charging an admission fee therefor, and is also to be permitted to allow associations and societies of limited membership to use portions of said premises and to give performances therein, to the exclusion of those who are not members of such societies or associations. This limited occupation and use of said premises is in either or any case confined to such times or occasions as said properties are not being used for public assemblages or conventions, while the revenues to be derived from such limited uses are to be deposited in the city treasury and devoted to such public purposes as are prescribed by law.

We are directed by the briefs of appellant to numerous cases holding that, when prop-

erty has been deeded or dedicated for specific public purposes and uses, such as for a public park or playground, or other like uses, where in the nature of things the general public must have equal access to the thing granted or dedicated in order to share in the enjoyment of its specific uses, in which cases it has been quite generally and properly held that the subject of such uses cannot be devoted to such other uses as would materially interfere with such general public enjoyment. We are also cited to cases holding that, where property has been acquired or dedicated to public use, it cannot be wholly set apart to uses or purposes which are not essentially public in their nature or control. Such was the case of California Academy of Sciences v. City and County of San Francisco, 107 Cal. 334, 40 P. 426, wherein it was held that pueblo lands of said municipality, held in trust for its inhabitants for municipal purposes, could not be set apart for the sole occupancy and use of the Academy of Sciences, a private corporation with limited membership, and the purposes of which, while incidentally for the public benefit, were essentially private, and intended primarily for the benefit and enjoyment of the few. Such was also the case of La Societa Italiana, etc., v. City and County of San Francisco, 131 Cal. 169, 63 P. 174, 53 L. R. A. 382, wherein it was held that lands of said municipality held in trust for public uses as a cemetery could not be granted to a private corporation for the burial exclusively of its own members, citing as authority the former case.

We are also cited to the case of Spires v. City of Los Angeles, 150 Cal. 64, 87 P. 1026, 11 Ann. Cas. 465, wherein it was held that lands dedicated to use as a public park could be occupied while properly usable as a site for a library but could not be devoted in whole or part to the general administrative purposes of said city. Our attention is also directed to the case of Egan v. City and County of San Francisco, 165 Cal. 576, 133 P. 294, Ann. Cas. 1915A, 754, in which it was held that the city of San Francisco could not turn over in perpetuity any portion of its public land to a private corporation for the erection of an opera house thereon. On the other hand, we are cited to the case of Harter v. City of San Jose, 141 Cal. 659, 75 P. 344, wherein it appeared that said city was proposing to devote a small portion of a tract of land known as Alum Rock Park, containing about 400 acres, with numerous mineral springs thereon, to a hotel to be erected by a private person under a lease for a limited period, and to be operated for private gain, but for the general convenience and welfare of visitors to the park, and under the rules and regulations of the city authorities, and in a manner consistent with the general public nature and use of said park, the city to derive a revenue from such lease and use. It was held that such proposed limited use of a portion of said public property was not beyond the powers of the city authorities; and it was further held that the discretion confided in municipal authorities in the matter of the utilization of property devoted to public uses ought not to be interfered with in the absence of a clear showing of manifest abuse. Among the authorities relied upon by the court as supporting its conclusion in that case was the case of State v. Schweickardt, 109 Mo. 496, 19 S. W. 47, wherein the city authorities of St. Louis were proposing to give possession to a lessee of certain buildings in a public park for the purpose of the sale of refreshments therein, and wherein it was held by the Supreme Court of Missouri that such possession and use of a limited area for such purposes were not to be regarded as a diversion from the legitimate uses of the park.

Passing from a review of these cases to the law as declared by text-writers and by the courts of other jurisdictions, we find it stated in McQuillin on Municipal Corporations, p. 2479, under the heading "Power to Erect Convention and Assembly Halls," that it is generally held that a municipality has power to erect an assembly hall or auditorium for public purposes, and that under such power it may erect, even in public parks, a pavilion for public amusement or convenience, and may fit up a portion of a building intended for strictly municipal purposes as a hall for public assemblies, dramatic exhibitions, etc., and it is also declared to be the law (page 2478) that a town which has authority to devote its public funds to the erection of a market house, which is to be the leading object in erecting the building, may devote an upper story thereof to other subordinate and incidental purposes—citing Spaulding v. City of Lowell, 23 Pick. (Mass.) 71, and also citing the case of French v. Quincy, 3 Allen (Mass.) 9, wherein it was held that a town may erect a building for the transaction of its public business and may make a provision in the same for its prospective wants, and, if all the rooms are not used, the vacant ones may be rented for private business, and that the provision in the deed to the land on which the building stands that the same "shall not be used for any other purpose than as a place for a town house for said inhabitants" is not violated, because a hall on the second floor has been used for miscellaneous purposes, and vacant rooms rented to a private business. In the case of Wheelock v. City of Lowell, 196 Mass. 220, 81 N. E. 977, 124 Am. St. Rep. 543, 12 Ann. Cas. 1109, where it appeared that a building proposed to be erected for the use of municipal boards and officers was also being used as a place for holding theatrical exhibitions, dances, and other amusements, the court held that such incidental use was not a

diversion of the building from its public purposes, and in so holding said:

"If the dominating motive for the erection of the hall is a strictly public use, then the expenditure for it is legal, although incidentally it may be devoted occasionally to uses which are not public. If, however, the project of the defendant city is merely colorable, masking under the pretext of a public purpose a general design to enter into the private business of maintaining a public hall for gain, or devoting it mainly to any other than its public use as a gathering place for citizens generally, such an attempt would be a perversion of power and a nullity and no public funds could be appropriated for it. * * * The reported facts show a substantial use of Huntington Hall for political rallies, conventions, and other public meetings of citizens, although from time to time it has been rented for purposes of amusements and instruction. That the building has also been let for private uses, when not required by the public needs, does not affect the general legal purpose"—citing French v. Quincy, supra.

The facts of the foregoing case are strikingly similar to those of the instant case, and we are satisfied that the principles of law therein enunciated have also direct and proper application to the case at bar, and hence meet with our full approval. It is not an insignificant fact, having an important bearing upon this case, that the state Legislature in the year 1903 adopted an act entitled "An act authorizing cities, towns, and municipal corporations to establish and maintain public assembly or convention halls, and to incur indebtedness for such improvements" (St. 1903, p. 412), and that apparently the city of Sacramento has proceeded under said act in resolving to erect its said "assembly or convention hall" and to vote and issue bonds therefor. Section 8 of said act provides that:

"All moneys derived from the use or hire of such assembly or convention hall shall be deposited in the treasury of the municipality to the credit of said public hall fund," etc.

Herein is to be found the plain intendment that upon occasion such public assembly and convention hall may be let for purposes to the enjoyment of which the general public may be excluded, except upon the payment of admission charges. Looking to the findings and conclusions of the trial court, we fail to perceive that the uses and purposes to which the city authorities of Sacramento intend to devote the lands and structure in question are such as are inimical to the scope and intendment of the original grant of such lands.

The judgment is affirmed.

We concur: SHENK, J.; WASTE, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

72 Cal. App. 318

PEOPLE v. GIBSON. (Cr. 1203.)

(District Court of Appeal, First District, Division 2, California. April 16, 1925.)

1. Criminal law ⟸1159(3)—Where there is a conflict in the testimony, the verdict of the jury is binding on appeal.

Though, in prosecution for murder, there was sufficient evidence to warrant acquittal on theory of self-defense, where evidence was conflicting, verdict of guilty was binding on appeal.

2. Criminal law ⟸1037(2)—Alleged misconduct not considered on appeal, when instruction not requested, or misconduct assigned.

Conduct of district attorney in murder trial would not be considered on appeal, where it was not assigned as misconduct, and no request was made for instruction to disregard it.

3. Homicide ⟸169(1)—Testimony in murder trial, that companion of deceased carried a weapon, properly excluded.

Testimony, that person, who accompanied deceased to defendant's flat, but remained outside, carried a revolver, was properly excluded, there being no showing that such person took any part in the struggle, or that defendant fired the fatal shot because he was armed.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Dee Gibson was convicted of manslaughter, and he appeals. Affirmed.

Edmond H. Lomasney, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., and Wm. F. Cleary, Deputy Attys. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment of conviction of the crime of manslaughter. He had been charged by information with murder, but the jury found him guilty of the lesser crime.

It is contended that the evidence is insufficient to sustain the verdict. There is a conflict in the record, not only as between testimony of witnesses, but in possible inferences to be drawn from much of that testimony. Had the jury chosen to believe all testimony in the record and drawn all inferences therefrom most favorable to the defendant, they would have had substantial reasons for acquitting the defendant upon the theory that he had killed Sanford in self-defense; but the jury has chosen to disregard such testimony and such inferences, and to accept as facts the testimony appearing in the record, which is inconsistent with the theory of the defense. We shall review, briefly, such testimony, and its presence in the record is a complete answer to appellant's position upon this aspect of the case.

On January 16, 1924, defendant rented a flat at 2300 California street, San Francisco. He testified that he intended to move into it with his family, when his rent was due upon premises at 561 Cedar street, where he was living at the time of the homicide. He had rented out rooms in this flat to various persons, among whom was a woman, Alma Jackson, over whom the killing occurred. All persons concerned in this tragedy are negroes. Alma Jackson, before going to live at defendant's flat, had been living with Willie Sanford. She had left him, he had refused to give up her clothing, she had secured a warrant for his arrest, and in response to this, he had returned her clothes. Sanford was not satisfied, evidently, to end the relationship between himself and Alma Jackson, and he met the defendant and complained about the conduct of the Jackson woman in leaving him and trying to have him arrested, and inquired as to how long she had been living in the California street flat. Defendant told him that the woman had said she didn't wish to have anything to do with Sanford, and had asked him (defendant) not to permit Sanford to come to the house, as she was afraid of him. Sanford said he would go up there and run the women out of the house. It also appears that Sanford threatened to kill defendant, but defendant stated that he was not afraid of him, and did not take his threats seriously. On the night of February 1, 1924, several women were visitng at the flat and defendant was spending the evening there. About midnight Sanford came to the house and wanted to see the Jackson woman. Defendant went to the door and refused to allow Sanford to enter. Sanford was accompanied by another negro, who remained outside while Sanford forced his way into the hall. There is abundant evidence from which it may be concluded that Sanford had no weapon of any kind with him. The two men engaged in a "scuffle" in the hall, defendant trying to eject Sanford and Sanford struggling to remain in the house. Defendant was armed and in the struggle drew his revolver and shot Sanford. It is true that he testified at the trial that Sanford had a gun and was endeavoring to shoot him (defendant), but this testimony is in conflict with his statement to the police shortly after the shooting, and contrary to the inference to be drawn from the fact that no weapon of any kind was found in the premises after Sanford was shot, although the police came there shortly thereafter, and Sanford was injured so seriously as to be unable to move or make away with any weapon which he might have had. In support of the verdict there is also the dying statement of Sanford, in part as follows:

"D. Gibson shot me over that woman, Alma Jackson, colored woman. I was living with her at 2503 Bush street. Happened inside of house 2300 California. She was living with me, and left me for D. Gibson. Mrs. Alma Jackson was in room. We had words. I had no gun, no revolver, no razor. I did not strike D. Gibson or attack him or attempt to attack him. I knocked at the door of room at 2300 California street. He opened the door. I asked for Mrs. Alma Jackson and Mr. Gibson told me to beat it. He said you can't talk to her. I said I just want to tell her about her stockings. He grabbed me, Gibson tore my coat, could not hold me, drew his pistol and shot me. Pistol was in his bosom. He fired one shot at me."

[1] There is testimony in the record presenting a different picture of the struggle, and appellant has discussed that testimony in his brief. We shall not review it here, because in so far as it is in conflict with the foregoing, the jury was entitled to disregard it, and we are bound by their view of the parties and their motives.

[2] Appellant complains of alleged misconduct of the district attorney in stating during the trial that counsel for defendant was nodding to a witness upon the stand—Alma Jackson. Counsel denied this in court, explaining that he could not hear the witness, and was putting his head forward to hear her. The district attorney then said that the nodding was done unconsciously, perhaps. That was all there was to the incident, and counsel for defendant did not assign it as misconduct, nor request an instruction to the jury to disregard it. Under this state of fact, we must disregard it upon appeal.

[3] The only other point urged upon the appeal is the contention that error was committed in refusing to admit the testimony of a witness, Reese, that a negro called "Stickhorse" and who accompanied deceased to the scene of the homicide and remained outside the house, was armed with a revolver on the night of the homicide. The witness was asked:

"Was 'Stickhorse' or Sanford armed with any deadly weapon, if you know?"

The question was objected to as complex. Counsel was directed by the court to ask separate questions as to each of these persons. He then asked:

"Was Sanford armed with any deadly weapon, if you know? A. Not that I know of, sir."

The witness was then asked if "Stickhorse" was armed, objection was made upon the ground of incompetency, irrelevancy, and immateriality, and such objection was sustained.

No authorities are cited by appellant which would support the admission of this testimony. There is no evidence in the record that "Stickhorse" assaulted the defendant, and nothing to suggest that defendant fired the shot which killed Sanford, because he knew "Stickhorse" was armed. The

jury was justified in believing that "Stick-horse," armed or unarmed, did not come into the house, and took no part in the struggle, and that deceased was entirely unarmed at the time he was shot by defendant.

The judgment is affirmed.

We concur: NOURSE, J.; PRESTON, Justice pro tem.

---

72 Cal. App. 214

EHLERS v. LANGLEY & MICHAELS CO.
(Civ. 4743.)

(District Court of Appeal, First District, Division 1, California. April 8, 1925. Hearing Denied by Supreme Court June 3, 1925.)

1. Master and servant ⟸40(3)—Evidence held to justify recovery for dismissal of employee.

In action by employee for breach of contract of employment requiring 30 days' notice of dismissal, defended on ground that plaintiff's failure to obey lawful and reasonable orders and willful disobedience warranted dismissal, under Civ. Code, §§ 1981, 2000, evidence *held* to justify verdict for plaintiff.

2. Master and servant ⟸30(5)—To justify dismissal of employee, there must have been willful violation of rule or instruction.

Although willful disobedience by employee warrants peremptory dismissal, to justify dismissal without notice required by contract of employment, employee must have deliberately and willfully broken some rule, order, or instruction of employer.

3. Master and servant ⟸30(5)—To justify dismissal of employee, thing done or omitted to be done contrary to rule or instruction must be done or omitted intentionally.

To justify dismissal of employee without notice required by contract of employment, although it is not necessary that violation of rule, order, or instruction of employer be perverse or malicious, or that it be result of evil intent toward employer, thing done or omitted to be done must have been done or omitted intentionally.

Appeal from Superior Court, City and County of San Francisco; H. L. Preston, Judge.

Action by C. W. Ehlers against the Langley & Michaels Company. Judgment for plaintiff, and defendant appeals. Affirmed.

McCutchen, Olney, Mannon & Greene, of San Francisco, for appellant.

A. J. Treat and T. F. Draper, both of San Francisco, for respondent.

KNIGHT, J. The plaintiff, an employee of the defendant corporation, was dismissed from his employment without notice, and later brought this action to recover the amount of salary and commissions accruing during the 30-day period following his discharge, plaintiff contending that such summary dismissal was in violation of the express terms of the contract of employment, which he claims required a 30-day notice to be given before the employment thereunder could be terminated. The action was tried by a jury, resulting in a verdict in favor of the plaintiff for the sum of $814.57, that being the amount of salary and commissions plaintiff would have received if he had been allowed to remain in such employment for the additional 30 days. Judgment was entered upon said verdict, and defendant appeals.

The contract of employment was made up of certain letters which passed between the parties. Those letters were afterwards lost or destroyed, and, consequently, the terms of the contract were established by secondary evidence. Appellant concedes that the evidence adduced at the trial in relation to the contents of said letters was conflicting, and for that reason has not urged on this appeal the point that said contract of employment did not require the giving of the 30-day notice contended for by respondent.

The main contention upon which appellant seeks a reversal of the judgment is grounded upon the principle of law that it is the duty of the servant to obey all lawful and reasonable orders and instructions of the master and that willful disobedience thereof warrants peremptory dismissal. Civ. Code §§ 1981, 2000; Wiley v. California Hosiery Co., 3 Cal. Unrep. 814, 32 P. 522; May v. New York Motion Picture Co., 45 Cal. App. 396, 187 P. 785.

The appellant company is engaged in the wholesale drug business in San Francisco, and in connection therewith conducts a department for the sale and installation of drug store fixtures, of which department respondent had been the successful manager for two years. The controversy here arose over certain contracts secured by the appellant company for the manufacture and installation of fixtures, and the performance of certain construction work, for a firm in Petaluma, which contracts were, in accordance with the usual custom of appellant company, sublet on this occasion to the Mullen Manufacturing Company of San Francisco, to whom it had previously sublet similar contracts.

Appellant contends that it was an office rule of appellant company, known to respondent, that no part of the work of the subcontractor should be paid for until the entire contract was completed and a written acceptance of the work received from the customer; that before the work of the subcontractor on this particular job was completed respondent fraudulently procured a written acceptance of the work from the customer, contrary to business morals, and in-

jurious to appellant's business standing and reputation, and that therefore the summary dismissal of respondent was justified. Respondent denied that he had practiced any fraud or deceit whatever in obtaining said written acceptance of said work, and further denied that there was any such rule, as appellant contends for, in operation at the time the Petaluma transaction occurred. These disputed questions of fact were resolved by the jury in favor of respondent, and we are of the opinion that the jury's conclusions find ample support in the evidence.

Testimony was given by respondent to the effect that, some eight months previous to the dispute concerning the Petaluma job, the appellant company installed certain fixtures in a drug store in Oakland under a contract which had been also sublet to the Mullen Company; that at that time the impracticability of the rule requiring a written acceptance to be secured from the customer before any of the work of the subcontractor was paid for, came into question and was discussed by respondent with Mr. Pattioni, the vice president and manager, and Mr. Norton, the secretary of appellant company; that the discussion arose on account of the objections made by Mullen, who asserted that it was impossible for him to accept contracts subject to such a rule for the reason that the customer might, for some fanciful reason, refuse to accept the work at all and in that event he, as the subcontractor, would never be paid. Respondent further testified that following said discussion it was understood, by said corporation officers, that written acceptances from the customer would not be insisted upon; and that thereafter said acceptances were not, in fact, procured, although completion of the work was always required as a condition precedent to payment.

The particular circumstances relating to the Petaluma job were as follows: The entire job was covered by three contracts, the first of which was the main agreement and called for the manufacture and installation of fixtures to the extent of $5,625, of which amount appellant received $1,400 when the contract was signed; the second contract specified certain paneling for a fixed price of $1,020; the third contract, an oral one, related to screens and window backs. The fixtures were manufactured and assembled by the Mullen Company, at its factory in San Francisco, and shipped to Petaluma. After installation work under the first contract, and construction work called for by the additional ones, had been in progress for a week or nine days, and the work under the first contract had been practically finished, respondent, following his usual practice, so reported to Mr. Norton, the secretary, stating that Mullen would like to have his check delivered in time to meet his payroll on the following Saturday, May 13th. Norton replied that the check would be ready. On May 12th Norton told respondent that Mr. Michael, the company's president, had seen the check lying on the cashier's desk and had stated that it should not be delivered until a written acceptance was obtained from the customer. Respondent so informed Mullen, and the latter protested that the delay would work a hardship on him because he had depended on said check to meet his payroll. In order to obviate the embarrassment respondent, that night, personally inspected the work at Petaluma, ascertained that the material called for by all three contracts was on the job, and that the work under the first contract had been practically completed; that the only thing remaining to be done was to shove the showcases into position "like you would a table or desk"; thereupon respondent obtained from the customer the necessary written acceptance, which was filed in the company's office and the next day the Mullen check for the sum of $4,200 was delivered to Mullen.

About 10 days later respondent was called before a meeting of four of the officers of the appellant company, those present being Mr. Michaels, the president, Mr. Pattioni, the vice president and manager, Mr. Norton, the secretary, Mr. Terry, the treasurer, also the company's sales manager, and a member of the drug firm for whom the work was being done. After some questioning, respondent was arbitrarily discharged from his employment by the president, Mr. Michaels. He was first asked by Michaels if he did not know that it was against the rules of the company to pay the accounts of a subcontractor without first obtaining a written acceptance from the customer and he replied that he did not. Respondent then explained that the same difficulty had arisen in reference to the Oakland job, and that the understanding at that time with the company's officers was that said rule should be relaxed. He further attempted to explain how the appellant company was being benefited by prompt payment to the subcontractor, upon completion of the work, without awaiting the customer's acceptance. In this connection respondent stated that the success of the department depended largely upon pleasing the customer; that in the performance of all contracts for the manufacture and installation of fixtures the customer invariably requested small extras not included in the contract; also that it was frequently the case that several days after the job had been completed and accepted it would be found that a drawer would stick or a door would jam, owing to shrinkage of material; that if the subcontractor was paid promptly upon completion of the work, and thereby able to take care of his current demands for labor and material, he was always willing to go beyond his contract and perform these small extra jobs without cost to either the customer

or the appellant company. Respondent testified that upon explaining these matters to Mr. Michaels the latter said:

"He did not care anything about that; what he wanted to know was whether or not I had received instructions not to pay it—any bills on any occasion—pay any bills until we had received an acceptance from the customer."

Continuing, respondent testified:

"I tried to explain as I did to you now, and he didn't want any explanation, he wanted an answer 'yes' or 'no.' Well, I said yes, I did receive those instructions, then he said this remarkable thing, that because I had violated those instructions, and seem so anxious to pay Mr. Mullen that money, that I was more loyal to Mr. Mullen than I was to him, and therefore had lost all confidence in me and having lost confidence in me, there wasn't any room for he and I under the same roof. Those were his very words. * * * Then I asked him if that meant I was through working for him and he said, 'It does.' I told him then that I did not believe that he had lost confidence in me, he was the first man that ever in my life had told me that. I left the company."

[1] It would thus appear from respondent's testimony, which, in view of the verdict of the jury in his favor, must be taken as true, that the rule upon which the president of appellant company assumed to stand in the matter of the peremptory discharge of respondent, was not effective at the time the Petaluma transaction occurred, but had been suspended for several months prior thereto, with the express approval of the officers of said company. And so far as the special instructions of Michaels were concerned, to the effect that the Mullen check be withheld until written acceptance was obtained, the evidence shows, without dispute, that those instructions were complied with. But in this regard appellant claims that said acceptance was procured through fraud and deceit. The evidence does not so prove, and we think the jury was fully justified in deciding adversely to appellant upon this issue. Even construing the testimony of the witness Tuttle, who signed the acceptance, most strongly against respondent, it utterly failed to show that said acceptance was the product of any deception whatever. The work under the first contract, for which the check was delivered in payment, was at that time practically finished. Even Tuttle testified the things remaining to be done were comparatively trifling. The reason said work was not entirely finished, respondent testified, was that Mullen's men had been working on the second and third contracts. Tuttle knew, however, of the true conditions as they existed when said acceptance was signed, and the mere fact that he believed, from respondent's statements, that it was Michaels who requested the acceptance, cannot be considered as a reflection upon the integrity of respondent.

On the other hand, respondent testified that he truthfully explained to Tuttle the situation of Mullen's approaching pay day, his reliance upon the check to meet it, and that Michaels had insisted upon the acceptance before the delivery of the check; that thereupon Tuttle said, "Certainly I will sign it." There is nothing in the record which tends to prove that respondent's action in securing said written acceptance resulted in any personal gain to him or that it operated to the injury of the customer or to the prejudice of appellant company, which of itself may be taken as negative proof of the charge of fraud made by appellant. The entire job was afterwards satisfactorily finished, and the small extra jobs requested by Tuttle, when he signed the acceptance, were performed by Mullen without cost.

In further justification of the payment to Mullen, it was shown that as subcontractor Mullen had no contractual relations with the customer and was, in fact, entitled to his money when his work was completed; that he had expended large sums of money in the manufacture of the fixtures and incurred labor bills in the installation of the same; that there was no agreement on his part that he should wait until the customer had accepted the work before he received any part of his pay; that up to that time he had received no money whatever, although the appellant company had received $1,400 in cash from the customer at the time their contracts were signed. The evidence further shows that during the two years respondent managed said department the business thereof increased about 20 per cent. in volume, amounting during the second year to about $200,000 gross. In fact, appellant states that there is no criticism raised as to his general conduct of his department.

[2] While it is doubtless the law, as appellant contends, that willful disobedience by the servant warrants peremptory dismissal by the master, nevertheless before the law will allow an employer to ignore the specific terms of a contract of employment, which requires notice to be given the employee of its proposed termination, it must appear that there has been some rule, order, or instruction of the employer violated, and that such violation was committed willfully and deliberately on the part of the employee.

[3] Although it is not necessary that the violation be perverse or malicious, or that it be the result of an evil intent toward the master, it must be made clear that the thing done or omitted to be done was done or omitted intentionally (May v. New York Motion Picture Co., supra) the rule being grounded upon the theory that willful disobedience of specific instructions of the master, if such instructions be reasonable and consistent with the contract of employment is a breach of duty—a breach of the contract of service; and like any other breach of contract, of it-

self entitles the master to renounce the contract of employment. Labatt's Master and Servant, (2d Ed.) § 291, p. 877.

Under the circumstances and for the reasons above stated, we believe the jury was justified in concluding that there was no breach of duty on the part of plaintiff, and therefore he was entitled to the benefit of the 30 days' notice provided for in the contract of employment.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

72 Cal. App. 314

HERBERT v. GRAHAM et al. (Civ. 4863.)

(District Court of Appeal, First District, Division 1, California. April 16, 1925.)

1. Mines and minerals ⟸77—Where no dispute as to facts or inferences drawn therefrom, question of abandonment of oil lease becomes one at law.

While question of abandonment of an oil lease is one of intention to be determined only upon an investigation of all facts and circumstances, still, where there is no dispute as to facts or inferences to be drawn therefrom, question becomes one at law.

2. Mines and minerals ⟸78(1)—Lessee held not to have abandoned oil lease.

Lessee, under oil lease, compelled to stop drilling operations because of storms, rains, and impassable roads, but who left drilling machinery and tools on ground with man in charge, *held* not to have abandoned oil lease.

3. Mines and minerals ⟸78(3)—Lessor must give notice of intention to terminate oil lease for nondevelopment.

If a lessor desires to declare a forfeiture of oil lease on ground that land has not been fully developed, he must give notice of such intention, and a reasonable time must be given for the development.

4. Mines and minerals ⟸78(3)—Notice held not sufficient notice of intention to declare a forfeiture of lease.

Where lessor of oil lease informed one of lessees he wanted him to resume work on land or quit, such notice fell short of notice to declare a forfeiture and could not effectuate any such purpose, merely indicating dissatisfaction on part of lessor and desire to have operations resumed.

5. Mines and minerals ⟸77—Nonuser, without intention to abandon oil lease, does not constitute abandonment.

Mere nonuser alone, without any intention to abandon an oil lease, does not constitute an abandonment thereof.

Appeal from Superior Court, Monterey County; J. A. Bardin, Judge.

Action by Stanley Herbert against E. F. Graham and others. From a judgment for plaintiff, defendants appeal. Reversed.

Porter & Sutton, of Los Angeles, for appellants.

J. A. Bardin and Russell Scott, both of Salinas, for respondent.

TYLER, P. J. Action to quiet title. The complaint is in the usual form. The answer sets forth that plaintiff and his wife had executed to defendant Graham a certain oil lease, whereby they granted to him all the oil, gas, coal, sulphur, shale, and other minerals in and under the premises demised, and that this lease had been assigned to the appellants, who had entered upon the property and expended over $14,000 in sinking oil wells, and had paid plaintiff the sum of $50 per quarter up to the 31st day of March, 1921, the date when drilling was commenced, as provided for in the lease. By an amended answer they allege that, since they commenced drilling on the property, they had sunk a well to a depth of 600 feet, and it then had to be abandoned, as it was destroyed by an earthquake, and they thereafter sank a second well to a depth of some 590 feet, and in the sinking thereof had used due diligence, and had continued work until December 31, 1921, when they were compelled to stop drilling by reason of rains, storms, and impassable roads, but that they had left their rig, tools, and machinery upon the property and intended to resume operations; that plaintiff knew of these facts, and never gave appellants any notice to resume drilling, or that no extensions would be granted, but instead commenced this action on the 31st day of May, 1922.

Included in the lease were provisions to the effect that the lessee should drill a well upon the premises within one year from the date thereof, or thereafter pay to the lessor $50 a quarter until the well was drilled or the property granted was reconveyed, and that, unless a well had been completed to a depth of 2,000 feet (providing oil, gas, or other minerals were not found at a less depth) within 2 years from said date, the lessor, by giving 6 months' notice in writing, could thereafter refuse to accept further rentals under the grant, and if, before the expiration of such notice, the lessee had not commenced a well on the premises, the grant should be null and void, and both parties released therefrom.

The trial court found that the lease had been executed between the parties, but that the same had been wholly abandoned by the assignees of the lessee, and judgment was accordingly rendered, quieting plaintiff's title.

The contention of the appellants is that the facts shown do not as matter of law constitute an abandonment, and that the decree of the court in effect enforces a forfeiture entirely unjustified by the evidence.

Respondents, on the other hand, claim that the question of abandonment in a mining lease is a question of fact, and that the determination of the trial court on the subject is conclusive.

[1] While the question of abandonment is one of intention, to be determined only upon an investigation of all the facts and circumstances, still, where there is no dispute as to the facts or the inferences to be drawn therefrom, the question becomes one of law.

[2, 3] Given the most favorable interpretation for plaintiff, we are of the opinion that the evidence fails entirely to show any abandonment, but, on the contrary, it at most shows a mere disuse or nonuser of the grant for the period of 6 or 7 months. Aside from this, the evidence also affirmatively shows that no notice of termination of the lease was ever given. If a lessor desires to declare a forfeiture on the ground that the land has not been fully developed, he must give notice of such intention, and a reasonable time must be given for the development. Thornton on Oil and Gas (3d Ed.) 862.

[4, 5] Here there is no evidence of any such notice. It is true that plaintiff informed one of the appellants that he wanted him to resume or quit, but this falls far short of notice of a determination on his part to declare a forfeiture, and cannot effectuate any such purpose. It merely indicated dissatisfaction on the part of plaintiff and a desire to have operations resumed.

Nor is there any merit in the contention that the evidence shows that the defendants abandoned the property and vacated the same upon receiving plaintiff's complaint as to the progress of the work. Mr. Okell, to whom the notice to resume work was given, seldom visited the property. His absence signified no intention of abandoning the same. He left his machinery on the ground and his crew in charge, with directions to have the tools repaired so that operations might be resumed. We have already referred to the fact that the evidence shows that two wells had been started; that the first was abandoned, and the second had caved, in consequence of which work was suspended, and the machinery was left upon the property with a man in charge. These acts rebut any inference that the assignees of the lease had abandoned the premises. People v. Southern Pac. Co., 172 Cal. 692, 158 P. 177. Nonuser alone, without any intention to abandon, does not constitute an abandonment. Utt v. Frey, 106 Cal. 397, 39 P. 807.

Appellants make the further contention that the lease in question provided for the payment of rent, and that they had paid the same up to the 31st day of March, 1921, in conformity with the terms of the lease, which did not provide for forfeiture upon nonpayment of rent, or contain any provision for a right of re-entry upon breach of this covenant. It is accordingly claimed that to give plaintiff a right of re-entry a demand for the rent was essential, as also to complete a forfeiture, citing Sauer v. Meyer, 87 Cal. 34, 25 P. 153. Considering the conclusion we have reached, this question becomes unimportant, and a discussion thereof is unnecessary.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

---

72 Cal. App. 68

WESTERN ASSUR. CO. OF TORONTO et al. v. SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. (Civ. 2853.)

(District Court of Appeal, Third District, California. March 30, 1925. Hearing Denied by Supreme Court May 28, 1925.)

1. Drains ⟹13 — Drainage and reclamation districts are governmental agencies.

Drainage and reclamation districts are not corporations, but rather governmental agencies, to carry out a specific purpose; agency ceasing with accomplishment thereof.

2. Drains ⟹13—District established to accomplish reclamation work constitutes public mandatory or governmental agency of the state.

Where sole and exclusive right and power to administer affairs of a district organized to carry out and accomplish reclamation of swamp and overflowed lands is by the state, through its Legislature, vested solely in itself, district or organization so established constitutes a public mandatory or a governmental agency of the state.

3. Levees and flood control ⟹1—State's jurisdiction over flood control involves valid exercise of police power.

Act of state in taking cognizance of, and jurisdiction over, matter of flood control, and all other works germane thereto, involves a valid exercise of state's police power.

4. Eminent domain ⟹293(1)—Complaint in action against drainage district held not to state facts showing that private property was taken for public use without just compensation.

In action for damages for injury to property resulting from negligence of servants of drainage district in setting fire to grass, which spread to another's property, complaint *held* not to state facts showing that property was taken for public use without just compensation, as provided by Const. art. 1, § 14.

5. States ⟹112, 191(1)—State cannot be sued without its consent; state not liable for torts of its officers or servants.

State cannot be sued without its consent, and generally is not liable for torts of its officers, agents, or servants, and can be made so

liable only by its clear and definitely given consent.

6. Drains ⟸19 — Drainage district, being deemed a governmental agency, was not liable for negligence of servants.

Drainage district organized under St. Ex. Sess. 1911, p. 117, being deemed a governmental agency, was not subject to an action for damages for injuries to property, resulting from negligence of its servants in setting fire to grass in front of dredger, being used by it for that purpose, which fire spread to and destroyed another's property.

7. Drains ⟸17 — Statute providing that reclamation board should have power to sue and be sued is remedial only.

St. 1913, p. 266, § 3, creating reclamation board and providing that it shall have power to sue and be sued, merely affords a remedy where none was formerly available for enforcement of such liability as would have existed if statute had not been enacted.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by the Western Assurance Company of Toronto, a corporation, and others against the Sacramento & San Joaquin Drainage District, a body corporate and politic. From judgment of dismissal, plaintiffs appeal. Affirmed.

Miller & Thornton, of San Francisco, for appellants.

Downey, Downey & Seymour and Stephen W. Downey, all of Sacramento, for respondent.

HART, J. The plaintiffs, five in number, are duly organized corporations, and, during all the times mentioned in the complaint, engaged in the fire insurance business in the state of California, by authority of and obediently to the laws thereof. Each of these insurance companies—some in the year 1919 and the others in the year 1920—issued a policy of insurance in a certain specified sum on the dwelling house, a tankhouse, and windmill, a blacksmith shop, a garage, a large barn and two small barns, all located upon the east side of Sutter basin by-pass levee, on what was formerly known as the Ball ranch, in Sutter county, and of which property the Sutter Basin Company was then and at the time of the commencement of this action the owner and in possession. The aggregate amount of the insurance so taken upon and covering said property was $23,587.88.

The defendant is a body corporate and politic under and by virtue of the provisions of an act of the Legislature of the state of California, approved Dec. 24, 1911 (Stats. Ex. Sess. 1911, p. 117), and subsequent acts amendatory thereof, said defendant being "generally known and designated as the 'Reclamation Board of the State of California.'"

The complaint thus states the ground upon which the plaintiffs base their alleged cause of action against the defendant as follows:

"That on the 1st day of September, 1919, the defendant above named acting by and through the reclamation board of the state of California, made and entered into a contract in writing with one William P. Dwyer, wherein and whereby the said Dwyer was engaged and employed by it to do certain work in connection with the construction and completion of the east levee of the Sutter by-pass and the east and west levees of Wadsworth slough canal and the drainage east of Sutter by-pass under and in accordance with and subject to the supervision, directions, and instructions of said reclamation board, or its representatives, which said work or a portion thereof, was done for the said Dwyer under and subject to the supervision, directions and instructions of said reclamation board, or its representatives, by the Ajax Dredging Company.

"That in the doing of said work the said Ajax Dredging Company set fire to grass and weeds in front of a dredger being used by it for that purpose, which fire, by and through the carelessness and negligence of the persons in charge thereof, spread to a stubble field adjoining the place where said fire was started, and then to the buildings and structures of the said Sutter Basin Company, which are set forth and described in paragraph VI of this complaint, and totally destroyed the same to the damage of the said Sutter Basin Company in the sum of $4,410, which said sum was the reasonable market price and value of said property so destroyed at the time of its said destruction."

The payment by the several plaintiffs of their respective proportions of the loss, sustained by reason of the destruction of the property mentioned, is then alleged, and, further, that, prior to the commencement of this action, the said Sutter Basin Company, "in consideration of the payment to it by said insurance companies, respectively, of the amounts" paid to said company for the loss as alleged in the complaint, assigned and transferred to the plaintiffs all claims and demands that it had "against any person or persons whatsoever arising out of the fire which destroyed the property referred to in paragraph VI" of the complaint, "and that, ever since that time, the plaintiffs have been, and now are, the sole and exclusive owners of said claims, and all thereof." These claims and the assignments thereof to plaintiffs, the complaint proceeds, were before the commencement of this action, duly presented to the reclamation board of the state of California, "which said reclamation board at all the dates and times herein stated was, and now is, acting for and on behalf of the defendant above named with reference to any and all of the matters of fact and things herein alleged," and that said reclamation board, acting for and on behalf of the defendant, rejected and refused to allow said claims, or any part thereof," and refused to allow or pay the same or any part thereof. The ag-

gregate amount for which judgment is prayed is the sum of $2,472.92.

The defendant demurred to the complaint on the ground of the insufficiency of facts to state a cause of action, and on the special grounds of ambiguity, unintelligibleness, and uncertainty in numerous specified particulars. The court sustained the demurrer, without leave to amend, and thereupon dismissed the action. This appeal is by the plaintiffs from the judgment entered upon said orders.

The pivotal question presented herein is whether an action will lie against the defendant for damage to property occurring in consequence of the negligence of its servants or employees. This question was, of course, raised by the general demurrer, and the ruling sustaining the demurrer presents the question to us.

[1-3] It is established by the decisions that drainage and reclamation districts, in strictness, are not corporations, "but rather governmental agencies to carry out a specific purpose—the agency ceasing with the accomplishment of the purpose." People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 382, 103 P. 207, 212. See, also, People v. Reclamation District 551, 117 Cal. 114, 48 P. 1016; People v. Levee District No. 6, 131 Cal. 30, 63 P. 676; Reclamation District No. 551 v. County of Sacramento, 134 Cal. 477, 66 P. 668; Reclamation District No. 70 v. Sherman, 11 Cal. App. 399, 105 P. 277; Whiteman v. Anderson-Cottonwood Irrigation District, 60 Cal. App. 234, 212 P. 706. Some of the drainage and reclamation and irrigation districts considered by the cases just mentioned were formed and organized under special acts of the Legislature and some under the general laws of the state, and, while the administration of the affairs of all of them is committed entirely to the owners of the lands embraced within the districts, still they are, nevertheless, public mandatories or governmental agencies through which the state administers and executes one of its most important functions. The reason that that is so as to reclamation districts is because the swamp and overflowed lands of California were granted by the general government to the state upon condition that the latter would see to the reclamation of the same so that they might become suitable for the purposes of cultivation, and, as an essential corollary of that proposition, those who purchase such lands from the state so take them subject to the right, and indeed the duty, of the state, either by a scheme immediately directed and supervised by itself through officers or agents appointed for that purpose, or by committing that duty to the owners themselves of such lands, to coerce such reclamation according to such rules, regulations, and plans as may be prescribed by the state through its Legislature. If, however, drainage and reclamation districts organized and their affairs administered by virtue of special acts or under the general laws of the state are public mandatories or governmental agencies of the state, there is much stronger reason for holding that where the sole and exclusive right and power to administer the affairs of a district organized to carry out and accomplish the same general purpose is by the state, through its Legislature, vested solely in itself, the district or organization so established constitutes a public mandatory or governmental agency of the state in the strictest sense—as much so, indeed, as any other governmental agency or department created by the Legislature, such as the state highway commission, the state board of education, the state board of health, the state mining bureau, and the numerous other like instrumentalities, through and by means of which the state exercises and applies portions of its sovereign authority. Indeed, it has frequently well been held that the act of the state in taking cognizance of and jurisdiction over the matter of flood control and all other works germane thereto involves a valid exercise of the state's police power. See Gray v. Reclamation Dist. 1500, 174 Cal. 622, and cases therein cited at page 638, 163 P. 1024.

That the defendant herein is strictly a state agency is a proposition not only clearly shown by the provisions themselves of the several legislative acts creating and vesting in it the powers which it is authorized to exercise to accomplish the great purposes of its creation, but also thoroughly established and settled by the decisions of our courts. In confirmation of this statement, it is hardly necessary to go further than to reproduce herein the following from the case of Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 343, 181 P. 84, 88:

"Much more closely is the Sacramento and San Joaquin drainage district knitted to the state and really part of it than is the ordinary drainage district. Section 7 of the Reclamation Act of 1915 declares that 'the state of California and the people thereof are hereby declared to have a primary and supreme interest in having erected, maintained and protected on the banks of the Sacramento and San Joaquin rivers and their tributaries and the bypasses and overflow channels and basins mentioned herein, good and sufficient levees and embankments or other works of reclamation, adequately protecting the lands overflowed or subject to overflow by said streams, * * * and it shall be the duty of the reclamation board at all times to enforce on behalf of the state of California and the people thereof the erection, maintenance and protection of such levees * * * as will, in their judgment, best serve the interests of the state of California. The purposes and objects of this act are to carry into effect the plans of the California débris commission with such modifications and amendments and such additional plans as have been or may hereafter be adopted by the reclamation board for the control of the flood waters of the Sacramento and San Joaquin rivers and their tributaries and said basins and to vest in said

reclamation board control and jurisdiction over said plans.'"

Interesting, too, to the present inquiry, is the clear and succinct statement, embraced in the opinion in the Argyle Dredging Co. Case, of the Honorable Robert T. Devlin, a recognized authority upon the subject, of the objects and legislative history of the acts creating the state board of reclamation and the defendant and providing for the work to be done and for the governing machinery thereof. Mr. Devlin therein shows that said legislative acts were the culmination of an agreement between the general government and the state of California, based upon elaborate reports as to flood control and reclamation along the Sacramento and San Joaquin rivers by government engineers, whereby the federal government and the state of California were to undertake, under the exclusive jurisdiction and control of the state, at the joint expense of the two governments, and the landowners to be benefited thereby, the accomplishment of the prodigious purposes of said legislation.

Thus it is to be seen that, in considering this appeal, or the questions presented for solution thereby, we are dealing with a public mandatory or governmental agency of the state—indeed, with the state itself, exercising through and by means of the defendant or its governing body portions of the infinite variety of functions which belong or are pertinent to its sovereign powers and the policies essentially incident thereto.

[4] The complaint, it will be observed, does not state facts which would bring this case within the terms of section 14 of article 1 of the Constitution, which, among other things, provides that—

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner."

There is no allegation in the complaint from which it is to be inferred or implied that the property destroyed was thus taken or damaged for a public use or to promote the ends of a public use. It is not alleged that the setting of the fire to the grass and weeds "in front of the dredger" constituted an act necessary to the doing of the work in the performance of which, for the defendant, the dredger company was then engaged. And, even if a direct averment to that effect were in the complaint, and it was true, the basis of the charge of the plaintiffs would not rest on that fact, but upon the fact that the agents or servants of the defendant, by their carelessness and negligence, caused an act, in and of itself necessary and proper, to extend its effect beyond the designed and legitimate purpose and scope thereof, to the damage of the property described in the complaint. This, it is clear, makes a case only in which it is sought to bind the defendant, upon the doctrine of respondeat superior, to liability for the consequences of a tort negligently committed by its officers, agents, employees, or servants while performing their duties as such.

[5] It is elementary that the state cannot be sued in any case without its consent; and all the authorities are united upon the proposition that it is a general principle of law that a state is not liable for the torts of its officers, agents, or servants, and that it can be made so liable only upon its clear and definitely given consent. See notes, 13 A. L. R. 1276.

In Gibbons v. U. S., 8 Wall. 275, 19 L. Ed. 453, Mr. Justice Miller said:

"The general principle which we have already stated as applicable to all governments, forbids, on a policy imposed by necessity, that they should hold themselves liable for unauthorized wrongs inflicted by their officers on the citizen, though occurring while engaged in the discharge of official duties."

In his work on Agency (§ 319), Judge Story declares that—

"The government does not undertake to guarantee to any person the fidelity of any of its officers or agents whom it employs, since that would involve it in all its operations in endless embarrassments, and difficulties and losses, which would be subversive of the public interests."

See, also, Hensley v. Reclamation District No. 556, 121 Cal. 96, 97, 53 P. 401; Sels v. Greene (C. C.) 81 F. 555, affirmed in (C. C.) 88 F. 127.

[6, 7] Neither the acts creating the defendant or the state board of reclamation, nor any other statute with which we are familiar, authorize actions against the defendant or the state board of reclamation for damage or injury to property resulting from the negligence of its servants, agents, or employees, while engaged in the performance of services or their duties as such. It is true that the act whereby the defendant was brought into existence (section 3, Stats. 1913, p. 266) provides that said board "shall have power to sue and to be sued"; but such a provision in a statute creating a governmental agency is remedial only—that is, its effect is not to create a liability against such governmental agency, but merely to afford a remedy where none was formerly available for the enforcement of "such liability as would have existed if the statute had not been enacted." Denning v. State of California, 123 Cal. 316, 319, 55 P. 1000, 1001. See, also, Chapman v. State, etc., 104 Cal. 690, 38 P. 457, 43 Am. St. Rep. 158; Melvin v. State, 121 Cal. 16, 53 P. 416.

It has uniformly been held in this state, as we have seen, that irrigation districts, formed and organized under the general laws, of the state or by special legislative acts, are governmental agencies of the state, and it has also likewise been held that the law as to

such organizations is the same as that applicable to public or governmental agencies, whose objects or purposes are similar to those of the defendant. See In re Madera Irrigation District, 92 Cal. 296, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106; Jenison v. Redfield, 149 Cal. 500, 87 P. 62; Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 187 P. 1056; Turlock Irr. Dist. v. White, 186 Cal. 183, 198 P. 1060, 17 A. L. R. 72; Tormey v. Anderson-Cottonwood Irr. Dist., 53 Cal. App. 559, 200 P. 814; Whiteman v. Anderson-Cottonwood Irr. Dist. et al., 60 Cal. App. 234, 237 et seq., 212 P. 706.

In the case last named (Whiteman v. Anderson-Cottonwood Irr. Dist.), the very question involved herein was presented to this court. In the opinion the late Justice Burnett, the author thereof, after reviewing many authorities, and an exhaustive consideration of the several points involved therein, summarized the conclusions of this court in said case as follows:

"(1) Whatever may be the recognized rule in other jurisdictions under similar legislation, an irrigation district organized under the Wright Act or California Irrigation District Act must be deemed a public agency created for a public purpose; (2) such agency is not subject to an action for damages resulting from the negligence of its officers or agents in the absence of a statute expressly imposing such liability; (3) that no such liability is expressly imposed in or by the law providing for the organization and government of such districts or by any other statute of this state."

The foregoing summary of the conclusions arrived at in that case is precisely applicable to this. Indeed, that case is decisive of the instant case,

It is not necessary to review the cases cited by the plaintiffs herein which they claim support their contention that the complaint states a cause of action against the defendant. There is no inconsistency between the rulings in those cases and the conclusions herein reached. We do not, of course, here hold that, where public work is done by the agents or employees of a public corporation, such, for instance, a municipality, in accordance with specific directions of or plans and specifications adopted by the corporation itself through its governing body, such corporation would not be liable in damages for injuries to the property of a citizen necessarily and directly resulting from the performance of the work itself. That in such circumstances a public corporation would be so liable is precisely what section 14 of article 1 of the Constitution declares, and what the cases relied upon by the plaintiffs herein hold, and properly so. No such a case is presented here, however, as has above been pointed out.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 322

PEOPLE v. BUCK. (Cr. 835.)

(District Court of Appeal, Third District, California. April 16, 1925.)

Criminal law ⟸1129(1), 1130(1)—Appellate Court not required to search record, where no brief is filed, and no specifications of error made in trial.

Appellate Court is not required to search record to determine whether or not trial was without prejudice to rights of defendant, where no brief has been filed on his behalf, and there has been no specification of errors made in the trial of the case.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

H. Buck was convicted of incest, and he appeals. Affirmed.

Hale Day, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

McDANIEL, Justice pro tem. The defendant was convicted of the crime of incest. The appeal to this court is from the judgment of conviction following a verdict of guilty, as charged in the information, and the order denying defendant's motion for new trial.

The appeal has been submitted upon the record in the case. No brief has been filed on behalf of the defendant, and there has been no specification of errors made in the trial of the case.

As is said in the case of People v. Perry, 16 Cal. App. 771, 117 P. 1036:

"This court is not required, in the absence of special assignments, in some form, of alleged error, to search the record for the purpose of determining whether the trial in the court below was in all respects conducted without prejudice to the substantial rights of the accused.

"We have, however, taken the pains carefully to read the stenographer's transcription of the testimony, and we have, from such investigation, discovered no reason for questioning its sufficiency to justify and support the verdict."

The judgment and order are accordingly affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

72 Cal. App. 282

TUFFIN et ux. v. WARFIELD et ux. (Civ. 2862.)

(District Court of Appeal, Third District, California. April 15, 1925.)

1. Vendor and purchaser ⟸143—Vendee held to have waived vendor's default by remaining in possession thereafter and admitting he was bound for purchase price.

Vendee *held* to have waived vendor's failure to have title quieted within time specified in contract by remaining in possession and improving land after expiration of time limit and by writing letter in which he indicated that he deemed himself bound for purchase price, though he objected to paying part cost of clearing title.

2. Vendor and purchaser ⟸120 — Vendee, waiving vendor's default, must demand performance within reasonable time to again put vendor in default.

Vendee, having waived provision of contract fixing time limit for clearing up title, could place vendor in default only by demanding performance within a reasonable time, and a letter by vendee demanding that vendor "settle" pecuniarily with him, but which did not demand that vendor clear up title, was not such a demand.

Appeal from Superior Court, El Dorado County; George H. Thompson, Judge.

Action by Allan Tuffin and Helen Tuffin against Charles F. Warfield and Annie E. Warfield. From a judgment for defendants, plaintiffs appeal. Affirmed.

E. Fitzgerald, of Placerville (Thomas Maul, of Placerville, of counsel), for appellants.

Abe Darlington and Henry S. Lyon, both of Placerville, for respondents.

JONES, Justice pro tem. On December 15, 1920, the appellants and respondents entered into an agreement, by the terms of which the respondents agreed to sell to the appellants, and the latter agreed to buy, certain farm land situate in El Dorado county, for the sum of $7,500, of which amount $2,000 was paid on the execution of the agreement, and the balance was to be paid upon the execution and delivery of the deed. The vendees, it was agreed, should have immediate possession of the premises, and, if the vendors failed to give a good and sufficient title, the vendees should be permitted to remain on the land for the period of one year from the date of the agreement, and to take the proceeds of the farm as compensation for their services and loss of time in cultivating and caring for the premises.

It was further "agreed that certain landmarks used in the description of said property have been obliterated by the lapse of time, and it is necessary that the said property shall be resurveyed, and that thereafter a suit to quiet title be instituted for the purpose of decreeing the title vested in said vendors, and for that purpose the parties hereto agree to equally share said expenses; that in event said suit shall not be successful that all moneys heretofore paid by said vendees to said vendors shall be refunded to said vendees by said vendors. And it is agreed that said surveying and the prosecuting of said action shall be done within one year from the date hereof, and, in case the title to the whole of said lands has not been quieted and found to be sufficient within said period of one year, said vendors shall be regarded and treated as having failed to give title as herein provided and required. Time is expressly made the essence of the contract.

Upon the completion of said survey of said premises and the final adjudication in said suit to quiet title, decreeing said title to be vested in said vendors within the time limited in the contract, the vendees agreed to pay $1,750, and give a mortgage on the property for the sum of $3,750. We have not set forth all the provisions of the agreement, but only those we deem necessary to be considered on this appeal.

The appellants entered into the possession of the land, and cultivated it, and made certain improvements thereon. The title, however, was not quieted within the time specified in the contract, and on July 21, 1922, the appellants commenced an action against the respondents, alleging the failure by the latter to furnish the former with a good title and to complete proceedings in perfecting the title according to the agreement, and demanding the return of all moneys paid and damages for the breach. Judgment was rendered in favor of the defendants, from which judgment the plaintiffs have taken an appeal.

The appellants contend that certain findings made by the trial court are not supported by the evidence, and that the court erred in admitting certain testimony offered by the respondents.

Appellants' claim for relief is based upon the alleged failure of respondents to procure, within the time designated in the contract, a decree quieting their title to the land, but it is the contention of the respondents that the appellants waived such default of the respondents and gave no new notice demanding performance at any particular time. The findings objected to are, in the main, of facts supporting this contention of the respondents.

[1] An examination of the record reveals that there was evidence presented supporting the findings of the court that the appellants had waived the time limit fixed in the agreement for the procuring of the decree quieting title. The admitted acts and conduct on the part of the appellants were such as to com-

pel the conclusion that, if the vendors were in default on December 15, 1921, the default was waived, and that they had lost their right to insist that time was of the essence as to that clause of the agreement. They continued to remain in possession of the land after the expiration of the year, and made improvements thereon, such as the setting out, in March, 1922, of 2,800 grape cuttings. On March 19, 1922, the following letter was written by Allan Tuffin to the respondent Chas. F. Warfield:

"Am writing you a few facts regarding the ranch. Of course you are aware, I suppose, that our agreement is out dated and is useless as far as I can see, so everything stands about the same as it did a year ago, but I know quite a lot more about this ranch than I did at that time."

Here follows a description of the bad condition of the orchard, and the writer then continues:

"Well, Mr. Warfield, under those conditions and the price I agreed to pay for the place which I think is all that is worth in more improved conditions, do you think it is fair and just for you to expect me to pay half of the expense of getting a clear title for your property? I will take my medicine on the purchase price of the place but paying half of the cost is a little too strong."

One would be justified in construing this communication to mean that, while the writer deemed himself bound to pay the purchase price fixed by the contract, yet, owing to the poor condition of the farm and the work he had done to improve it, he did not feel that he should be expected to pay one-half of the expense of clearing the title. The terms of this letter, combined with the acts of the appellants in connection with the land, were sufficient to constitute a waiver of their right to declare the respondents in default as of December 15, 1921.

The rule is laid down by Pomeroy in his work on Contracts, § 418:

"Whether time is originally essential or is made so by notice, or is simply material, all objections to a delay, either in finally completing or in doing any particular act, or to a failure to comply with the stipulations concerning time, will be waived by conduct on the part of the one who could otherwise raise them, which show with reasonable certainty that he could not consistently have intended to insist upon the objection, or that he did intend to treat the contract as still subsisting, notwithstanding the delay. * * * If the title is not yet perfect, and the day for completion passes, but the vendee continues the negotiation or dealing concerning it, he thereby waives the delay."

[2] Appellants, having waived the provision fixing the time for the clearing of the title, could then place the respondents in default in regard to such provision only by demanding performance within a reasonable time. "Where time was originally essential, but for sufficient cause a forfeiture for default therein has been waived, time ceases to be essential, and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand." Boone v. Templeman, 158 Cal. 290, 299, 110 P. 947, 139 Am. St. Rep. 126; and in the case of Daly v. Ruddell, 137 Cal. 671, 70 P. 784, it was held that—

"The circumstances disclose a waiver of Ruddell's right to insist that time was of the essence of the contract, and this being the case, it was incumbent upon him before terminating the contract to give notice to the other party, and allow a reasonable time within which to do any act required before the contract can be considered as violated or rescinded."

Appellants contend that such a notice for performance was given by a letter from Allan Tuffin to Mr. Warfield, dated June 19, 1922, the pertinent portions of which are as follows:

"I want you to settle with me as quick as possible. I mean pay me what you owe me and I will get off the place. * * * I will expect some action on your part in less than thirty days, if not I will take some. Hoping we will settle without trouble. * * *"

This document fails completely to demand that the respondents clear the title within 30 days or any other time. It does demand that the respondents "settle" with the appellants, and the writer explains that he means by "settle" to pay what is owing him. It clearly lacks those matters essential to later place the respondents in default for a failure to complete their contract.

"The notice cannot be an arbitrary and sudden termination of the transaction; it cannot put an immediate end to a pending dispute or negotiation as to the title; it must allow a reasonable length of time for the other party to perform, and, if it fails in any of these respects, it may be disregarded, and will produce no effect upon the equitable remedial rights of the party to whom it is given. * * * The notice also to be effectual in making the time allotted an essential element of the performance, must be express, clear, distinct, and unequivocal." Pomeroy on Contracts, § 396.

A review of the evidence determines that there was a sufficient showing to justify the trial court in finding that there was a waiver on the part of the appellants of the time limit fixed by the agreement for perfecting the title, and that no notice terminating such waiver and allowing a reasonable time for the performance of the contract in that respect had been given by appellants at any time, from which it would follow that the respondents were not in default at the time of the commencement of the action.

As to the contention of the appellants that the court erred in admitting evidence of a conversation of the appellant A. Tuffin with

the witness Darlington, in which reference was made to an alleged request by the former to be permitted to withdraw certain money on deposit in his name, it must be held that no error was committed, as the conversation was clearly admissible as bearing upon the question of waiver.

Respondents, in their brief, seek to have reviewed an order of the trial court, relieving appellants from their default in failing to give the notice to the clerk to prepare the transcript within the time required by section 953a of the Code of Civil Procedure; the appellants having elected to proceed under the provisions of that section. The authority of this court to review such an order on an appeal from the judgment may be questioned, but the conclusion we have reached on the merits of the appeal make it unnecessary to determine the question or to review the making of the order by the trial court, if such review would be proper.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 226

PEOPLE v. HEAPE. (Cr. 1192.)

(District Court of Appeal, Second District, Division 2, California. April 9, 1925. Rehearing Denied May 9, 1925. Hearing Denied by Supreme Court June 8, 1925.)

1. Criminal law ⟸413(1)—Conversation occurring after defendant's arrest, and after he had become aware that he was suspected of larceny, held properly excluded as being self-serving.

In prosecution for larceny by fraud and trickery, question which was broad enough to call for conversation occurring after defendant's arrest, and long after he had become aware that he was suspected of larceny, *held* properly excluded as being self-serving.

2. Criminal law ⟸413(1)—Statements after larceny are not admissible in defendant's behalf, unless made at or about time property was taken, or as a part of res gestæ.

Though statements at any time after larceny are admissible against accused to show his felonious intent, they are not admissible in his behalf to show an honest intent, unless they are made at or about the time property was taken, or as a part of the res gestæ.

3. Criminal law ⟸670—Exclusion of question relating to conversation not erroneous where no offer of proof made.

In prosecution for larceny, exclusion of question relating to conversation between complaining witness and defendant was not erroneous, where no offer was made by defendant to prove by conversation any specific fact, and purpose of question was not obvious from its terms.

4. Criminal law ⟸670—Question as to delivery of money or property by defendant to complaining witness properly excluded, as including acts after defendant's arrest.

In prosecution for larceny, question whether defendant ever gave complaining witness any money or property was so broad that it included acts after defendant's arrest, and after he knew that he was charged with larceny, and was properly excluded.

5. Criminal law ⟸670—Questions concerning demands made by complaining witness on defendant properly excluded when not limited to date prior to consummation of larceny.

In prosecution for larceny, questions to complaining witness to show unreasonable demands made by him on defendant were properly excluded when not limited to date prior to consummation of crime.

6. Criminal law ⟸1170(1)—Refusal to permit defendant to testify as to what he had done with all his funds in prosecution for larceny held not prejudicial.

In prosecution for larceny of money received for investment, court's refusal to permit defendant to testify as to what he had done with moneys received from his business transactions *held* not prejudicial, where defendant was allowed to state his reasons for failing to carry out his contract with complaining witness.

7. Larceny ⟸52—Refusal to permit defendant to testify as to failure to possess a broker's license, held not prejudicial.

In prosecution for larceny of money received for investment, in which there was evidence of false representation by defendant that he had broker's license refusal to permit defendant to testify as to his reason for failing to procure a license *held* not prejudicial.

8. Larceny ⟸44—Refusal to permit defendant to testify why incorporation of fictitious corporation was never completed held not erroneous.

In prosecution for larceny of money obtained by false pretenses for investment in corporation, which defendant claimed he had taken steps to incorporate, but which was nonexistent at time he pretended to be its authorized representative, empowered to contract for it, refusal to permit defendant to testify as to why incorporation was never completed *held* not erroneous.

9. Witnesses ⟸388(2) — Conversation with complaining witness subsequent to larceny held properly excluded.

In prosecution for larceny, exclusion of conversation with complaining witness, subsequent to time when crime must have been fully consummated, *held* not erroneous, where no foundation had been laid for impeachment of complaining witness, since, save for such purpose, nothing said by complaining witness after consummation of crime could be competent evidence for defense.

10. Witnesses ⊂⊃245—Refusal to permit witness to testify further as to defendant's reputation in prosecution for larceny held not erroneous.

In prosecution for larceny, refusal to permit witness, who disclaimed any knowledge of defendant's reputation for honesty in community in which he resided, but who was permitted to testify that, so far as he knew, defendant's reputation in his business relations was good, to testify further as to defendant's reputation, *held*, not erroneous.

11. Criminal law ⊂⊃379—Accused cannot show what his reputation for particular trait is among members of a particular class of people.

While it is permissible for accused when a particular trait of character is in issue to show his general reputation with regard to such trait in communities in which he has lived, it is not permissible to show what his reputation for such trait is among members of a particular class of people.

12. Criminal law ⊂⊃829(3)—Refusal of defendant's requested instruction held not prejudicial, in view of court's instruction.

Refusal of defendant's instruction that if he had no felonious intent to steal property when he took it, jury must acquit him, though he subsequently conceived such intent, though correct as an abstract proposition of law, *held*, not prejudicial, in view of court's charge that accused must have obtained possession "with felonious intention of stealing it when he gets possession of it."

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Trafford Henry Heape was convicted of grand larceny, and appeals. Affirmed.

C. A. Shutt and Arthur C. Fisher, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

FINLAYSON, P. J. Defendant was charged with the larceny of $250, the property of one Bruce G. Kingsley. He was found guilty as charged, and now appeals from the judgment of conviction.

A general outline of the case, as shown by the people's witnesses, sufficient for an understanding of the points to be discussed, may be stated thus: On October 3, 1923, Kingsley and the defendant—the latter assuming to act in the name of and for and on behalf of a fictitious corporation designated as the Great Western Builders Inc.—executed a written contract whereby Kingsley agreed to pay $1,000 to the mythical corporation, and that supposititious entity, according to the letter of the contract, agreed (1) to apply the $1,000 to the purchase of a certain lot in the city of Los Angeles, and to build a bungalow thereon for Kingsley; (2) to arrange for all such financial aid as might be necessary to carry out the agreement; (3) to complete the building within 90 days; and (4) to secure for Kingsley, within such 90-day period, a purchaser of the lot with the building thereon who would buy the premises at a price that would net Kingsley a profit of $1,000. There was either no such corporation as the Great Western Builders, Inc., or, if there was, defendant had no connection therewith.

Kingsley did not have more than about $250 in ready money available for the purpose of his agreement, and it was therefore agreed between him and defendant that, instead of paying the full amount of $1,000 in cash, he would give his check for $250 to defendant, and also deliver a certain trust deed which had been executed in Kingsley's favor by certain parties some years previously to secure an indebtedness evidenced by a promissory note upon which the sum of $1,019.19 remained unpaid. Pursuant to the last-mentioned agreement, entered into contemporaneously with the one first mentioned, Kingsley delivered his check for $250 to defendant, payable to the latter's order, and also delivered to him the trust deed and the note secured thereby. Thereupon defendant delivered to Kingsley a written receipt, which recited that the trust deed was to be used by the Great Western Builders, Inc., "as collateral security to the extent of not less than $750, until such time as Dr. Kingsley shall remit $750 in currency, said deed to be thereupon returned to the said Dr. Kingsley immediately." The receipt also recited that the check for $250, with the $750 so to be raised on the trust deed, "shall be taken to apply * * * as payment of the sum of $1,000 referred to" in the first-mentioned agreement.

Upon receiving Kingsley's check for $250, defendant indorsed his name upon it and deposited it to his credit at his bank. The 90-day period passed within which the Great Western Builders, Inc., was to do the things which ostensibly it had undertaken to do, and no attempt was made to build the bungalow or do any of the things which defendant, in the name of the Great Western Builders, Inc., had promised should be done with Kingsley's money. It is true that, when testifying as a witness on his own behalf, defendant advanced a specious excuse for his failure to carry out the terms of the agreement with Kingsley, but it is evident that the jury attached no credence to his story, for, by its verdict of conviction, it impliedly found that defendant intended all the while to convert the $250 to his own use, and that he obtained possession of the check by fraud and trickery; i. e., under the false pretense that he would invest the $250 for Kingsley so that the latter, within a period

of 90 days, would be repaid the full amount of his investment, and also make a profit thereon of 100 per cent.

It is contended that the court erred in its rulings upon objections to certain evidence, and also in refusing certain instructions requested by appellant. We shall consider appellant's points in the order of their presentation.

[1, 2] On his cross-examination, the complaining witness, on being asked by defendant's counsel if he knew what had become of the trust deed and the note which he had delivered to defendant to be used as collateral in raising the sum of $750, replied that he had since learned that they had come into the hands of a certain law firm in Los Angeles, but that he did not know how the firm had obtained possession of the documents. Thereupon defendant's counsel propounded this question: "Did you ever have a conversation with Mr. Heape [the defendant] in which you spoke or talked of this trust deed and note, and how it got into these people's hands?" To this question the court sustained an objection interposed by the district attorney. Appellant assigns this as error. We cannot perceive how it was possible for appellant to be injured by the ruling. He was not charged with the theft of the trust deed or of the note secured thereby. He claims that if the question had been answered in the affirmative and had then been followed by a question educing the conversation, it might have been shown that when he made the contract of October 3, 1923, he had no intention to defraud Kingsley. It is not claimed that anything was said by Kingsley in the course of the conversation which would shed light upon appellant's intention. The claim, as we understand it, is that appellant himself might have said something during the conversation which would tend to show that, when he executed the contract in the name of the supposititious corporation, he honestly intended to fulfil his promissory representations. At least one flaw in this argument is that the question to which the objection was sustained is broad enough to include any conversation between appellant and Kingsley in which mention was made of the note and trust deed, and how they got into the hands of the Los Angeles law firm, regardless of the time when the conversation may have taken place. The question was broad enough to call for a conversation occurring after appellant's arrest, and long after he had become aware that his right to the $250 was questioned, and that he was suspected of larceny. Anything which he may have said in his own behalf after his arrest, or after his right to the money was first brought into question, would be self-serving and inadmissible. Though statements made at any time after the larceny are admissible against the accused to show his felonious intent, they are not admissible in his behalf to show an honest intent unless they were made at or about the time the property was taken, or as a part of the res gestæ, i. e., instantly upon the property being discovered in his possession, or immediately upon the accusation of theft being brought home to his knowledge, and before he has had the opportunity to concoct evidence exculpatory of himself. Evidence of statements made by the defendant at any other time is inadmissible in his behalf. 36 C. J. p. 890; 17 R. C. L. pp. 77, 78; Mason v. State, 171 Ind. 78, 85 N. E. 776, 16 Ann. Cas. 1212. Such statements are excluded as evidence on behalf of the accused, not because they might never contribute to the ascertainment of the truth, but because, if received, they would most commonly consist of falsehoods fabricated for the occasion, and would mislead oftener than they would enlighten. 16 C. J. pp. 636, 637.

[3] Moreover, no offer was made by appellant to prove by the conversation, if any was had, any specific fact or facts. The purpose of the question, as now stated by appellant, was not obvious from its terms. In such cases the party seeking to introduce the evidence should make an offer of what he expects to prove, so that the trial court may determine whether the proposed proof is material and relevant.

[4] The complaining witness, when testifying on his direct examination, stated that the $250 represented by the check which he had given defendant was never returned to him. In the course of his cross-examination the witness testified that he never received any consideration from defendant prior to the latter's arrest. He also testified that just previous to defendant's preliminary examination, the latter gave the witness three documents. What those documents were does not appear, for at this point in the witness' narrative he was interrupted by an objection interposed by the district attorney to any evidence as to defendant's acts subsequent to his arrest. From the colloquy which then ensued between court and counsel it appears that it was the purpose of defendant's counsel to show by his client's conduct that it was not the latter's intention to appropriate the $250 to his own use, in violation of the agreement which had been made with the complaining witness on October 3, 1923. Without making any specific ruling upon the objection, the learned trial judge stated from the bench that the rule in such cases is that evidence of a defendant's conduct after his arrest is not admissible in his favor on the question of intention in taking the property. There was no intimation from the court that counsel could not show by his cross-examination of the complaining witness anything which may have been said

or done by defendant prior to his arrest. The rule thus announced by the court was as favorable to appellant as he could rightfully expect. As we already have stated, evidence of the acts or declarations of one accused of larceny, done or made after he becomes aware that he is charged with the theft, and when he has had an opportunity to concoct a defense, is not admissible in his favor. After the court had thus announced the line of demarcation which delimits such acts and declarations of an accused as are admissible in his behalf, defendant's counsel propounded to the complaining witness this question: "Did he [defendant] ever give you anything in the way of money or property?" The question was objected to by the district attorney upon the ground that any testimony regarding the return of money subsequent to the 90-day period referred to in the agreement of October 3, 1923, is incompetent and immaterial. The court sustained the objection. It is of this ruling that appellant now complains. From the tenor of the remarks previously made from the bench, defendant's counsel must have known that he would be allowed to question the witness as to any act done by defendant prior to his arrest, and which might tend to shed light upon his intention at the time when he received the check for $250. But notwithstanding the court's painstaking care to enlighten the parties with regard to the proper limits within which all such questions should be confined, defendant's counsel saw fit to ask a question which was of a scope so broad that it included the delivery of any money or property by defendant to Kingsley after the former's arrest, and after he knew that he was charged with larceny. For this reason, if for none other, the question was objectionable.

[5] The court sustained objections to each of the following questions propounded to the complaining witness on his cross-examination:

"Did you ever have a conversation with Mr. Heape in which you asked for $2,800?"

"Did you ever make any demand for any more than $250, or the trust deed?"

We are told by appellant's counsel that the purpose of these questions was to show that Kingsley made unreasonable demands upon defendant; wherefore it is argued that if such demands were made their unreasonableness would tend to explain and to excuse defendant's failure to return the $250. The questions were so general and indefinite as to time that the witness might have answered concerning demands made by him as recently as a date subsequent to the consummation of the crime and after defendant's arrest, or even as recently as some time during the progress of the trial. Obviously, no act of omission or commission on appellant's part, no matter what the excuse therefor may have been, could absolve him or justify his crime if it occurred subsequently to the full consummation of the alleged larceny, which, if committed, must have culminated at a time prior to the filing of the complaint with the committing magistrate. Appellant's counsel made no attempt to ask the witness any question which would have directed his attention to a time prior to the date when the alleged larceny, if committed, must have become a fully consummated and completed offense. It was not error, therefore, to sustain an objection to questions so indefinite and uncertain. State v. Bailey, 31 Wash. 89, 71 P. 715. See, also, People v. Machado, 6 Cal. Unrep. 600, 63 P. 66; People v. Lee, 13 Cal. App. 48, 108 P. 738; and 40 Cyc. p. 2420. Particularly is this so in view of the of the trial judge's clear and explicit statement of the rule that evidence of defendant's conduct, or of conversations had with him, occurring subsequently to his arrest, is not admissible.

[6] After having testified that he received the check for $250 from Kingsley, and that he had deposited it in his bank so as to mingle it with his other funds, defendant, who had taken the stand as a witness in his own behalf, was asked by his counsel on his direct examination to state, not what he had done with the $250, but what he had done with all his funds—the product of moneys which he had received from time to time in his business transactions. The court, on objection being made by the district attorney, and after the witness had commenced to answer the question, refused to permit defendant to testify further along that line. This is now assigned as error, appellant claiming that had he been permitted to testify as to what he had done with all of his funds it would have had a bearing upon the question as to whether he had an intention to defraud Kingsley at the time when he received the latter's check for $250. We fail to perceive how the testimony could have been material or relevant to the issue of fraudulent intent. Moreover, the court expressly announced from the bench, during the ensuing colloquy, that appellant would be permitted to testify as to what resources he had for carrying out his contract with Kingsley, and also that he might give the reason why he did not "go ahead" with that contract. Accordingly, defendant testified that the reason why he did not proceed with his contract was that certain moneys which his business associate expected to have available for the purpose were not forthcoming. Having been allowed thus to state what he claimed was his sole reason for failing to perform his promissory representations to Kingsley, we are utterly unable to perceive how he could possibly have been injured by the ruling of which he now complains.

[7] When the prosecution was putting in

its evidence in chief, the prosecuting witness, without any objection from the defense, testified that when defendant was negotiating for the contract of October 3, 1923, the latter represented himself as the possessor of a broker's license, and that subsequently the witness discovered that defendant never had a license. Defendant, when testifying in his own behalf, admitted that he was not a licensed broker. He was then asked by his counsel why he did not have a license. To this question the court sustained an objection. We do not see how appellant could have been injured by this ruling. Assuming, for the purpose of the argument, the relevancy and materiality of Kingsley's testimony to the effect that appellant falsely represented himself as the possessor of a broker's license, nevertheless, the falsity of that representation, and the fact that appellant must have known it to be false, would in no wise be overcome by the fact that appellant may have had some excuse for not procuring a license. His reason for failing to secure a license, whatever that reason may have been, cannot affect the fact that, though he possessed no license, he knowingly and falsely represented himself to be a licensed broker.

[8] When the prosecution was putting in its case in chief, it was shown by the people's witnesses that there never was such an entity as the Great Western Builders, Inc., or, if there was, that defendant had no connection with it. Defendant, testifying in his own behalf, gave evidence to the effect that preliminary steps were taken by him as early as September of 1923 to incorporate a company to be known as the Great Western Builders, Inc., but that the incorporation was never completed. It seems to be conceded that on October 3, 1923, when appellant, in the name of the Great Western Builders, Inc., entered into the contract with Kingsley, there was no corporation of that name with which appellant had any connection whatever. Having testified that steps preliminary to the incorporation of such a company were taken by him in September, 1923, appellant was then asked by his counsel to state why the incorporation was never completed. The district attorney objected to the question upon the ground that it was incompetent, irrelevant, and immaterial. The court sustained the objection. Appellant now contends that the evidence sought to be elicited by the question was relevant and material to the issue of his alleged fraudulent intent. With this contention we cannot agree. Whatever appellant's purpose may have been respecting the ultimate incorporation of an artificial entity to be known as the Great Western Builders, Inc., the fact remains that there was no such corporation at the time when he pretended to be its authorized representative, empowered to make a contract for it and in its name, and that he knew that no such corporation existed. His representation was, not that such a corporate being had been conceived, but that it had been actually born into the world of reality.

[9] The defense called to the witness stand an acquaintance of the defendant, who testified that he had a conversation with Kingsley in the month of March or April of 1924. This was some five or six months subsequent to the execution of the contract with Kingsley, or two or three months after the expiration of the 90 days within which the contract was to be performed, and was subsequent to the time when the crime of larceny must have been fully consummated by appellant—if crime there was. The witness was asked to state his conversation with Kingsley. The question was objected to by the district attorney, and the objection was sustained. In this we find no error. No foundation had been laid for the impeachment of Kingsley, and save for some such purpose as that of impeachment, nothing which may have been said by Kingsley after the consummation of the crime could by any possibility be competent evidence for the defense.

A character witness having been called by the defense and having testified that he had known defendant for about two years, the following ensued:

"Q. [By Mr. Shutt, defendant's counsel]: I will ask you if you know what the general reputation of the defendant is for truth, honesty, and integrity in the community in which he resides, and in his business relations? A. I don't know about the community in which he resides.

"Q. But in his business relations? A. In his business relations, they are good as far as I know.

"Mr. Jordan [the deputy district attorney]: I object to any *further* questions of him as a character witness. [Italics ours.]

"The Court: Objection sustained.

"Mr. Shutt: I believe we are entitled to go into that, to show what his reputation is in the business world.

"The Court: The only reputation you can show is the reputation in the community in which he resides."

[10, 11] The court did not err in refusing to permit the witness to testify further as to defendant's reputation. The trait involved in the offense charged against defendant is such that it was proper for him to show, if he could, that he bore a good reputation for honesty and integrity in the community in which he lived. And since the prosecution claimed that the alleged larceny was committed in the course of appellant's business dealings, it doubtless would have been proper to ask the witness to tell, if he could, what appellant's general reputation was in the community in which he lived for honesty and integrity in his business relations. But the question was not so framed. The witness, though disclaiming any knowledge of defendant's general reputation for

truth, honesty, and integrity in the community in which he resided, was permitted, nevertheless, to testify that, so far as he knew, defendant's reputation in his business relations was good. What more could appellant ask? While it is permissible for an accused, when a particular trait of character is in issue, to show his general reputation with regard to such trait, in the community or communities in which he has lived, it is not permissible for him to show what his reputation for such trait is among the members of a particular class of people. 16 C. J. pp. 582, 583. In State v. Brady, 71 N. J. Law, 360, 59 A. 6—a case in which the defendant was charged with the carnal abuse of a young girl—it was held that a question which called for the defendant's reputation "among his fellow workmen" as to his chastity and morality was too narrow, the court saying:

"The defendant was entitled to give evidence as to his reputation in the community in which he lived for chastity and morality, but not his reputation among a selected number from such community."

"When the character of one is in issue, it can be shown only by evidence of his general reputation as disclosed by the common speech of his neighbors and members of the community." Commonwealth v. Porter, 237 Mass. 1, 129 N. E. 298.

"In all cases where a defendant is allowed to prove his character for peace and quiet, it must be done by proving general reputation in the community or communities where he has lived." People v. Murphy, 146 Cal. 506, 80 P. 709.

[12] Finally, it is claimed that the court erred in refusing to give the following instruction requested by defendant:

"You are instructed that if defendant had no felonious intent to steal the property at the time he took it, the jury must acquit him, even if you believe he subsequently conceived the intent to appropriate it."

Considered as an abstract legal proposition, the requested instruction was a correct statement of the law. People v. Morino, 85 Cal. 515, 24 P. 892; 15 Cal. Jur. p. 908. And if we could see that appellant was injured by the court's refusal, we doubtless would be constrained to hold that there was ground for a reversal. But upon a consideration of the entire charge to the jury, we think it plain that the refusal to give this particular instruction could not have prejudiced appellant's rights. In giving its charge the court was at pains to instruct the jury that, to constitute larceny by trick, fraud, or artifice, the accused must have obtained possession of the property "with the felonious intention of stealing it *when he gets possession of it*." (Italics ours.) From the charge as a whole, the jury, in our opinion, could not possibly have failed to understand that it was their duty to acquit unless they believed, beyond a reasonable doubt, that defendant had a felonious intent to steal the property at the time when he took it, and that any subsequently conceived intention to appropriate it would not justify a conviction.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

72 Cal. App. 202

DYER BROS. GOLDEN WEST IRON WORKS et al. v. CENTRAL IRON WORKS et al. (Civ. 5080.)

(District Court of Appeal, First District, Division 2, California. April 7, 1925. Rehearing Denied May 7, 1925. Hearing Denied by Supreme Court June 3, 1925.)

1. Jury ⊜25(2)—Refusal to submit case, involving both legal and equitable issues, to jury not error.

Even if case involved both equitable and legal issues, refusal to submit it to jury was not error, in view of failure to request court to dispose of equitable issues and call jury to try issues at law

2. Damages ⊜78(2)—Use of word "penalty" by parties held not to preclude finding that amount to be paid was liquidated damages.

That witness referring to provision of contract used word "penalty," and that parties in drafting contract committed same irregularity, instead of "liquidated damages," *held* not to require finding that amount to be paid on breach was penalty, where contract as whole evidenced intent to prescribe liquidated damages.

3. Contracts ⊜272—Party to contract, breaking it subsequent to notice of withdrawal therefrom by other parties, held not entitled to recover on it.

Where manufacturers by contract agreed to common plan of dealing with demands of employees, and shortly thereafter defendants gave notice that they withdrew from contract and would not be bound thereby, and later plaintiffs, the other parties to contract, acting separately, abandoned the contract by adopting eight-hour work day, such abandonment amounted to rescission of contract precluding recovery of liquidated damages from defendants, and subsequent written agreement of plaintiffs terminating contract was an idle act.

4. Contracts ⊜274—Remedies on abandonment of contract stated.

Where contract for common plan of dealing with employees was abandoned by defendants, plaintiffs had option to treat it as rescinded and recover on quantum meruit as far as performance had extended, or could keep contract alive for benefit of all parties, being at all times ready and able to perform, or could treat repudiation as ending contract for all purposes of performance, and sue for profits which they would have realized had they not been prevented from performing.

5. Contracts ⊜274—After rescission or abandonment of contract by both parties, rights of either may not be enforced in action on contract, but may be enforced in action on common counts.

When both parties have rescinded or abandoned contract, rights of either may not be enforced in action on contract; no question of prevention of performance or excuse for nonperformance (Civ. Code, §§ 1511, 1512), being involved, but party maintaining action is confined to common counts, and application of this rule does not depend upon which party was first to depart from covenants of contract.

6. Contracts ⊜274—Purported rescission ending contract without reservation held to prevent maintenance of action on contract.

Under Civ. Code, § 1688, providing that rescission extinguishes contract, conceding that party, after his abandonment of contract, subsequent to withdrawal therefrom by other parties, could rescind purported document of rescission, which was outright termination of contract, without any reservation, terminated contract wholly, and action could not thereafter be maintained on it.

On Petition for Rehearing.

7. Contracts ⊜303(4)—Breach of contract, containing only mutual covenants, held not act preventing performance by other party.

Where contract did not contain single condition precedent, but contained mutual covenants, parties, refusing to be bound thereby, did not breach condition precedent to performance by other party thereto, and therefore did not commit act preventing performance by such party.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by the Dyer Bros. Golden West Iron Works and others against the Central Iron Works and others. Judgment for plaintiffs, and defendants appeal. Reversed.

See, also, 182 Cal. 588, 189 P. 445.

Brownstone & Goodman and Alexander O'Grady, all of San Francisco, for appellants.

William P. Hubbard, of San Francisco, for respondents.

STURTEVANT, J. This is an action brought by the plaintiffs to recover damages for an alleged breach of contract. It is the second appeal. The first appeal is reported. Dyer Bros. I. Wks. v. Central I. Wks., 182 Cal. 588, 189 P. 445. After the decision on the first appeal, the case was remanded to the trial court and, pursuant to the mandate

of the Supreme Court, the demurrer was overruled, the defendants answered, and a trial was had before the court sitting without a jury. A judgment was rendered in favor of the plaintiffs, and the defendants have appealed.

[1] The nature of the controversy is fully stated in the decision above mentioned, and we pass at once to a consideration of the points made by the appellants. The first point made by the appellants is that the trial court erred in denying the appellants a jury trial. In this behalf, the appellants argue that the case was an action at law. We think the point was decided adversely to the appellants by what was said by the Supreme Court in its decision on the first appeal. Conceding, without deciding, that the case presented certain equitable issues and certain issues at law, at no time did the appellants present the point in the lower court and ask that court to dispose of the equitable issues and call a jury to try the issues at law. The trial court did not commit an error in refusing to submit all issues to a jury.

[2] The appellants contend that the evidence introduced showed that the respondents were seeking to recover a penalty, and not liquidated damages. This point was ruled adversely to the appellants, in so far as the pleadings are conecrned on the first appeal. The evidence which was introduced followed the pleadings. True it is that some of the witnesses made use of the word "penalty," instead of the words liquidated damages. That irregularity was committed also by the parties in drafting the contract, and the fact was before the court on the first appeal. But, taking up the contract by its four corners, the Supreme Court reached the conclusion that the parties were attempting to draw a contract providing for liquidated damages in the event of a breach thereof, and not for a penalty. No evidence is called to our attention that causes us to entertain a different opinion on the evidence than the Supreme Court reached on a consideration of the facts as pleaded.

[3] The appellants also contend that the proof showed that the respondents suffered no actual damage of any kind. From the nature of the case, it was impracticable and extremely difficult for any one of the respondents to fix the amount of its actual damage, and to that extent the appellants' contention is sound, but that very fact was what caused the parties in the first place to attempt to frame the contract and to insert the provisions which are now in controversy. In other words, it is the contention of the respondents that, from the date their contract was made until the alleged breach by the appellants, each and all of the parties to the contract were on an even basis in being precluded by the labor organizations from getting any business. And it is the contention of the respondents that from the time that the appellants made the concessions to the labor organizations that the appellants were at once enabled to get business and completed it, whereas the respondents were not able to compete with the appellants on an even footing. In this contention we think the respondents are clearly correct.

In the next place, the appellants make two points which are but different ways of expressing their contention that they proved at the trial a complete defense, whether the action be said to sound in equity or otherwise. They say, "Respondents did not come into court with clean hands and were not entitled to relief in a court of equity," and they say also, "Respondents, themselves, failed to perform the contract and acted in respect thereto exactly as they have charged appellants with having acted." An understanding of these contentions requires a consideration of the sequence of certain events. June 16, 1916, the contract was executed, and by its terms it was to continue for three years from date. On August 8, 1916, two of the appellants, and on September 12, 1916, the third appellant, served notice on the respondents that they respectively withdrew from the contract and would not thereafter be bound by any of the terms of said contract. On February 1, 1917, the respondents abandoned the contract in the following manner: On that date each of the respondents, acting separately, changed its method of doing business by proceeding to operate its shop on an eight-hour day instead of a nine-hour day. That act by respondents constituted a rescission. Pearson v. Brown, 27 Cal. App. 125, 131, 148 P. 956. Thereafter respondents continued to transact their business until the 26th day of September, 1917, at which time they executed an instrument in writing purporting to terminate the agreement without any reservations whatever. Thereafter, on the 17th day of December, 1917, this action was commenced, which purports to be an action on the contract to recover the liquidated damages provided for in the contract. It is not contended that the writing dated September 26, 1917, was not properly signed and executed, but it is contended that the execution of said writing was an idle act, because theretofore on the 1st day of February, 1917, by their acts the respondents did, in violation of the terms of the contract, cease to act thereunder, and did as individuals, and not as an organization, change from a nine-hour day to an eight-hour day, and thus do and commit the very act that the contract was drawn to prevent. The respondents do not attempt to answer the point. Indeed, we do not see what answer could be made.

[4] When on September 12, 1916, the appellants abandoned the contract, the respondents had three remedies. They could treat the contract as rescinded and recover

upon a quantum meruit as far as they had performed; or they could keep the contract alive for the benefit of both parties, being at all times ready and able to perform; or, third, they could treat the repudiation as putting an end to the contract for all purposes of performance, and sue for the profits they would have realized, if the respondents had not been prevented from performing. McConnell v. Corona City Water Co., 149 Cal. 60, 65, 85 P. 929, 8 L. R. A. (N. S.) 1171. They did not take any one of those courses, but thereafter, on February 1, 1917, in violation of their own contract, and in violation of the rules adopted by the executive committee, they changed from a nine-hour day to an eight-hour day. That act on the part of the respondents was a breach of performance. It was of such a susbtantial nature as to be a breach on the very identical covenant which gave rise to the formation of the contract. From that day on the respondents could not in any proper sense be said to have performed their contract.

[5] If the respondents would assert that, the appellants having renounced the obligations of the contract, then and in that event the respondents thereafter owed no duty toward the appellants, that contention is sound only within certain limits. If thereafter they expected to make no claim on the appellants the contention would be sound. If, on the other hand, they intended, as they would here attempt to do, to hold the appellants responsible to them in an action for damages for the breach of the contract, then, and in that event, as stated in the McConnell Case, supra, they were bound to "keep the contract alive, for the benefit of both parties. * * *" The respondents were not entitled to breach the contract, rescind it, or abandon it, and to attempt thereafter to base an action on the contract as for a breach of damages. When both parties have rescinded or abandoned a contract the rights of either one thereafter may be enforced not in an action on the contract, but the party who would maintain the action is confined to an action on the common counts. McConnell v. Corona City Water Co., supra; Olson v. Lamb, 56 Neb. 104, 76 N. W. 433, 71 Am. St. Rep. 670, 677. The application of the rule does not depend upon which party was the first to depart from the covenants of the contract. Cleary v. Folger, 84 Cal. 316, 24 P. 280, 18 Am. St. Rep. 187; Drew v. Pedlar, 87 Cal. 443, 449, 450, 25 P. 749, 22 Am. St. Rep. 257; Phelps v. Brown, 95 Cal. 572, 574, 575, 30 P. 774; Easton v. Cressey, 100 Cal. 75, 34 P. 622; Bray v. Lowery, 163 Cal. 256, 261, 124 P. 1004. When the appellants departed from the covenants of the contract, the respondents were not called upon to likewise depart from the covenants of the contract. Nevertheless, as they did so they may not maintain an action on the contract. As said by the Supreme Court in House v. Piercy, 181 Cal. 247, at page 252, 183 P. 807, 809:

"But if the facts exist which justify a rescission by one party, and he exercises his right and declares a rescission in some effectual manner, he terminates the contract, and it cannot thereafter be made the basis of an action for damages caused by the breach of its covenants."

In other words, in the case before us, the terms of the contract are such that the contracting parties agreed one with the other that they would do and would not do certain things with reference to a third party, to wit, their employees. No question regarding excuse for nonperformance (Civ. Code, § 1511) is involved. No question of prevention of performance (Civ. Code, § 1512) is involved. But the very nature of the contract was such that the acts of each employer toward his employees became the consideration for the promise of each and every other employer. To present the case, the plaintiff pleaded outright performance. The trial court found the fact as alleged. Whereas, all of the proof was to the effect that the respondents failed in performance in the same manner as did the appellants, only to a less degree.

[6] If it be said that the contract contained a covenant authorizing the termination of the whole contract, the answer is that on February 1, 1917, the respondents did not attempt to proceed to terminate the contract in the manner stipulated in the contract. When thereafter, on September 26, 1917, they did attempt to terminate the contract in the manner provided therein, their act in that behalf was, as stated above, an idle act. They had breached the contract on February 1, 1917, and continuously thereafter, until September 26, 1917. Being themselves in default, they could not legally rescind. California Sugar, etc., Agency v. Penoyar, 167 Cal. 274, 139 P. 671. However, conceding for the moment that they could at that time rescind, still their position is no better. The purported document of rescission is set forth in the transcript, and it purports to be an outright termination of the contract without any reservations. If, therefore, it be treated as a rescission, it operated to exterminate the contract wholly (Civ. Code, § 1688), and, as the contract had been rescinded by both parties prior to the commencement of the action, neither party had any right to maintain any action founded thereon. 13 C. J. 623, § 683.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. [7] The petition for a rehearing is denied. The respondents admit that they abandoned the contract, and all of their allegations and proofs are to the

effect that the appellants abandoned the contract. The authorities, cited in our former opinion, sustain the proposition that under such circumstances no recovery can be had on the contract. The respondents, however, earnestly contend that their whole case rests on the theory that they were prevented from performing, but we do not see any "prevention" as that expression has been defined by the courts of this state. There is neither allegation, proof, nor finding that the respondents have "been prevented from going on with their contract by the positive affirmative act of" the appellants. Cox v. McLaughlin, 54 Cal. 605. The contract between the parties does not contain a single "condition precedent." It does contain mutual covenants. In doing what they did, the appellants did not "breach a condition precedent to the performance by the respondents." They did not therefore commit an act preventing the performance by the respondents. Alderson v. Houston, 154 Cal. 1, 96 P. 884. Neither in the former opinion, nor in this opinion, are we holding that the appellants can take advantage of their own wrongful breach. We are holding that the respondents, having themselves failed to perform from February 1, 1917, until September 26, 1917, may not recover on a cause of action based on the contract. Their rights, however, may be enforced in a different manner.

"We have seen that when parties make a contract, which is not apportionable, no part of the consideration can be recovered in an action on a contract, until the whole of that for which the consideration was to be paid is performed. But it must not be inferred from this that a party, who has performed a part of his side of a contract, and has failed to perform the residue, is in all cases without remedy. For though he can have no remedy on the contract as originally made, the circumstances may be such that the law will raise a new contract, and give him a remedy on a quantum meruit.

"Thus if one party is prevented from fully performing his contract by the fault of the other party, it is clear that the party thus in fault cannot be allowed to take advantage of his own wrong, and screen himself from payment for what has been done under the contract. The law therefore will imply a promise on his part to remunerate the other party for what he has done at his request; and upon this promise an action may be brought." 2 Parsons on Contracts, 522, 523.

"Where one party renounces the contract and refuses to perform, the other party is excused from performance on his side, this being a code provision in some jurisdictions. But it should be noted that the repudiation of the contract by one party cannot be held equivalent to performance, or a legal excuse for nonperformance by the other party of conditions precedent, so as to authorize a recovery as for performance of such conditions." 13 C. J. 653, 654.

"An allegation that the opposite party refuses to permit performance of conditions precedent is not equivalent to an allegation of performance (Myrick v. Merritt, 22 Fla. 335); and especially is this true where the complaining party, as in this case, does not allege his willingness and ability to perform at the time of such refusal, or at any time prior to the expiration of the period fixed for performance. It is true that an absolute repudiation of his part of a contract by one of the parties thereto prior to the time fixed by the contract for performance of the agreement of the other party, or while the contract is being performed by such other within the time limited, will entitle such other party to an action for damages, as for a breach of the contract (Myrick v. Merritt, 22 Fla. 335; Sullivan v. McMillan, 26 Fla. 543); but in this case the defendant does not allege or claim any damage to him arising from the complainant's alleged repudiation of the contract, and in no case can a repudiation of a contract by one party be held equivalent to performance, or a legal excuse for nonperformance by the other party of conditions precedent, so as to authorize recovery as for performance of such conditions precedent." Thompson v. Kyle, 39 Fla. 582, 598, 23 So. 12, 17, 63 Am. St. Rep. 193, 199.

"The general rule is that where one of the parties has endeavored in good faith to perform, and has substantially performed his contract, and thereby conferred on the other party a substantial benefit, although he has failed to perform in some particulars, he may recover, as the case may be, on the quantum meruit or the contract price, less the damage sustained by the other party by reason of the failure of strict performance. The right to this recovery does not always come from the original contract, but rests on another contract implied by the law. It is another statement of the principle to say that, where the default was not willful, but due to such causes as sickness, death, prevention of performance by the other party, or other causes not due to his fault, the law creates a promise to pay for the benefits received from part performance." 3 Elliott on Contracts, § 2101.

---

72 Cal. App. 354

MACEDO et al. v. GOODRICH et al.
(Civ. 4890.)

(District Court of Appeal, First District, Division 2. California. April 18, 1925.)

Appeal and error ⟸1011(1) — Where there was conflicting evidence as to alleged false representations, finding of trial court held conclusive.

Where, in action for damages for alleged false representations as to value of land received from defendants in trade for other property, evidence as to making of alleged representations was conflicting, finding of trial court that no false representations as to value of the land were made was conclusive.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by M. V. Macedo and another against V. D. Goodrich, doing business under the name and style of the San Joaquin

Valley Company, and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

O. H. Speciale, of San Jose, for appellants.

Fry & Jenkins, of San Jose, for respondents.

NOURSE, J. Plaintiffs sued to recover the sum of $5,400 as damages for the alleged false representations as to the value of land situated in Santa Clara county which they received from the defendants in trade for their property situated in Madera county. The cause was tried before the court, sitting without a jury, and judgment was entered in favor of the defendants, from which the plaintiffs appeal under section 953a, Code of Civil Procedure.

The cause of action is founded upon the allegations of the third amended complaint in which it is claimed that the respondent Goodrich falsely represented to the appellants that the seven-acre tract of land situated on the Story road in the county of Santa Clara, and which came to the appellants as a part of the trade, was of the value of $10,000, and that the house and lot situated in the city of San Jose, and also traded to the appellants, was of the value of $5,000. The trial court found that the respondent Goodrich did not represent these parcels to be of the value alleged in the third amended complaint, and also found that no false representations were made to the appellants as an inducement to make the trade.

On this appeal the appellants insist that the trial court committed error in finding that the representations as to the value of the two tracts of land in Santa Clara county were merely expressions of opinion and not statements of fact. In reply, the respondents point out that the trial court did not find as claimed by the appellants, but that it did expressly find that the alleged false representations were not made. It is then said by the respondents that, the evidence regarding these alleged representations being in conflict, the finding of the trial court is conclusive upon this appeal.

The respondents have correctly presented the only issue which is involved here. The cause of action was founded upon the alleged false representations as to value. The trial court found that these false representations were not made. The evidence on the part of the appellants is that the respondent Goodrich assured the appellants that he could get $10,000 for the Story road property and $4,500 for the San Jose house and lot. Another witness testified for the appellants that he heard Goodrich tell them that the property in San Jose was worth $4,500 or $5,000, and that he could get $10,000 for the property in the country. On the part of the respondents the evidence is that no representations were made as to the value of either parcel involved in the trade, but that Goodrich stated to the appellants that the house in San Jose would make good trading property at from $4,000 to $5,000; that it was rented for $35 a month, and would pay good interest on the investment. As to the ranch on the Story road, Goodrich testified that he told one of the appellants that, if he would fix it up, he could make it a $7,000 to $10,000 ranch. This testimony was in harmony with that given by the appellant M. V. Macedo to the effect that Goodrich stated to him, in reference to the Story road property, that, if he would "work it up good," he would guarantee to get the appellant $10,000 for the place. All the testimony covering the transactions indicates that the only representations made by the respondent Goodrich related to the value of the properties for trading purposes, and that the only testimony in support of the allegations of the third amended complaint, that false representations as to the values of these properties were made to the appellants, was expressly denied. There is therefore a conflict in the evidence covering the issue of false representations which the trial court resolved in favor of the respondents. As there is sufficient evidence to support the finding of the trial court on that issue, it is conclusive on this appeal.

Judgment affirmed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

---

72 Cal. App. 292

PEOPLE v. HAYES. (Cr. 1188.)

(District Court of Appeal, Second District, Division 2, California. April 15, 1925. As Modified May 12, 1925.)

1. Criminal law ⇐1178—Points in brief, which are not argued, will not be considered.

Points, which are stated in brief, but which are not argued, will not be considered.

2. Criminal law ⇐317—Evidence sufficient to show ownership of property in burglary, as against presumption from not calling witness.

In prosecution for burglary, where phonograph and radio set were taken from bungalow occupied by inmate of sanitarium, evidence *held* sufficient to prove ownership of property stolen in occupant, notwithstanding any presumption which might arise from failure to call alleged owner as witness.

3. Criminal law ⇐317—Failure of prosecution to call witness sufficiently excused.

In prosecution for burglary of bungalow occupied by inmate of sanitarium, testimony as to inmate's condition *held* sufficient to excuse failure of prosecution to produce him to prove ownership of property stolen, and defeat pre-

sumption which would otherwise arise that his testimony would be adverse.

4. Burglary ⊂⊃28(7)—Property need only have been in possession and control of person from whom it was taken.

In charge of burglary, where entry is shown with intent to commit larceny, possession and control of person from whom property is claimed to have been stolen must be shown, but not necessarily his ownership.

5. Burglary ⊂⊃41(1)—Evidence of possession and control of property sufficiently shown.

In prosecution for burglary, where phonograph and radio set were taken from bungalow occupied by inmate of sanitarium, evidence *held* sufficient to show that stolen articles were in possession and control of occupant, either directly, or through employees of sanitarium.

6. Burglary ⊂⊃41(1)—Evidence sufficient to negative claim that property was taken with permission.

In prosecution for burglary of bungalow occupied by inmate of sanitarium, where phonograph and radio set were taken by attendant of sanitarium, who it was claimed had permission of occupant of bungalow, evidence *held* sufficient for jury to find he had not permission.

7. Burglary ⊂⊃29—Guardianship of inmate of sanitarium not presumed, and not presumed that any other than officials control his property.

In absence of any showing that inmate of sanitarium, who was incompetent, has a guardian, court will not presume so, or that any one save officials of institution would be qualified to give permission for exercise of dominion over his property.

8. Criminal law ⊂⊃1159(2)—Inculpating testimony alone considered as to sufficiency of evidence to support conviction.

In determining sufficiency of evidence to support conviction, inculpating testimony alone will be considered.

9. Burglary ⊂⊃41(1)—Evidence sufficient to sustain conviction.

In prosecution for burglary in taking victrola and radio set from bungalow occupied by inmate of sanitarium, evidence *held* sufficient to sustain conviction.

10. Burglary ⊂⊃41(2)—Proof of corpus delicti sufficient.

In prosecution for burglary, in taking victrola and radio set from bungalow occupied by inmate of sanitarium, proof of corpus delicti *held* sufficient.

11. Criminal law ⊂⊃543(2)—Due diligence in attempting to secure absent witness not shown to warrant introduction of testimony on preliminary examination.

In prosecution for burglary, evidence *held* not to show sufficient diligence in procuring absent witness, who had been intermediary for sale of stolen property, so as to permit introduction of his testimony at preliminary examination, under Pen. Code, § 686.

12. Criminal law ⊂⊃543(2), 1153(6)—Due diligence in procuring absent witness is for discretion of trial court, whose ruling not disturbed save for abuse.

Determination by trial court as to whether due diligence has been shown in endeavoring to procure attendance of witness, as basis for accepting his testimony at preliminary examination, is primarily discretionary, and ruling will not be disturbed except for abuse.

13. Criminal law ⊂⊃543(2)—Some effort must be made to locate absent witness outside of county of trial in order to introduce testimony at preliminary hearing.

Where witness cannot be found in county of trial, to show due diligence in trying to procure him, so as to admit testimony given at preliminary examination under Pen. Code, § 686, some effort must be made to locate witness in state at large outside of county of trial, unless it would be clearly fruitless.

14. Criminal law ⊂⊃543(2)—Subpœnas for absent witness need not be sent to every county to fulfill requirements of statute allowing introduction of testimony on preliminary examination.

Where witness cannot be found in county of trial, subpœnas need not be sent to every county in state, in order to show due diligence permitting admission of testimony at preliminary examination, under Pen. Code, § 686.

15. Criminal law ⊂⊃1171(6)—Appellation of accused as three-time loser not prejudicial, where same remark had been previously unobjected to.

Cross-examination of accused's accomplice, showing that he had asked not to be put in same cell with accused, because latter was a three-time loser and liable to kill him, *held* not prejudicial, where, on cross-examination by accused's counsel, police officer had testified to same thing, and his testimony, though subject to motion to strike, was not objected to.

16. Criminal law ⊂⊃728(5)—Propriety of cross-examination not considered, where ruling of court not insisted on or instruction requested.

Whether cross-examination is improper will not be considered, where no ruling of court is insisted on regarding objection, or where no request is made that jury be instructed to disregard, so long as alleged misconduct is not so extreme that admonition would not remove prejudicial effect.

17. Criminal law ⊂⊃728(5)—Objections to final argument of prosecuting attorney not considered, in absence of request for admonition to jury.

Propriety of remarks of prosecuting attorney in final argument will not be considered, in absence of request for admonition to jury.

18. Criminal law ⊂⊃722(2)—Argument by prosecutor, referring to accused as a habitual criminal, whose soul was beyond redemption, misconduct.

Argument of prosecutor that accused was an habitual criminal, whose soul was beyond redemption, *held* overzealous and unfair to accused, so as to amount to misconduct.

19. Criminal law ⟸722(3)—Reference in instruction to particular propensities or passions of person whose act is in question held erroneous, in absence of evidence of such passion.

In prosecution for burglary, instruction to jury that inference must be founded on fact, and deduction therefrom as warranted by consideration of particular propensities or passions of person whose act is in question, *held* erroneous, because it was only act of appellant which was under investigation, and there was no evidence of possession by him of peculiar propensities or passions.

20. Criminal law ⟸1186(4)—Errors of court and misconduct of district attorney held not prejudicial, where evidence required conviction.

In view of Const. art. 6, § 4½, errors of trial court, in admitting evidence and giving instructions, and of misconduct of prosecuting attorney in final argument, *held* not to require reversal, where evidence was such as to have required jury to convict, irrespective of errors.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Roy A. Hayes was convicted of burglary, and he appeals. Affirmed.

Kirby, Holland & Kirby, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and John W. Maltman and H. H. Linney, Deputy Attys. Gen., for the People.

WORKS, J. The defendant, Hayes, together with one Moe, was charged with the crime of burglary. A trial of the two jointly was commenced, but during its progress Moe, who had previously made a written confession of his culpability, pleaded guilty. The trial then proceeded against Hayes alone, and he was convicted. He appeals from the judgment and from an order denying his motion for a new trial.

The charge against appellant was based upon the taking, from a bungalow, which was part of a private sanitarium for incompetent and weak-minded persons, of a phonograph and a radio set. The bungalow was occupied by one Whiting, an inmate of the sanitarium, and one of the questions argued in the briefs is whether the articles which were taken were his property. Moe, up to the time of the burglary, had been a nurse at the sanitarium, and it is settled beyond dispute that he effected an entrance into the bungalow, that he took therefrom the articles mentioned, that appellant awaited him outside the house and near at hand while he did so, and that the two together then carried the "stuff" to an automobile in front of the sanitarium grounds, in which they, accompanied by a young girl, had driven to the place. Other facts, bearing upon particular points made by appellant for a reversal will be stated as we proceed.

[1] Appellant sets forth 29 points in his brief, but no attempt is made to discuss the merits of many of them. These we shall not decide, as it is a rule, which should be well understood by the profession, that points which are stated in a brief, but which are not argued, are not to be considered.

[2-5] It is contended that the evidence was insufficient to support the verdict. A specific point made under this general specification is that the ownership of the phonograph and radio set was never proved by competent evidence. While there was much testimony that Moe told appellant, before they embarked on their alleged burglarious expedition, that the articles were his property, a circumstance which will later be the subject of treatment upon another point, Moe testified positively that he did not own them. Whiting, whose testimony upon the score of an ownership in him would have been the most satisfactory, granting for the moment that he was competent to testify, was not called to the witness stand. There was, however, other evidence introduced for the purpose of showing a title in that individual. The assistant supervisor of the sanitarium testified, without objection, that Whiting's bungalow was mostly furnished by the institution, but that "the individual" had belongings there, that Whiting owned a Victrola and radio set, and that the witness had seen the radio set in the bungalow nearly a year, and the phonograph several years. An employee of the sanitarium testified that he had been at work there for about 2½ or 3 years, that the phonograph was always in Whiting's bungalow, and that the radio was there 5 or 6 months. It is a part of appellant's contention that, as Whiting was not produced as a witness, it must be presumed, under a familiar rule of evidence, that his testimony, if he had been produced, would have been adverse to the prosecution. The assistant supervisor of the sanitarium testified that Whiting was wholly incompetent and unable to take care of himself. There was also evidence to the effect that he had been an inmate of the place for 5 or 6 years, that he was cared for by a nurse, a part of whose duty it was to superintend his undressing and his going to bed every night, and that the door of his bungalow was locked from the outside after he retired; the key being secreted on the porch of the house thereafter. This evidence furnished ample excuse for the failure to call Whiting as a witness. Even if it did not, however, and if it were proper for the jury to have indulged the presumption alluded to by appellant, nothing but a conflict of evidence would have arisen (Maguire v. Cunningham, 64 Cal. App. 536, 222 P. 838); the presumption being arrayed on one side of the conflict, and the testimony

above referred to on the other. The jury was, of course, clothed with the power to resolve the conflict in favor of the testimony and against the presumption, and the testimony furnished ample support for a finding that Whiting was the owner of the property. It is also to be observed, in passing, that, if it be necessary under a charge of burglary to prove anything concerning the title to the property stolen (see 4 Cal. Jur. tit. Burglary, § 19), in order to show an entry for the purpose of committing larceny, a point which we have not heretofore mentioned, and which is not discussed in the briefs, the charge is sufficiently proven in this regard, if it be shown that the property was in the possession and under the control of the person from whom it is claimed to have been taken. 9 C. J. 1062. The evidence here showed that the stolen articles were in the possession and under the control of Whiting, either directly or through the employees of the sanitarium.

[6, 7] It is insisted that the evidence was insufficient to support the verdict, for the reason that there was no testimony to the effect that Whiting had not given Moe and appellant permission to take the phonograph and radio set. If it be assumed that such proof was necessary, we are satisfied that the point is sufficiently met by testimony in the record. The assistant supervisor of the sanitarium testified that Whiting was under his care and supervision, and that Moe worked under his direction. He further testified that he never gave the latter permission to take from the bungalow the articles which were stolen. Here it is to be observed that there is no evidence that appellant ever entered the bungalow An attendant at the sanitarium, whose duty it was to care for Whiting in the absence of his regular nurse, testified that he gave neither Moe nor appellant leave to enter the bungalow or to take from it the property which was stolen. Whiting's nurse testified to the same effect. There is nothing in the record to show that Whiting had a guardian, either of his person or of his property, appointed under the law, and it cannot be presumed in aid of the appeal that he had one. The witnesses above mentioned appear from the record to have been the only persons who had any direction of Whiting's affairs or who exercised any control over his property. Granting, for the sake of argument, again, that it was necessary for the prosecution to prove the negative that no permission had been given Moe or appellant to remove the phonograph and radio set from the bungalow (but see People v. Moronati [Cal. App.] 232 P. 991), we think that the fact was established prima facie by the testimony of the witnesses mentioned. The record is such that the jury was justified in concluding that there was no other person qualified to give the permission in question. Certainly there is evidence from which the jury might have inferred that Whiting himself was not qualified to give it. The point presented is without merit.

[8, 9] The point is also made in a more general sense that the evidence was insufficient to uphold the conviction of appellant. We here recite the showing made against him by the record, leaving for a later time a statement of some slight features of the evidence which operated in his favor, as we are interested in the inculpating testimony alone in considering the question now presented. The alleged crime was committed in the evening. The girl who accompanied Moe and appellant to the sanitarium, and who was apparently free from guilty knowledge concerning their acts, testified that two trips were made to the place; that on the first occasion the three arrived there at about 8 o'clock; that the two defendants then went into the place and shortly came out, whereupon the three drove away; that they returned 20 minutes or half an hour later; that Moe went into the place first, and that appellant followed him; that after 5 minutes they came back with the phonograph and radio set, appellant carrying a part of the two outfits and Moe the remainder; and that the articles were then taken to appellant's apartment. Viewing the evidence in the order in which it was produced at the trial, the next witness was one MacClark, who testified that the day following the alleged burglary he purchased the stolen property from one Guin, giving him $20 for it. Moe testified that appellant accompanied him when he went to the bungalow to get the property which was taken, and remained outside the house while Moe went inside; that the articles were then taken in the automobile to an apartment which he and appellant rented together; that he (Moe) went with Guin to MacClark's place when the stolen property was sold to the latter; that after the sale they returned to the apartment, where appellant was waiting, and Guin handed the proceeds of the sale to appellant, who complained of the smallness of the amount obtained, and then handed the money to Moe; that he (Moe) then gave a "few dollars" of the twenty to Guin and a "few dollars" to appellant; and that he and appellant together arranged with Guin to sell the property. As already observed, Moe made written confession of his guilt. After appellant was arrested, he was made acquainted with this fact, and was asked by officers if he desired to make a statement. He said, Moe being present:

"No, there is no use. That bastard has already told you everything. There is no use for me to make a statement."

Appellant made use of other expressions to the officers, which the jury was justified in interpreting, in connection with other evidence in the case, as opposed to his plea of

not guilty. One of the officers testified to the following conversation with him:

"I asked him where he got that Victrola box. He said he didn't know. He said he didn't know anything about it. He said he didn't know where it came from. I asked him if he did not bring it up to the room, and he said, 'No.' I asked him if he knew who did. He said, 'No,' he didn't; he hadn't the least idea in the world where it came from."

Again, from the same officer:

"Q. Did you ask him whether or not he went out there with Moe and took this stuff? A. Yes. Q. What did he say? A. He said he did not. He said he had not been out there; knew nothing of the place. Q. Did you ask him whether or not he had ever been out with Moe? A. He said he had not."

With this array of evidence, added to the facts which are above stated, it is futile to assert that the record is insufficient to support the conviction of appellant.

[10] The contention is made that there was no proof of the corpus delicti. This point requires no lengthy discussion. The facts already stated, independently of the admissions of appellant, will demonstrate that the contention is not well founded. We are satisfied, also, that the corpus delicti was sufficiently proved before evidence was received of the admissions of appellant. "It is sufficient," as a basis for the offer of a defendant's confession or admissions, "if there is some proof, or prima facie proof, or even slight proof of the corpus delicti." 8 Cal. Jur. tit. Crim. Law, § 303. Without segregating here the evidence which was received before the testimony concerning appellant's admissions went to the jury, we are satisfied that the proof came well within the rule stated.

[11] Guin, the individual who acted as an intermediary in the sale of the stolen property to MacClark, did not appear as a witness at the trial, but his testimony, taken at the preliminary examination, was read to the jury over appellant's objection. It is insisted that no sufficient foundation was laid for the introduction of the evidence in this form, in that there was no showing of due diligence in an endeavor to procure the personal attendance of the witness. Such foundation as there was is confined to the testimony of two witnesses. The first of these was an investigator, a deputy sheriff, who was connected with the district attorney's office. It appearing that at the preliminary examination Guin had given his address as a certain number on West Third street in Los Angeles, the investigator testified that he had called at that address, that the proprietor of the place, a hotel, told him that Guin no longer resided there, and that on departing he had left no forwarding address, and that the proprietor said he did not know where Guin was. Guin testified at the preliminary examination that he "used to live" at Pasadena with his mother. Taking this statement as a guide in his search, the investigator said he visted Pasadena and the adjacent town of Altadena. He testified that he saw all persons named Guin in the two places, there being one of that name in each, but found that neither of them was related to the absent witness. The record discloses that at the time of the sale of the phonograph and radio set to MacClark the missing witness was employed by the Shopping News, evidently a newspaper, in Los Angeles. The witness MacClark was then also an employee in in the same establishment. The investigator testified that he sought Guin at the office of the paper, that he was no longer employed there, that he had left no forwarding address at the place, and that no information could be obtained there as to where he had gone when his employment terminated. He further testified that he visited the postal inspector at the post office at Los Angeles, and was informed by that official that there was in the office no change of Guin's address from the number on West Third street, that he had searched the city directory of Los Angeles, and that Guin's name was not contained in it. He testified to the same effect concerning the directories of Pasadena and Altadena. On cross-examination, the investigator testified that he had begun his investigation on the 1st or 2d day of the month of the trial, the trial having been commenced on the 8th, and the taking of the evidence having been concluded on the same day; that he had never actually visited Pasadena on his quest until the morning of the trial, having theretofore used the telephone "on some occasions" to obtain information from there; that he made no investigation as to whether Guin was deceased; that he visited the county hospital at Los Angeles, the witness MacClark having told him that Guin had been the victim of a heart attack and had been taken to that place, but that he did not find the absent witness there, nor any record of his having been there; and that he did not visit "the jails" or any other hospital.

The testimony of Guin at the preliminary examination was then offered by the district attorney, but, upon objection being made to the offer, the court called MacClark to the witness stand. He testified that the last time he saw Guin he was taken sick; that Guin said it was a heart attack, but that he (MacClark) thought he had been drinking; that the seizure occurred at the office of the Shopping News; that Guin was sent home in a taxicab; and that "his people were sent for, and he stayed home 3 or 4 days from work." This question was then put to the witness: "Then what happened?" The answer was that Guin came back to work the next day, but "they told him his job wasn't there any more," that he was "let off." MacClark next testified that Guin "went from

there down to the L. A. Engraving Company and worked there a week, and he suddenly disappeared from there;" that he (MacClark) wanted to get in connection with Guin and called up the L. A. Engraving Company; that the manager of that concern then told him that Guin "laid off from work, and the last they heard of him he was taken sick and was in the county hospital with a heart attack, and if they wanted him to come to work, he left them some telephone number;" that he (MacClark) did not "know the number that he had left;" that his talk over the telephone with the manager of the engraving company was "the latter part of last month, * * * later than a week ago;" that Guin "left a telephone number and said he had been in the county hospital with a heart attack, and if they needed him to employ him again, he left an address, wherever it was;" that "they" did not say it was a telephone number in Los Angeles; that "I don't know the number at all;" and that "they didn't give me the number."

At this juncture the trial judge remarked:

"I think you will have to have the engraving company here. * * * Let the investigator telephone and find out what he can from the L. A. Engraving Company. * * * We will take a recess * * * for 5 minutes."

After the recess, the trial was resumed, but the investigator was not called. MacClark again took the stand and testified, upon questions by the district attorney:

That he had been down to the Los Angeles Engraving Company the day before the trial; that he then saw the manager of the concern; that he asked him if he had any information as to where Guin could be located, and he said at the number of West Third street.

"I asked him if he had any other address, and he said, 'No,' just the one he just gave me. Q. Did he say anything about the county hospital? A. No, sir. Q. Did he say anything about a phone number? A. No, sir."

Upon questions by counsel for the defense MacClark then testified:

"Q. He did not give you the phone number? A. No, sir. Q. Did he tell you when he was last at * * * West Third street? A. He did not. * * * Q. Did he tell you when he had left his employment there? A. No, sir. Q. Did you ask him? A. No, sir."

Thus was left the evidence upon the question of due diligence, and, after a repetition of objection, the testimony of Guin at the preliminary examination was read to the jury.

The admission in evidence, in criminal trials in the superior court, of the testimony of witnesses given at preliminary examinations, is governed by the provisions of section 686 of the Penal Code. The enactment reads, in part:

"In a criminal action the defendant is entitled: * * * To * * * be confronted with the witnesses against him, in the presence of the court, except that where the charge has been preliminarily examined before a committing magistrate and the testimony taken down by question and answer in the presence of the defendant, who has, either in person or by counsel, cross-examined or had an opportunity to cross-examine the witness; * * * the deposition of such witness may be read, upon its being satisfactorily shown to the court that he is dead or insane, or cannot with due diligence be found within the state. * * *"

The question as to what amounts to "due diligence," as that term is used in the quoted enactment, has been before the courts with great frequency. In the following cases, under the particular facts appearing in each, it was determined that due diligence was shown: People v. Reilly, 106 Cal. 648, 40 P. 13; People v. Witty, 138 Cal. 576, 72 P. 177; People v. Lewandowski, 143 Cal. 574, 77 P. 467; People v Grill, 151 Cal. 592, 91 P. 515; People v. Leavens, 12 Cal. App. 178, 106 P. 1103; People v. Edwards, 14 Cal. App. 128, 111 P. 263; People v. Boyd, 16 Cal. App. 130, 116 P. 323; People v. Lederer, 17 Cal. App. 369, 119 P. 949; People v. Kelly, 17 Cal. App. 447, 120 P 46; People v. Louie Dene, 20 Cal. App. 137, 128 P. 339; People v. Mueller, 168 Cal. 526, 143 P. 750; People v. Trent, 25 Cal. App. 740, 145 P. 541; People v. Poo On, 49 Cal. App. 219, 192 P. 1090; People v. Ramos, 52 Cal. App. 491, 199 P. 544; People v. Brown, 61 Cal. App. 748, 216 P. 58; People v. Frank, 193 Cal. 474, 225 P. 448.

[12] There is at least one case in which, under the facts there appearing, it was held that the requirement as to due diligence was not satisfied. People v Ballard, 1 Cal. App. 222, 81 P. 1040. It is well settled that the question as to whether due diligence has been shown in an endeavor to procure the personal attendance of a witness, as a basis for the reception in evidence of his testimony, given at the preliminary examination, is one primarily to be determined by the trial court, in the exercise of a sound discretion, and that a ruling upon the question will not be disturbed on appeal, unless it appears that such ruling is the result of an abuse of the discretion reposed in the tribunal. People v. Mueller, supra; People v. Brown, supra. While each of the cases in the long list cited above was necessarily different in its facts from all the others, the collection nevertheless furnishes some guide to a determination of the question now before us. Following that guide and, moreover, reasoning from general principles which must govern in such cases, we are satisfied that there was an abuse of the trial court's discretion in permitting Guin's "deposition" to be read to the jury. As a prelude to a more specific examination of the subject, it is to be observed that the right of the defendant in a criminal case to be confronted with the witnesses against him, while not guaranteed in this

state by the Constitution, as it is in some of the Constitutions of the sister commonwealths, but secured only by statutory provision, is one of great value.

"The right thus given to a defendant by the statute is deemed a most substantial one." People v. Plyler, 126 Cal. 379, 58 P. 904.

"That the right of a defendant to be confronted in person by the witnesses against him is a most important one, and that the trial court should be fully satisfied by the evidence that the absent witness cannot with due diligence be found in the state before allowing the deposition of such witness taken on the preliminary examination to be read, may be freely conceded." People v. Lewandowski, supra.

What are the circumstances present in the instant case which show an abuse of discretion by the trial court? It was said as to the missing witness in question in People v. Reilly, supra:

"That diligent efforts to find him had been made in all those portions of the city where he had been accustomed to wander, and where he would be likely to be found, but that all such efforts had been unsuccessful."

[13, 14] No such search was made for Guin. He was a photo engraver by trade. No endeavor was made to locate him at any of the places of business in Los Angeles at which such a craftsman might hope to find employment, except the two at which it was known that he had been employed, nor was such a search made in cities of considerable size which are within easy reach of Los Angeles, notably Long Beach, Santa Monica, Glendale, and Pasadena. No investigation of such a character was made in any of the other cities of Southern California, nor, in fact, in any of the other cities of the state. The statute provides that the testimony of a witness at a preliminary examination may not be used at his trial in the superior court unless he "cannot with due diligence be found within the state." This language necessarily means that some effort must be made to locate the witness in the state at large, unless there is evidence from which the court may properly conclude that such a search would be unavailing. In one case (People v. Witty, supra), subpœnas were sent to the sheriff of every county in the state in an endeavor to secure the attendance of the absent witness, and 46 of the officers made return that after due diligence he could not be found in their respective counties. No attempt of any character was made to locate Guin anywhere outside of Los Angeles county. We have not overlooked the fact that it was said, in People v. Boyd, supra, that it is not necessary, in order to disclose due diligence, to show that a subpœna for a missing witness has been sent to every county in the state. In that case, however, there was ample evidence justifying a finding that the witness there in question was in hiding in a particular county for the purpose of avoiding the service of process. That evidence supported the action of the trial court in allowing the use of the deposition of the witness. Pursuing further the remark in People v. Boyd, we do not mean to say that it can be laid down as a hard and fast rule that subpœnas need be sent to any county in the state from a county in which the attendance of a witness is desired, before his deposition may be received in evidence. We do say, however, that where, as here, there is no evidence tending to show that the witness has left the state, there must be some endeavor to ascertain whether he is in the state at large. The extent of that endeavor will be measured by the necessities of each particular case.

We need not further continue this subject from the standpoint of the language of the courts of the state in the decided cases, practically all of which we have cited; nor need we point out other weaknesses, except one, in the showing made. We close with a reference to one circumstance appearing upon the present appeal—a circumstance which alone shows a lack of due diligence in the quest for Guin. The testimony of MacClark is plainly to the effect that Guin gave to the Los Angeles Engraving Company a telephone number through the use of which he might be located. This number may have been that of the telephone at his Third street address. On the other hand, it may not have been. No attempt was made to ascertain whether it was or whether it was not. This avenue, if followed, might have led to a discovery of the witness, and there was a lack of diligence in not following it. The court erred in allowing the deposition of Guin to go to the jury. Whether this error was harmful will be considered later.

[15, 16] It is complained that the district attorney was guilty of misconduct during the trial. This contention is made upon several grounds. When Moe was on the witness stand, the prosecuting officer, for the purpose of showing that the witness was testifying in behalf of appellant through fear, asked him, "Before you ever made any statement to the police officers, didn't you ask them not to put you in a cell with Red [Hayes]; that he was liable to beat you up; that he was a three-time loser?" Counsel for appellant, evidently assuming that the expression "three-time loser" meant that appellant had been thrice convicted of crime—an assumption which is made throughout the briefs on this appeal—objected to the question on the ground that counsel "well knows he cannot test the record of this man unless he has been on the stand," and moved that it be stricken. On this objection and motion, the trial court ruled adversely to appellant, and the question was answered in the affirmative. If we concede for the moment that in asking the question the district attorney was guilty

of misconduct, and if we grant further that the objection and motion of appellant was sufficient to present the charge of misconduct to the trial court, we hasten to observe that the action of the district attorney was harmless. Earlier in the trial, when one of the police officers was under cross-examination, appellant's counsel asked the witness: "Did you, in these conversations with Mr. Moe, make the statement * * * that Hayes was a bad egg, and that you were going to get him?" To this question the officer answered: "Mr. Moe made a statement to us that Mr. Hayes was a three-time loser, and not to lock him up with him; that he might kill him; that he was a bad egg." The answer was not responsive and should have been stricken on motion, but no such motion was forthcoming, nor was the court asked to instruct the jury to disregard the answer. As the expression "three-time loser" was thus fastened upon the minds of the jurors through the act or omission of appellant's counsel early in the trial, the action of the district attorney in later employing it could have worked no damage to appellant's rights. For the same reason his putting the question was not misconduct. The following appears in the record during the cross-examination of Moe by the district attorney:

"Q. * * * Did Hayes ever say anything to you about going out and stealing tires for a living? A. No, sir. * * * Q. That you go out and steal tires and make about $10 a night?

"Mr. Holland: I object to that as not proper cross-examination.

"Q. * * * I am asking you if Hayes ever said that to you?

"Mr. Holland: I do not see how that is an issue in this case."

No ruling was made by the court upon the objection of counsel, and no response was made by the judge to his last remark. It is now contended that the district attorney's action in asking the questions set forth was misconduct, but appellant is in no position to present that question here. In order that the claim of misconduct may be considered on appeal, it is necessary that the point shall have been made in the trial court, together with a request that the trial judge admonish the jury to disregard the fault, unless the alleged misconduct is of such an extreme character that an admonition will not remove its prejudicial effect. 8 Cal. Jur. tit. Crim. Law, §§ 321, 521. Here the objections were not such as to inform the court that misconduct was claimed, and there was no request for an admonitory statement to the jury. If such a request had been made, the effect of the misconduct, if any there was, could have been removed by an admonition. The point is therefore not well taken.

[17] The following record was made during the final argument of the district attorney to the jury:

"Mr. Jordan: * * * I think it has been fully demonstrated to you that the burglary was committed out there, and the ringleader, and the man who stands back of it, a three-time loser, that puts the other boy—

"Mr. Holland: I object to that as improper. There is no evidence in this record to show that this man is at any time a loser.

"Mr. Jordan: There is evidence here—

"The Court: Yes; there is. * * *

"Mr. Jordan: And that Moe, perhaps knowing nothing about this business, falls in and commits this burglary. * * * Then after they get down to the apartment, who is the one most interested in getting the money out of this stuff? Moe is scared to death, from the time he is arrested, of this defendant, asked the police officers to put him in another cell, that Red would kill him.

"Mr. Holland: * * * I object to that statement as not being in the record.

"Mr. Jordan: It is in the record.

"The Court: Proceed with your discussion of the evidence.

"Mr. Jordan: * * * I want to say to you, ladies and gentlemen, that on two occasions on this witness stand, on direct examination and on cross-examination [two police officers] testified that Moe said Hayes was a three-time loser, not to lock him up in the same cell with him, or he would kill him; and that is why Mr. Moe is taking all the blame. And Hayes himself says: 'I have been in trouble before. I cannot afford to talk.' [Substantially this statement was attributed to appellant by one of the officers.] And when Hayes is told that Mr. Moe has made a confession, * * * and asked if he wants to make a statement, and he says: 'No; the bastard has told you all about it. Why should I talk?' And doesn't that show that there is malice, that there is death in the defendant's heart? He doesn't talk; but the new man, the apprentice, talks, confesses. Mr. Holland refers [in his argument, evidently] to Jesus Christ on Calvary. Christ is still here and willing to redeem this defendant's soul. After the first time there was no redemption; after the second time there was no redemption; after the third time he is beyond redemption. And now, ladies and gentlemen, you are looking upon a habitual criminal that none of us can redeem from the world of crime. * * *

"Mr. Holland: * * * I wish to object to that portion of the argument of counsel for the people in reference to the fact that this man is a three-time loser; prejudicial and improper.

"The Court: The jury will remember what the testimony is, and be guided entirely by the testimony."

[18] It is to be observed that the only objection made my appellant's counsel during the district attorney's address to the jury was that it was improper for the speaker to refer to appellant as a three-time loser, except for an unfounded objection that certain matter was not in the record. There was nothing improper, under the circumstances to which we have already adverted, in the district attorney's mere reference to appellant as a three-time loser. Further, if it were improper, the harm done by it easily could

have been erased by admonition to the jury, but no admonition was asked for. This objection may therefore be summarily dismissed from consideration. Departing, however, from the limited scope of his assault at the trial upon the remarks of the prosecuting officer, but omitting objections which he might have made, either in the trial court, or here, appellant now contends that the prosecutor was guilty of misconduct in that part of his remarks following his reference to the Master—in his language characterizing appellant as a habitual criminal whose soul was beyond redemption. We think that in the designated portion of his address the prosecutor was guilty of misconduct. He there allowed his zeal to overcome his judgment, and he there took an attitude which was unfair to appellant. No objection having been made to this misconduct at the trial, and the judge not having been requested to admonish the jury to disregard it, we shall not decide that such objection and request was necessary, but shall assume, without deciding, that no admonition could have eradicated the harm done. We make this assumption solely for the reason, as we shall later point out, that the record against appellant is such that the jury could not well have avoided convicting him, even with that record unpurged of its showing as to the prosecutor's misconduct.

It is contended that the trial court erred in instructing the jury that a witness may be impeached by proof that he has been convicted of a felony. It is said that there was at the trial no witness to whom the instruction could properly apply. We have already observed that Moe, against whom the trial was commenced as a codefendant with appellant, pleaded guilty during the progress of the hearing. It was after the entry of the plea that he became a witness. Did his plea of guilty amount to proof that he had been convicted of a felony? If it did, was the instruction so framed as to apply to him, there being no instruction that a plea of guilty amounts to proof of conviction? These questions we shall not pause to decide. For reasons hereafter to be stated, it is our opinion that no reversal of the judgment against appellant should follow, even if it were conceded that the questioned instruction was erroneous.

[19] The jury was instructed:

"An inference must be founded on a fact legally proved, and on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature."

It is claimed that this instruction was erroneous in its reference to "the particular propensities and passions of the person whose act is in question." We think the portion of the instruction which is assailed was erroneous, for the reason that it was only the act of appellant which was under investigation on the trial. There was no evidence of the possession by him of peculiar propensities or passions. We shall deal later with the question whether the error in giving the instruction was prejudicial to the substantial rights of appellant under the Constitution.

[20] We have made a careful examination of the entire cause now before us, including the evidence, and, having in mind the provisions of section 4½ of article 6 of the Constitution, we must determine whether the errors of the trial court and the misconduct of the district attorney have resulted in a miscarriage of justice. We first, however, state the nature of the evidence erroneously received in the form of the deposition of Guin, as the bearing of the error in admitting the deposition upon the merits of the cause will not otherwise be understood. Guin's testimony at the preliminary examination was principally corroborative of the testimony of MacClark and Moe, although the latter was sworn as a witness for the defense, but it also covered certain other matters. The deposition was to the effect, in addition to the matters of corroboration just mentioned, that appellant told Guin, upon showing him the stolen articles, that he had gotten them from some person in lieu of a debt due him from that person; that appellant alone arranged with him to sell the "stuff"; and that, when he left appellant and Moe, after delivering the proceeds of the sale to the former, the money was still in his possession.

Disregarding the contents of Guin's deposition, the undisputed evidence in the case was that appellant and Moe together removed the stolen property from the sanitarium grounds; that they then took the articles to an apartment occupied by appellant, although Moe testified that he had paid a part of the rent upon it; that appellant at least aided in procuring Guin to sell the articles; that he kept or was given at least a part of the proceeds of the sale; that when told Moe had confessed he said that the bastard had told the officers everything, and that there was no use in his making a statement; and that he denied all knowledge of the manner in which the stolen property came into his apartment, and denied that he had ever been with Moe to the sanitarium, although he later admitted the last-stated fact. The sole defense interposed by appellant was that Moe had told him, not alone that the phonograph and radio set were his property, but that he had left his personal belongings at the sanitarium, and that he desired appellant to go with him to procure them. We shall state all the evidence bearing upon this defense, and shall then make

an estimate of the effect which it, both inherently and as opposed to the inculpatory evidence, must have had upon the jury. The girl who went to the sanitarium with Moe and appellant testified:

"Mr. Moe asked Mr. Hayes to go out there with him to get some of the things. He said he quit his job, and he wanted to take them away; but Mr. Hayes said he could not go because he promised to take me to the skating rink. But Moe kept on asking him, and finally he said if I wanted to go out there with him they would go out and get his things."

It was also shown that at the police station the girl had made a statement to the effect that Moe said "he had a phonograph and some other things he wanted to get, so he went over there in an automobile." An aunt of the girl testified:

"Mr. Moe asked Mr. Hayes if he could go out with him and help him bring in his things. * * * He said he had his trunks and things out there that he wanted to bring in."

Moe testified:

"I went over to Mr. Hayes' apartment, and asked Mr. Hayes if he would come over and get my radio and phonograph. I said, 'I am working out here in a sanitarium, and I am quitting my job in a few days.' * * * I just told him, 'I have got a radio and Victrola out here, and I want you to come out and get it for me, and put it in your apartment.'"

On Moe's cross-examination, this is a part of the record:

"Q. Didn't you say something about going over and getting a trunk, too, along with this radio and Victrola? A. Well, my clothes. Q. You didn't get your clothes that night, did you? A. No, Sir."

In our view, the defense made by appellant must have appeared to the jury to be a mere sham. Observe how the two malefactors went about the business of getting Moe's "things"—his trunks, his clothes, his personal belongings. They, in company with the girl, went to the sanitarium twice. On the first visit the two men entered the grounds, and in a few minutes returned to the automobile empty-handed. No explanation is made as to the purpose of this preliminary invasion of the premises. What possible reason was there for it, if appellant had been hoodwinked into the belief that he was merely aiding Moe to get his property? The jury must have believed that it was a mere reconnoitering expedition, that, whatever may have been said in the presence of the women as a "blind," the purpose of the original entry of the premises was to ascertain if the coast was clear, and that appellant knew that to be the purpose. The party returns to the place after 20 minutes or half an hour, and the two culprits again enter. They then emerge, not with the personal impedimenta which in the main was to have been taken from the institution by the man who was giving up his job, but with a phonograph and radio set only. Nothing more is ever heard of Moe's general personal belongings. It is useless further to discuss what must have appeared to the jury as a simulated defense, cooked up in an endeavor to forestall the conviction of appellant, except to say that, when the circumstances attendant upon the defense were added to the evidence against appellant, which is recited above, the jury must have seen confirmation of appellant's guilt strong as proof of holy writ. The errors of the trial court and the misconduct of the district attorney did not result in a miscarriage of justice. In our view, under an endeavor to put ourselves in the place of the jury, in so far as we may do so from the typewritten record, a miscarriage of justice would have resulted had appellant not been convicted, error or no error.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

72 Cal. App. 379

BURG v. HARRIS. (Civ. 5039.)

(District Court of Appeal, First District, Division 2, California. April 22, 1925. Petition for Modification of Decision and Judgment Denied May 20, 1925.)

1. Landlord and tenant ⊂⊃291(17) — Finding that tenancy did not cease on certain day alleged held not to negative allegations as to wrongful occupancy so as to support judgment for defendant.

In unlawful detainer, where plaintiff alleged termination of tenancy on a certain day, finding that tenancy did not cease on that day *held* not a finding that it had not terminated on some other date, so as to negative allegations of wrongful occupancy and to support judgment in favor of defendant.

2. Landlord and tenant ⊂⊃95—Tender of sum to terminate lease excused, when tender would not have been accepted if made.

Under lease providing for termination on 90 days' notice, and payment of certain sum, tender of that sum as condition to termination of tenancy *held* excused, where offer or tender would not have been accepted by lessee.

3. Landlord and tenant ⊂⊃95—Tender of sum due lessee on termination of lease held not prerequisite to termination.

Where lease required lessee to vacate on demand, on due notice, 90 days in advance, and stipulated that in such case lessor would pay lessee $500, tender of that sum *held* not condition precedent to termination of lease.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Unlawful detainer by C. H. Burg against Henry A. Harris. Judgment for defendant, and plaintiff appeals. Reversed.

William T. Kearney, of Richmond, for appellant.

Frank O. Nebeker, of Oakland, for respondent.

NOURSE, J. Plaintiff commenced this action in unlawful detainer to recover possession of premises held by defendant under a written lease. The cause was tried before the court, and judgment went for the defendant. Plaintiff appeals from the judgment on a record prepared under section 953a, Code of Civil Procedure.

The facts material to the appeal are that, on December 1, 1920, plaintiff's predecessor leased the premises to the defendant for a period of 5 years, through a written lease signed by both parties, which contained the following condition:

"It is further agreed that, if the parties of the first part make an actual sale of the above-described property, then the party of the second part will vacate the premises, if a demand is made on him, due notice having been given him ninety (90) days in advance and the parties of the first part agree to pay to the party of the second part the sum of five hundred dollars ($500) if the property is sold before December 1, 1923, provided the party of the second part is asked to vacate. Providing, however, that this lease shall not determine before May 1, 1922."

Acting upon the terms of this portion of the lease, the plaintiff, who had purchased the property after the lease was executed, gave notice to the defendant on January 7, 1924, that the lease would terminate 90 days thereafter, and demanded possession of the premises at that time. The defendant refused to vacate, and the statutory 3 days' notice was given after the expiration of the 90-day period and prior to the commencement of this action. The complaint was founded upon the theory that the tenancy terminated on the expiration of the 90-day period—April 6, 1924—and that the occupancy of the defendant thereafter was without right.

The trial court made just three findings of fact: First, that for more than one year prior to the date of the trial the plaintiff had been the owner of the premises (a matter which was admitted in the pleadings). Second, that the allegation in the complaint that defendant's tenancy ceased on April 6, 1924, was untrue, and that all the denials of defendant's answer were true. As the answer is in the same form, merely denying "that on the 6th day of April, 1924, the tenancy of defendant * * * ceased," it is a negative pregnant in keeping with the finding. Third, that at no time "during the tenancy of the defendant" has plaintiff offered to pay to defendant $500, or any other sum, for defendant's removal from the premises—a matter which was not in issue.

[1] On this appeal the appellant argues that the second and third findings are not supported by the evidence, but we are satisfied that the graver error is that the findings do not support the judgment. The finding in the form of the denials of the answer, that the tenancy did not cease on April 6, 1924, is not a finding that it had not ceased at some other time, and therefore does not negative the allegations of the complaint as to the wrongful occupancy.

[2] The third finding, so far as it is limited to a definite "offer" of $500, is supported by the evidence, though as to this there is a direct conflict in the testimony of the various witnesses. But the uncontroverted evidence is that the respondent refused to vacate the premises on payment of that sum and the showing was conclusive that no offer or tender would have been accepted by him. Such being the case, the appellant was entitled to a finding that any tender or offer to pay the respondent this sum of $500 would have been futile. This fact alone was sufficient to excuse a tender if one was necessary. Hoppin v. Munsey, 185 Cal. 678, 685, 198 P. 398, 401. In the latter case the Supreme Court said:

"A tender is not necessary where the conduct or declarations of the vendee are such as to show that it would be unavailing. 'It is a maxim that the law does not require a man to do a vain and fruitless thing, so it has been held that a strict and formal tender is not necessary where it appears that if made it would have been vain and fruitless.'"

[3] We have said that the appellant was entitled to a finding excusing a tender, but this is so only on the theory that a tender was necessary. But we are satisfied that, under the peculiar terms of the lease, no tender was necessary at the time the notice to vacate was given. The lessee agreed to vacate the premises if a sale was made, and "if a demand is made on him, due notice having been given him ninety (90) days in advance, and the parties of the first part agreed to pay to the party of the second part the sum of five hundred dollars ($500) if the property is sold before December 1st, 1923," and the lessee is asked to vacate. There is nothing in this contract which requires either the payment or the tender of the $500 when the notice to vacate is given. The only reasonable interpretation of the clause is that the owner would pay when the lessee vacated the premises. As the lessee refused to vacate, and so notified the owner when the notice was given, it would have been an idle act for the owner to have either paid or tendered the sum, which was due only on the surrender of the premises, particularly when the rental for the premises would continue to be-

come due from the lessee for each succeeding month.

Judgment reversed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

---

72 Cal. App. 323

DAVIS et al. v. BOSCOU. (Civ. 2802.)

(District Court of Appeal, Third District, California. April 17, 1925. Rehearing Denied May 16, 1925. Hearing Denied by Supreme Court June 15, 1925.)

1. Appeal and error ⟸1011(1)—Trial court's finding on conflicting evidence conclusive.

Trial court's finding, on conflicting evidence, that architects did not waive right to compensation for drawing plans and specifications for one-story building, in consideration of being employed to draw plans and specifications for three-story building, *held* binding on appeal.

2. Appeal and error ⟸1033(9)—Trial court's acceptance of figures in determining architects' compensation, resulting in awarding them smaller compensation than testimony justified, did not injure defendant.

In action by architects for compensation for drawing plans and specifications, acceptance by trial court, as basis of calculation of architects' compensation, of figures that awarded them a smaller compensation than their testimony would have justified, resulted in no injury to defendant.

3. Work and labor ⟸14(2)—Architects held entitled to recover reasonable value of services for preparing amended plans to conform with building requirements.

Where plans submitted by architects failed to comply with state building laws and city ordinances, whereupon they corrected plans to conform to legal requirements, *held* that, on owner's discharging architects before amended plans were completed, architects were entitled to recover reasonable value of their services.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Hugh Y. Davis and others, copartners doing business under the firm name and style of the Davis-Heller-Pearce Company, against L. Boscou. Judgment for plaintiffs, and defendant appeals. Affirmed.

Daniel V. Marceau, of Stockton, for appellant.

Warren H. Atherton, of Stockton, for respondents.

PLUMMER, J. Action by plaintiffs, to recover from the defendant the reasonable value of services rendered by plaintiffs for defendant, at his instance and request, as architects, in preparing plans and specifications for two buildings—one a one-story building and the other a three-story building. Plaintiffs had judgment for the sum of $1,950. From this judgment the defendant appeals.

It appears from the transcript that the defendant, the owner of a lot of land situate at one of the corners of Channel and California streets, in the city of Stockton, applied to the plaintiffs for the preparation of plans for the construction of a one-story building and after the plans and specifications for the one-story building had been completed, the defendant, conceiving the idea that the erection of a three-story building would produce a greater revenue, directed the plaintiffs to prepare plans and specifications for a three-story building, the lower story to be used for store purposes, and the two upper floors to be used as a hotel, and that, in pursuance of such directions, the plaintiffs entered upon the preparation of plans for a three-story building. It further appears that no specific directions were ever given by the defendant to the plaintiffs as to the kind and character of building which he desired to erect. The only directions, so far as the transcript shows, appear that the defendant desired the erection of a building which could be leased so as to yield him a return of 7 or 8 per cent. on the investment. The plaintiffs proceeded with the preparation of plans for a three-story building, the lower portion to be used for store purposes, and the upper floors to be used for hotel purposes, and thereafter delivered to the defendant plans and specifications for such a building. In the course of defendant's efforts to find a tenant for the proposed building, it was pointed out to the defendant, by some of the persons contemplating the taking of a lease thereon, that the contemplated buildings, in some particulars, violated the provisions of the state Housing Act, or the act to regulate the building and occupancy of hotels then in full force and effect, and would also violate certain ordinances of the city of Stockton. These defects were called to the attention of the plaintiffs, and certain tentative plans and drawings were again made by them for the purpose of obviating the objections so raised. In the course of the attempted leasing of the proposed building, it was pointed out, among other things, that the rooms were too small to admit of being let for occupancy by two persons under the state Housing Act (St. 1923, p. 781), as it then existed, and that changes and alterations would have to be made therein, in order to give sufficient cubic air space for the different rooms, to provide additional windows for the hallways, and certain other defects which were discovered. It appears from the transcript that the defendant and the persons with whom he was negotiating went to the offices of the plaintiff and stated that they wanted larger rooms, that the rooms as designed were for one person instead of two, and asked

how long it would take to make the changes, and were informed that it would take approximately three days. The testimony of one of the witnesses is that he prepared the necessary sketches, and that the defendant promised to come back the same day, but that the defendant never returned. Thereafter, on the 22d day of May, 1923, the defendant wrote to the plaintiffs the following letter:

"I am returning, under separate cover, blue prints and specifications prepared by you for a store and hotel building. My reason for the return is that the building designed by you is not suitable for use as a hotel, by reason of the fact that the rooms, as laid out by you, are too small. That under the state Housing Act, two persons cannot occupy any room in the proposed building. There are certain other provisions in the plans and specifications which are likewise objectionable. For the reasons above noted, the building, as designed by you, cannot be used for the purpose designed by me. Inasmuch as these plans have required over two months for preparation, it will be impossible for me to wait until new ones are prepared as an entirely new design of the building must be made." (Signed by the defendant.)

[1] Following the receipt of this letter, the plaintiffs instituted this action to recover the reasonable value of the services performed in drawing the plans and specifications for the two buildings herein referred to. The pleadings in this action show that the stipulated price to be paid for the services was the sum of 3 per cent. of the estimated cost of the buildings. There is a conflict in the testimony as to whether the plaintiffs had waived any right to compensation for services performed in drawing the plans and specifications for the one-story building, in consideration of being employed to draw plans and specifications for the three-story building. The finding of the court in favor of the plaintiffs, that there had been no agreement not to charge for the one-story building, based upon such conflicting evidence, is binding upon appeal.

As his principal ground for reversal herein, the defendant argues that the plans and specifications as drawn provided for a building that could not be erected under the state Housing Act as it then existed, and in support of his contention, relies principally upon the case of Nave v. McGrane, 19 Idaho, 111, 113 P. 82, and Bebb v. Jordan, 111 Wash. 73, 189 P. 553, 9 A. L. R. 1035. The McGrane Case states the law in relation to architects and their qualifications as follows:

"So far as an architect is concerned, there is always an implied contract that the work shall be suitable and capable of being used for the purpose for which it is prepared. Apart from questions of public policy, this principle would prevent him from recovering upon plans and specifications prepared in violation of law, unless he was directed to so prepare them by the owner."

The same rule is announced in the Bebb Case, supra. There is practically no conflict in the cases having to do with this subject, in holding that an architect is not entitled to recover compensation for plans and specifications drawn by him for a building which cannot be erected upon a specified lot, by reason of the provisions of building laws or ordinances, unless the architect is specially employed to prepare plans and specifications for such a building, irrespective of the place where it is to be erected. If the architect knows where the building is to be erected, and is employed generally to draw plans and specifications therefor, the plans and specifications so drawn by him, must provide for a building that can be legally erected, and reasonably suitable for the uses and purposes for which it is to be erected.

On the part of the plaintiffs, the reply is made that the plans and specifications under consideration have not been finally completed, that the defendant discharged the plaintiffs while they were engaged in preparing plans and specifications for the contemplated building. The testimony upon this question is conflicting, and the finding of the trial court is to the effect that the plaintiffs were discharged while they were so engaged. It is true that to make the plans and specifications conform to the requirements of the law as it existed at the time of the preparation of the plans in controversy would necessitate providing for larger rooms, which necessarily limited the number of rooms for the two stories of the building to be used for hotel purposes. There is nothing in the transcript which shows whether the rental value of the building would be lessened by reason of providing rooms capable of being occupied by two persons, rather than providing rooms that could be occupied by only one person, nor is there anything in the transcript from which the trial court could infer that the building could not be leased when the plans had been changed to conform with the state laws and building ordinances of the city of Stockton. There is testimony to the effect that three persons interviewed by the defendant declined to take a lease upon the premises, and there is testimony to the effect that, in the opinion of certain witnesses, the premises could be leased. The finding of the court is that the premises could be leased. The testimony shows that the defendant desired a building that would yield him the highest rate of interest on the investment, but there is no evidence that the plaintiffs made any representations whatever that a building could be erected on the premises that would yield a return of 7 or 8 per cent. per annum on the investment. The plans and specifications having been returned, as above stated, and the plaintiffs still being engaged in the correction of the same and in the rearrangement of the rooms to make them comply with the laws and ordinances relating thereto, and

the court having so found, the respondent relies upon the case of Bebb v. Jordan, supra, cited by the appellants. In that case it appears that the architects were employed to draw plans and specifications for the erection of two buildings. The plans and specifications, as contemplated for the erection of one building, were completed, and were in violation of the building laws of the state. It was held by the court that no compensation could be recovered for the drawing of such plans and specifications. The plans and specifications for the other building were not completed, and the services of the architect were dispensed with before such plans and specifications had been finished. The court stated the law applicable thereto, as follows:

"As to the services performed on the plans for the six-story building, we think the plaintiffs are entitled to recover their reasonable value. The defendant employed the plaintiffs to prepare them, and stopped the work thereon before they were completed. By these acts, unless a sufficient reason intervened, he obligated himself to pay such sum as the services performed thereon were reasonably worth. The defendant seeks to escape liability by showing that the plans as far as they had been prepared contemplated a building which could not be constructed within the limit of cost agreed upon, and showed, as do the plans for the building of eight stories, a violation of the city ordinances. As to the first of these objections the evidence was contradictory, and to our minds supports the one theory as well as the other. But we think the true answer is that the plans were incomplete when the defendant stopped work upon them, and that he cannot now be heard to say that when completed they would have violated the contract as to cost, or the city ordinances, or would have been otherwise defective. These are matters that cannot now be certainly known, and the reason they are in this uncertain condition is because of the defendant's acts, not because of the acts of the plaintiffs."

Judgment was awarded for the reasonable value of the services performed in preparing plans and specifications for the six-story building. There, as here, the question depends upon conflicting evidence, not as to the probable cost of the building, but as to the rentable value of the building and whether the building could be leased. The trial court found that the building could have been leased, and that the building, as designed by the plaintiffs, with the changes directed by the defendant, would have rendered it suitable for use as a hotel, and that such a building could have been legally constructed under the building laws of the state of California and the ordinances of the city of Stockton, and that, at the time of the termination of the plaintiffs' employment, they were engaged in making the necessary changes.

[2] The testimony was to the effect that the cost of erecting a building contemplated by the plans and specifications for a one-story structure would approximate the sum of $25,000, and that the cost of erecting a three-story building would approximate the sum of $65,000. The witnesses for the plaintiffs testified that the reasonable value of the plaintiffs' services was three-fifths of 6 per cent. of the estimated cost. The pleadings show that the compensation agreed upon for the contemplated plans was the sum of 3 per cent. of the cost of the building. Upon this calculation the amount of compensation earned upon the contemplated plans for a one-story building would be the sum of $750, leaving $1,200 allowed by the court as reasonable compensation for the services performed in preparing the plans and specifications for the three-story building. In fixing the reasonable value of services, the testimony was all based upon completed plans, but there was some testimony as to the reasonable value or cost of changing the plans so as to make them conform to the building laws and ordinances. This testimony was to the effect that the cost of making such changes would approximate the sum of $180. Making such deduction, the finding of the court that the reasonable value of the services performed by the plaintiffs for the defendant, amounted to the sum of $1,950, is considerably less than the sum that would have been supported by the evidence, had the court found for such greater sum. In this particular, the defendant cites as error the admission of the testimony of the witness Davis that the cost of the one-story building, with walls for a three-story building, would approximate the sum of $45,000, and that the court must have taken such testimony as the basis for its calculations in fixing the amount to which it found the plaintiffs reasonably entitled. There is nothing in the transcript which shows that applicability of testimony as to the cost of such a building, and there is nothing in the record which distinctively shows how the court arrived at the figure of $1,950, but, as the amount is below that which the admissible testimony would have justified the court in finding, the defendant has not been injured by the court accepting, if it did accept as a basis of calculation, figures that awarded the plaintiffs a smaller compensation than their testimony would have justified, assuming that the trial court believed the testimony to which we have referred.

[3] The evidence set forth in the transcript shows that the plans and specifications at the time the defendant wrote the letter, which we have herein set forth, failed to comply with the building laws of the state and ordinances of the city of Stockton in the particulars pointed out by the defendant, but the finding of the trial court, sustained by the evidence, that the plaintiffs were engaged in correcting and amending the same at the time of their discharge, makes directly applicable the ruling of the Bebb Case, supra, and relieves us from the necessity of considering the various instances in which the plans and specifi-

cations are said to be violative of the law of the state.

So far as the record shows, it does not appear that the defendant ever gave any specific directions as to the exact kind of building he desired to erect. It appears generally that he wanted a building with a maximum number of rooms, and a building that would yield a certain percentage on the investment. Further than that, it would seem that the arrangement of the building and all the details as to the plans and specifications were left to the plaintiffs. The trial court found that the work performed by the plaintiffs was, as far as the same had been completed, skillfully and properly performed, and it could not be said, as a matter of law, that the plans and specifications when finally completed, would not have complied with the law. This obviated any necessity for the trial court making a number of the negative findings in relation to the plans and specifications presented by the defendants. It is strongly insisted that there is no testimony supporting the finding of the court that the plaintiffs, at the request of the defendant, were making alterations in the plans to conform to the state building laws. The testimony does show that the plaintiffs stated they would proceed with the work of making the change, or changes, necessary, and that the defendant promised to come back the next day to see the amended plans, but that he never returned, from which the court would be entitled to draw the inference that the plaintiffs were proceeding to correct the plans to make them conform to the legal requirements.

While the trial court, upon the testimony introduced, might have come to a different conclusion, we think that there is sufficient testimony to support the findings, as made, and that the judgment of the trial court should be affirmed. It is so ordered.

We concur: FINCH, P. J.; McDANIEL, Justice pro tem.

---

72 Cal. App. 350

CONTRACTORS' INDEMNITY EXCH. OF CALIFORNIA v. STATE INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5162.)

(District Court of Appeal, First District, Division 1, California. April 18, 1925.)

1. Master and servant ⇐419—Order reducing total disability indemnity from time of hearing on petition only sustained.

Order reducing total disability indemnity to half compensation from time of hearing on petition, instead of earlier date, *held* sustained by evidence as to employee's ability to do light work.

2. Master and servant ⇐419 — Burden of proving injured workman's ability to obtain employment on insurer.

After total disability award in compensation proceedings, insurer petitioning for reduction of compensation had burden of proving employee's condition had so improved that he was able to obtain employment.

Proceeding under the Workmen's Compensation Act by Judge King, employee, to recover compensation for injuries, opposed by the Hutchinson Lumber Company, employer, and the Contractors' Indemnity Exchange of California, insurer. The Industrial Accident Commission made an award granting compensation to claimant, which by subsequent order on petition of insurer was amended by reducing compensation, and insurer brings certiorari. Award affirmed.

H. C. Kelsey, of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

TYLER, P. J. Certiorari for the purpose of having determined the lawfulness of a certain order and award made by the Industrial Accident Commission.

The record discloses the following facts:

Judge King, aged 51 years, was, on or about November 29, 1923, employed as a laborer by the Hutchinson Lumber Company at Oroville, California. On the date last mentioned he sustained an injury arising out of and in the course of his employment, when he was struck by a piece of lumber proximately causing injury of a serious nature to his hip and back. Both employer and employee were subject to the provisions of the Workmen's Compensation Act (St. 1913, p. 279).

Petitioner Contractors' Indemnity Exchange was the insurance carrier of the employer. On May 28, 1924, King filed an application with the respondent Commission for compensation benefits, reciting that Contractors' Indemnity Exchange had stopped payments on March 5, 1924, because of his alleged refusal to submit to an operation.

Hearings were held on June 13, 1924, at Oroville, and on August 12, 1924, at San Francisco, at which times medical reports relating to the injuries of the employee were filed. Upon said hearings and medical reports the Commission entered its findings and award on August 27, 1924. It found that King was still wholly disabled from labor on account of his injury, and awarded temporary total disability payments until the termination of such disability or the further order of the Commission. No rehearing was asked for.

On October 21, 1924, Contractors' Indemnity Exchange filed a petition with respondent Commission, reciting that, inasmuch as King had testified at the hearing on August 12, 1924, that he was able to do some light

work, petitioner had directed him to report to the employer at Oroville immediately, and that light work would be supplied him. It was further stated in the petition that King had not reported to the Hutchinson Lumber Company as requested, and was not attempting to do light work of any kind, and petitioner further claimed that, since August 12, 1924, King had been able to do this character of work.

The petition came on for hearing on November 19, 1924. King was the only witness at the hearing. He testified, in effect, that since the last hearing in the case he had done some light work around his home, and that, while his condition was improving, he could not stoop without suffering pain, nor could he lift anything that was heavy. He further testified that he would be glad to try to do light work, and that he had presented himself to the lumber company by whom he had been employed, and also another company, and asked for work, but had been unable to obtain any.

At the close of the hearing King was directed to report to the assistant medical director of respondent Commission, and also to petitioner's physician for examination. The report of the physician of the Commission shows that there was a gradual improvement in the injured workmen's condition, and that it would be for his best interest to obtain some light work which did not involve heavy lifting. The report of petitioner's physician states that King still suffered some muscle spasm in his back, but he believed that he could return to work, although he might be fatigued therefrom the first few days.

This is all the evidence that was had relative to the injured workman's condition between August 12, 1924, the date of the last hearing, and November 19th, when the modified award was had. Upon this evidence the Commission reduced King to half compensation, commencing November 19, 1924. From this order, amending the award, petitioner asked for a rehearing, which was denied.

[1, 2] The present petition is one to review this amendment of the prior award. It is petitioner's contention that all the evidence shows that the total disability indemnity should have been terminated, and partial disability indemnity should have been provided for as of August 12, 1924, or some date prior thereto.

It is conceded that the existence of disability caused by an industrial injury, and the extent or duration of that disability, are questions of fact to be established as other facts are established, but it is claimed that there is no evidence upon which the amended award can be based.

The contention is without merit. There is no question but that King was entitled to the award made in his behalf, following the two original hearings based upon the nature of his injuries, and there is no evidence in the record to show any improvement in that condition between the date of the last hearing, held August 12, 1924, and the one of November 19th of the same year. There is evidence to show that, upon the latter date, King's condition had improved, and he could, in all probability, have performed some character of work. But during the interval between these dates there is nothing to show what his condition was. The injured workman, upon being requested by petitioner to apply to his former employer for light work, repeatedly did so. He also solicited employment from another firm, work of the same character, but in both instances it was denied him. His own testimony does not show that he could have satisfactorily performed light work, but only indicates that he desired to do so. His weakened condition which the evidence shows still existed at the date of the last hearing, might have been responsible for his failing to secure the light employment he sought.

This physical impairment was a fact for the Commission to consider. The act in question does not contemplate that one in the weakened condition the evidence shows King to have been in should, from day to day, measure his strength and capacity in order to satisfy himself that he might be able to perform a light task of some character. It was for petitioner to prove that the injured workman's condition had so improved that he was able to obtain employment.

Compensation is payable for inability to do work, or to obtain work because of the weakened physical condition of the workman, due to the accident, and the evidence here presented is sufficient to justify the conclusion of the Commission that, before the period fixed, King was unable to perform work.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 374

Ex parte HOWARD. (Cr. 1225.)

(District Court of Appeal, Second District, Division 1, California. April 21, 1925.)

Criminal law ⟸1001—Suspension of sentence for 3 days does not render sentence unenforceable after lapse of period of sentence.

Where execution of sentence for 180 days was "suspended for 3 days," and prisoner remained at liberty from May 13th to Feb. 17th following, without any revocation of suspension of sentence, *held* that suspension should not be presumed an admission to probation, under Pen. Code, § 1203, and judgment was not satisfied, and was still enforceable.

Application by Albert Howard for writ of habeas corpus directed to the Chief of Police of the City of Los Angeles. Prisoner remanded.

Cooper, Collings & Shreve, of Los Angeles, for petitioner.

J. M. Friedlander, City Pros., J. D. Taggart, and Tracy C. Becker, all of Los Angeles, for respondent.

CONREY, P. J. On petition of Albert Howard, a writ of habeas corpus was allowed herein. On return duly made the matter has been submitted for decision.

On the 13th day of May, 1924, in the police court of the city of Los Angeles, in an action wherein the petitioner was defendant, he pleaded guilty to a charge of misdemeanor. Thereupon the defendant was sentenced to imprisonment in the city jail for the term of 180 days. At the same time the court made this order: "Execution suspended for 3 days." At that time, the defendant was in fact allowed his liberty without any order of court to that effect, other than a supposed implication from the suspension of execution. On the 17th day of February, 1925, petitioner was arrested and imprisoned in the city jail to begin the service of said sentence. The commitment bears date May 13, 1924, which was the date of the judgment.

The sentence was not enforced or modified, nor was any revocation of the suspension of sentence ever requested or granted during the six months immediately following the date of the judgment; and six months, it will be noted, was the maximum period of sentence allowed by law for the stated offense.

Petitioner contends that his imprisonment is illegal in this, that because he was allowed to remain at liberty throughout the maximum possible term of his sentence, and during that period of time there was no revocation of the suspension of execution, no authority thereafter exists to imprison him in satisfaction of such judgment. In support of this contention petitioner contends that the facts bring this case within the reasoning of In re Giannini, 18 Cal. App. 166, 122 P. 831; People v. O'Donnell, 37 Cal. App. 192, 174 P. 102, and Ex parte Slattery, 163 Cal. 176, 124 P. 856.

In the Giannini Case, the justice's court, at the time of sentence of the prisoner to a term of 90 days in the county jail, ordered that the sentence be suspended "during the good behavior of defendant Francisco Giannini, and any violation made by defendant in future, commitment will issue for his imprisonment." This order was made in June, 1911. After the expiration of the 90 days, but within six months, the justice issued the commitment under which petitioner was taken into custody. The maximum possible term of sentence was six months. Prior to the year 1911 there was no statute authorizing a court to suspend the execution of sentence, and an order of suspension of execution of sentence, if valid at all, was only authorized as an exercise of an inherent power of the court. In re Collins, 8 Cal. App. 367, 97 P. 188. But section 1203, Penal Code, as amended in the year 1911 (Stats. 1911, p. 689, effective April 6, 1911), in connection with its provisions relating to the admission of convicted persons to probation, directly authorized the court to suspend execution of a sentence of imprisonment. In the Giannini Case this court said:

"We think a proper construction of the statute is that absolute power of suspending sentence is given by this section, and that where a court acts under the statute, within the limits thereof, such order of suspension is not invalidated because the court omits a duty imposed by law upon it: namely, to place the party in charge of a probation officer."

People v. O'Donnell, 37 Cal. App. 192, 174 P. 102, was a proceeding in mandamus against the superior court of Solano county and the judge thereof. It related to a criminal case in which a defendant, after plea of guilty, had been admitted to probation. It was held by the court of appeal that, in relation to said criminal action, the superior court had lost jurisdiction to set aside the order of suspension, for the reason that there had been no revocation or modification of the order of suspension during the prescribed period of probation.

The case of Ex parte Slattery, 163 Cal. 176, 124 P. 856, was a case arising in the year 1912. It appeared that Slattery had been sentenced by the police court of the city of Oakland to serve a term of six months in the city prison; that the execution of his sentence was stayed by order of the court withholding the issuance of the commitment; that defendant was allowed his liberty; that he remained at liberty for seven or eight months, and was then arrested and imprisoned under a commitment issued upon said

judgment. The Supreme Court referred to the fact that section 1203 of the Penal Code, as amended in 1911, was in effect at the time when judgment was pronounced against petitioner and the commitment upon such judgment withheld; and the court held that the withholding of the commitment was the equivalent of suspending the execution of the sentence. The court then referred to In re Collins, supra, as containing a satisfactory discussion of the inherent power of a court in a criminal case "to withhold the pronouncement of judgment or to suspend judgment when pronounced." But the court then said:

"By section 1203 of the Penal Code, the Probation Act, the Legislature has prescribed the form and method by which these powers may be exercised. It will be held that courts in exercising their powers so to withhold sentence or to suspend execution of sentence do so in conformity with these legislative provisions and it will not be held that by reason of any informality or irregularity of the order so doing a defendant should be made to suffer. * * * So treating the court's order as one permitted by and within the purview of section 1203 petitioner shows that his rearrest, and the effort to enforce this early judgment against him were made after 'the maximum possible term of his sentence' had expired. But by the provisions of the probation law when a defendant has fulfilled the conditions of his probation for the entire period thereof which cannot exceed the maximum possible term of such sentence, the power of the court to enforce its original judgment is at an end."

The court then cited Pen. Code, § 1203, subd. 5, which is identical with subdivision (e) of the same section as now in force.

In the Matter of the Application of Clark, 234 P. 109, this court recently had under consideration the validity of an order suspending execution of sentence, where it was claimed by petitioner that the order had been made under the probation law, and that because the period of suspension of execution as provided in the order had expired, the court was without authority to proceed further in execution of the judgment. Relying upon the decision of the Supreme Court in People v. Mendosa, 178 Cal. 509, 173 P. 998, we stated it as our opinion that the court below did not have authority to suspend execution of sentence without admitting the defendant to probation. We further found, however, that, under the record in the Clark Case, it affirmatively appeared that the court, in making its order, was not attempting to admit the defendant to probation, but was attempting to exercise, outside of the statutory authority, its assumed inherent power to make such order. But we held that the order itself, when considered in that light, was void, and that the judgment had not been satisfied by the expiration of a term of probation, or at all. This being so, there appeared to be no reason why the defendant might not be compelled to submit to imprisonment in satisfaction of the judgment. For that reason he was remanded to custody.

In People v. Mendosa, supra, it appeared that the superior court had sentenced the defendant to imprisonment in the state prison, but at the same time further ordered that the sentence be suspended, and the defendant remain in the county jail until further order of the court. The Supreme Court held that there was no authority in law for the action of the court in suspending the execution of the sentence and remanding the petitioner to the custody of the sheriff to be confined in the county jail; that if the court desired to suspend the execution of the sentence, the only way in which it could legally do so was by proceeding under section 1203 of the Penal Code, which contemplates that the defendant, while on probation and conforming to the terms thereof, shall be at large and not in confinement.

In its application to the present case, the effect of the law as thus declared is, that if the order suspending execution "for three days" was an attempted exercise of authority under the probation law, then on the facts shown by this record, the petitioner is entitled to his liberty. But if the order was merely an attempted exercise by the court of an assumed power to suspend execution of the judgment, separate and apart from any intention to admit the defendant to probation, then the judgment remains in force unsatisfied, and the imprisonment of defendant is lawful.

If it were not for the decision in Ex parte Slattery, supra, there would be less difficulty in deciding this question. The statement of facts, as contained in the decision of that case, merely shows that the court below stayed execution by an order withholding the issuance of the commitment, and that petitioner was allowed his liberty. Nevertheless, the Supreme Court held, in the language which we have quoted, that this was the equivalent of suspending the execution of the sentence, and interpreted the order as one made under the authority of the probation law.

But we are not satisfied to draw from the decision in the Slattery Case the inference that the Supreme Court intended to decide that in every case of unexplained suspension of sentence, and, for no matter how short a time, such order must be construed as an admission to probation. The discussion by the court is very brief, and it is not clear that this phase of the matter was thoroughly considered. We think that it would be a safer rule, and one entirely in accordance with the intention of the law, to hold that an order of suspension of execution for such a brief period as three days should not be presumed to be an attempted exercise of

authority under the probation law. Common sense indicates that none of the purposes of probation would be advanced by an unexplained three-day order of this kind. We think that in such an order, thus briefly limited as to time, there should be something further on the face of the order to indicate that it was an exercise of authority under the probation law, before it can be construed as of that character. And it is not important to determine whether the order, as made by the justice, was made in the exercise of some remaining vestige of the authority which once was a part of the inherent power of a court, or whether it be regarded as a void order. Under either view, the judgment remains in force and unsatisfied, and there is no legal reason why it may not be enforced.

The prisoner is remanded to custody.

I concur: CURTIS, J.

---

72 Cal. App. 339

BAILEY TRADING CO. et al. v. LEVY. (Civ. 2807.)

(District Court of Appeal, Third District, California. April 17, 1925.)

1. Sales ⟸270—Buyer relying on statutory warranty cannot charge seller on ground that examination of article purchased will occupy time or is inconvenient.

A buyer, relying on an implied or statutory warranty that article purchased is in sound and merchantable condition when purchase was made, cannot relieve himself and charge seller on ground that examination will occupy time, and is or may be attended with inconvenience and labor.

2. Pleading ⟸63—Complaint in action founded on statutory right must bring case clearly within terms thereof.

Where an action is founded on a statutory right, plaintiff must, by his complaint, bring himself squarely within terms of such statute.

3. Sales ⟸434—Complaint by buyer held not to state cause of action for breach of statutory warranty; "ready for shipment;" "immediately."

In action by buyer for breach of warranty as to sound and merchantable condition of milo, based on Civ. Code, § 1771, on ground that it was inaccessible to examination, complaint alleging that milo was on board a freight car "ready for shipment," and that it was "immediately" forwarded to market, *held* not to state a cause of action for breach of statutory warranty, as term "ready for shipment" does not necessarily mean that carrier had been given or taken possession and control of milo immediately on completion of work of loading, nor does word "immediately" necessarily mean without intervention of such interval of time as would have enabled buyer to make inspection (citing Words and Phrases, Second Series, "Immediate").

4. Appeal and error ⟸1040(2)—Denial of leave to amend complaint for second time not reviewable in absence of affirmative showing of abuse of discretion, or of application for leave after demurrer sustained.

Order, on sustaining demurrer, denying leave to amend complaint for second time cannot be reviewed, where it is not affirmatively shown that court abused its discretion, or that plaintiffs made application for leave to amend after demurrer was sustained.

Appeal from Superior Court, Tehama County; John F. Ellison, Judge.

Action by the Bailey Trading Company and another against J. T. Levy for damages for breach of warranty. From a judgment dismissing the action, plaintiffs appeal. Affirmed.

M. J. Cheatham, of Red Bluff, for appellants.

L. W. Hughes, of Corning, for respondent.

HART, J. This action is for damages for the breach of a general warranty, as provided by section 1771 of the Civil Code, that a certain quantity of milo purchased by plaintiffs from defendant was, at the time of said sale, in a sound and merchantable condition.

The defendant demurred to the first amended complaint on both general and special grounds, and the court sustained the demurrer, without leave to amend, and thereupon rendered judgment dismissing the action. This is an appeal by the plaintiffs from said judgment. The complaint, as amended, alleges:

"That at the city of Corning, in the county of Tehama, state of California, on or about the 30th day of October, 1923, plaintiffs purchased from defendant, 491 bags of milo and paid defendant then and there and therefor the sum of $990.89, lawful money of the United States. That at the time plaintiffs purchased said milo the same was loaded on board a freight car of the Southern Pacific Company at its railroad yards at Gerber railroad station, in said county of Tehama, state of California, about 12 miles from the said city of Corning, and was ready for shipment by freight, in a railroad train of said Southern Pacific Company, to market at San Francisco, Cal., and was inaccessible to the examination of plaintiffs at the time of the purchase thereof, and the same was immediately forwarded by freight in said Southern Pacific Company's train to market at said city and county of San Francisco, state of California. That plaintiffs purchased said milo to be marketed and sold in said city of San Francisco, all of which was well known to defendant at the time he sold the same to plaintiffs. That said milo was harvested in an unripe condition, and was sacked and prepared for shipment while the same was wet and damp, *and at the time plaintiffs purchased the same was wet and damp in the sacks aboard said freight car, and was unmerchantable, and continued to be unmerchantable until the same*

arrived in the said city of San Francisco by the usual and customary mode of transportation by said Southern Pacific freight train. That by reason of the said milo being sacked while damp and moist, the same heated and greatly depreciated in value, and was unmerchantable. That had said milo been in merchantable condition at the time same was purchased and sold the same would have been of the value of $1160.75, but on account of the unmerchantable condition thereof at the time the same was purchased and sold it was of the value of only $613.34. That plaintiffs have been damaged in the sum of $547.41 by reason of defendant's having sold them the said milo in said unmerchantable condition."

As indicated above, the plaintiffs ground their action on section 1771 of the Civil Code, which reads as follows:

"One who sells or agrees to sell merchandise inaccessible to the examination of the buyer, thereby warrants that it is sound and merchantable."

In sustaining the demurrer the learned trial judge said:

"The court is of the opinion that the complaint does not state facts sufficient to show that the goods sold were inaccessible to the examination of the buyer. They were only 12 miles away, and he could have examined them had he taken the trouble to make a trip to Gerber."

[1] It is to be assumed from the foregoing observations of the court on sustaining the demurrer, the court conceived that the ground upon which the plaintiffs relied, in attempting to invoke the warranty provided by section 1771 of the Civil Code, was that the alleged inaccessibility to the examination of the milo by the plaintiffs lay in the fact that, at the time the contract of sale was made and completed, the milo was situated at a point 12 miles from the point where the sale was effected. It may likewise be assumed that the argument of the demurrer in the court below was confined, in its scope, to the same restricted view of the pleading. If that was all that there was to the complaint—that is to say, if the alleged "inaccessibility to examination" was grounded entirely on the fact of the distance between the two points referred to—then there would be no reason for the least hesitation in agreeing with the trial court's conclusion that such fact was not such as to make section 1771 of the Civil Code applicable here. It has always been held that the buyer of a commodity, when relying upon an implied or a statutory warranty that the article purchased is in a sound and merchantable condition when the purchase was made, cannot relieve himself and charge the seller on the ground that the examination will occupy time, and is or may be attended with inconvenience and labor. Barnard v. Kellogg, 10 Wall. 383, 19 L. Ed. 987, 989. See, also, Hyatt v. Boyle, 5 Gill & J. (Md.) 110, 25 Am. Dec. 276, 281; 2 Mechem on Sales, § 1312. Mr. Mechem says:

"The rule is not altered by the fact that the examination or inspection will consume time or is attended with labor or inconvenience. No exception to it can be admitted, to use the language of a leading case (referring to Hyatt v. Boyle, supra), except 'where the examination at the time of the sale is, morally speaking, impracticable, as where goods are sold before their arrival or landing. The mere fact of the inspection being attended with inconvenience or labor is not equivalent to its impracticability. If the purchaser desire to avoid it and yet obtain the protection it would afford him, he must do so by exacting from the vendor an express warranty of quality.'"

But the plaintiffs here, in attempting to introduce into the contract of sale the provisions of section 1771 of the Civil Code, go further than merely relying on the fact of the distance between the point where the contract was made and the point where the milo was situated at the time of the consummation of the sale, and the inconvenience and labor which would be entailed by reason of that fact in inspecting the milo. It will be seen that, immediately preceding and in immediate connection with the statement that there was a distance of 12 miles between Corning, where the sale was effected, and Gerber, where the milo was situated, at the time of the making of the contract, the complaint alleges that the milo was, at the time the sale was consummated, "loaded on board a freight car of the Southern Pacific Company at its railroad yards at Gerber railroad station, * * * and was ready for shipment by freight in a railroad train of said Southern Pacific Company, * * * and the same was immediately forwarded by freight in said Southern Pacific Company's train to market at said city and county of San Francisco," etc. Further, in alleging that at the time the sale was made the milo was in an unsound and unmerchantable condition, the complaint (paragraph 3) adds that, at the time mentioned, the milo "was wet and damp in the sacks aboard said freight car." By all these averments, we may conjecture, it was the intention and purpose of the pleader to make it appear that, at the very time the contract of sale was consummated, the milo had not only been loaded on a freight car of the railroad company, but had been delivered into the possession and the control of the carrier. If such fact were clearly shown by the complaint, there would then be presented here an entirely different situation from that with which we are confronted. If, to be more explicit, the milo, at the time the sale thereof was made, was in the possession and under the control of the carrier, there would then exist, by reason of that fact, very strong ground for holding that the article was, when purchased, inaccessible to the exami-

nation of the plaintiffs, since such possession and control would be exclusive (subject, of course, to the right in the consignor of stoppage in transit) until the carrier's contract to transport and deliver the milo to the consignee at the place of consignment had been fulfilled. But it may be set down as a sound hypothesis, deduced from common knowledge, that if the milo was not, at the time the sale was made, in the possession and control of the carrier, it would not have been impracticable, "morally speaking," for the purchaser to have subjected it to a satisfactory examination before completing the purchase notwithstanding that the commodity was, at said time loaded, in sacks, in a freight car standing in the railroad yards of the carrier. By employing the method commonly practiced by buyers of cereals already in sacks to test the qualities of such commodities, there would be no more impracticability in the work of inspecting grain or corn in sacks loaded on a freight car than is ordinarily experienced in like examinations where the corn or grain is in sacks and the sacks stacked in the usual way on the ground or in a warehouse. So it is manifest that the primary question here is whether the complaint, with requisite certainty, discloses that the milo, at the time of the sale, was or was not in the possession and under the control of the carrier, and therefore not subject to be interfered with until the carrier's bailment had been terminated by any of the means by which that result may properly be accomplished.

[2] In construing the complaint to determine what the answer to that question should be, we must keep in mind the proposition that the relief sought herein is one which is alone afforded or authorized by statute—that is to say, the plaintiffs are relying upon a right given solely by statute, and that the rule is that where an action is founded on a statutory right or a right deducible wholly from statute, the plaintiff must, by his complaint, bring himself squarely and clearly within the terms or provisions of the statute upon which he relies or must rely to state a cause of action. "When a pleader wishes to avail himself of a statutory privilege or right given by particular facts, he must show the facts, and those facts which the statute requires as a foundation of the action must be stated in the complaint. * * * In remedial actions founded on a statute such averments must be made as are necessary to prove the case within the statute." Sutherland on Code Pleading and Practice, § 5630. See, also Dye v. Dye, 11 Cal. 163, 167, 168; Himmelman v. Danos, 35 Cal. 441, 448; County of San Luis Obispo v. Hendricks, 71 Cal. 242, 246, 11 P. 682. In other words, where a party relies upon a general or a statutory warranty for a recovery, the terms thereof and the facts from which damages for its breach are to be inferred must be set forth with reasonable certainty. 35 Cyc. 446.

[3] The complaint here, in our opinion, does not measure up to the requirements of the rules above stated. Undeniably, an attempt is thus made to state a cause of action founded upon section 1771 of the Civil Code, but it is nothing more than an attempt. It will be seen that, while the complaint states that the corn, at the time the sale was made, "was on board" a freight car of the carrier named "and was ready for shipment" it is not stated that the carrier had accepted possession and control thereof for the purpose of transporting it to the destination to which it was the intention to consign it. The phrase "ready for shipment," as used in the complaint, is susceptible of different interpretations or applications, each being fairly and reasonably within the signification thereof. When one engaged in the business of selling and shipping articles of merchandise or farm products, and which are required to be packed in boxes, kegs, barrels or in bales, and such articles are packed for the purpose of their shipment to some other point, even before being taken by truck or other means from the place where packed to a railroad station or steamboat landing to be put on board a car or a vessel, they are then "ready for shipment"—that is, they are fully prepared for that purpose. If, in this case, the milo had been sacked with a view of shipping it to market or to a particular consignee, and in that condition was still in a warehouse on the land from which it was harvested, it would then, in a general sense, be "ready for shipment," and for sufficient reasons might, while so situated, thus remain "ready for shipment" for several days or even weeks. The same might be true in the case of the loading of agricultural products on a freight car of a carrier of frieght standing in the railroad yards of the latter. Hence, it is to be seen that it does not necessarily follow from the fact that the milo in question was loaded on a car of the carrier, and that such car was standing in the railroad yards of the latter, the carrier has been given or has taken possession and control of the freight immediately upon the completion of the work of loading particularly in view of the fact that it is commonly known to be true that the loading of farm products on railroad cars is generally the work of the seller or shipper himself. Thus sufficiently is it made apparent that the complaint here is not clear or certain as to the meaning of the averment we are now considering. It may be suggested, though, that if it had been directly alleged that, at the time the sale was effected, the milo was loaded in the freight car of the carrier, and that the car, if not an open one, had been sealed after such loading, or that the carrier had accepted the milo as freight, issuing and delivering to the shipper a receipt or

bill of lading therefor, or something of similar import had been alleged in the complaint, then the pleading would make a strong showing that it was impracticable for the plaintiffs to inspect or examine the milo, and thus a cause of action would probably under the statute be stated.

Nor does the averment that the milo was "immediately forwarded by freight in said Southern Pacific Company's train to market at said city and county of San Francisco," make the complaint any clearer upon the question whether the milo was, at the time the sale was completed, in the possession and under the control of the carrier, and therefore in a condition in which it was "morally" impracticable for plaintiffs to examine or inspect it.

The word "immediately" is a relative term; that is to say, the real scope of its signification, like the phrase, "ready for shipment," is to be measured and determined by the circumstances or connection in which it is used. Like many other words, it possesses the quality of elasticity. When used in a pleading or legal documents or transactions involving obligations and duties springing from contract, it must be interpreted and understood according to the circumstances peculiar to the act or thing to be done. The lexicographers, it is true, define the word (as it is commonly understood) as meaning something "not to be deferred by an interval of time; at once, instantly," etc. But common sense tells us that there are things and acts which it may be provided shall be done "immediately" which cannot, in the very nature of the case, be done without the intervention of "an interval of time," or at the very instant of time the order or direction to do the thing is given. A party may order a building to be removed from his land "immediately." He may make a contract to that effect. The building, however, as is obvious, could not be removed until the necessary preparation therefor had been made, and then a number a days or even weeks might be required to do the work; yet the contract calling for immediate removal would be performed, if no more time than was necessary to accomplish the task was consumed. Thus, it is apparent, the word "immediately" would not and could not, under some circumstances, mean "at the very instant of time," or without the intervention of such an interval of time after the order or directions are given as would be necessary to render it practicable to do the thing or act, and that, as above stated, the signification of the word must be determined according to the circumstances in connection with which it is used. The decisions express similar views.

In Inhabitants of Robbinston v. Inhabitants of Lisbon, 40 Me. 287, 288, it is held that the word "immediate" means within such convenient time as is required for doing the thing. In Guthrie v. Carney, 19 Cal. App. 144, 124 P. 1045, it is, in effect, said: "Immediate delivery," as used in a statute requiring immediate delivery and change of possession, while not requiring a delivery instanter, requires delivery within a reasonable time according to the character of the property, its situation, and all the attending circumstances. See, also, 2 Words and Phrases, Second Series, p. 942.

In Feeley v. Boyd, 143 Cal. 282, 76 P. 1029, 65 L. R. A. 943, the court said:

"We think the words 'immediate delivery' must be given a reasonable construction. The words do not mean a delivery instanter. The word 'immediate' is defined in Bouvier's Law Dictionary (Rawle Revision), where it is said: 'Strictly it implies not deferred by any lapse of time, but as usually employed, it is rather within reasonable time having due regard to the nature and circumstances of the case. This word and "immediately" are of no very definite signification, and are much subject to the context. In legal proceedings they do not impart the exclusion of any interval of time."

There are many other cases in which it is shown that the signification or meaning of the word "immediate" or "immediately" must often be accepted, not in the sense in which it may commonly be understood to imply, but according to the circumstances or the connection in which or the purpose to subserve which it is employed.

Thus we have referred to the definitions variously given in the judicial decisions of the word "immediate," and its adverbial derivative "immediately," merely to illustrate the proposition that neither word bears a set or definitely fixed signification which is indiscriminately appropriate to all the varying conditions and circumstances in which it may be used.

From the foregoing considerations it will be seen that it is not possible to determine from the words "immediately forwarded" or the phrase "ready for shipment" the particular point of time with respect to the time the sale was made at which the milo was delivered into the possession and control of the carrier. It is certainly true that those phrases, as they are employed in the plaintiffs' pleading, are no less subject to the interpretation that the corn was ready for shipment and was forwarded or started on its way, and so under the control of the carrier at some time subsequent to the consummation of the contract of sale, than to the interpretation that the corn was or had been forwarded at the time of the sale. In other words, so far as it may be determined from the phrases referred to, as they are used in the complaint, the milo might not have been in the possession of the carrier or forwarded or started on the way to its destination until after such an interval of time following the sale as would have afforded the plaintiffs ample opportunity to subject it

to an examination by the method commonly resorted to in examining cereals already in sacks, and this proposition is no less true when both phrases are considered in connection with each other or when the complaint is examined in its entirety. Therefore, whether the act of forwarding the corn by freight or the fact of its being "ready for shipment" occurred and existed on the same day the milo was sold, or on some succeeding day, is a matter which cannot be ascertained or determined with certainty from the complaint. Hence, it must be held that the averments of the complaint are so uncertain as to the time when the milo was delivered, pro re nata, into the exclusive possession and control of the carrier, so that it was impracticable for the plaintiffs to examine or inspect before buying it, that that pleading fails to state a cause of action for the breach of the statutory warranty upon which the plaintiffs rely for a recovery. In other terms, the complaint is uncertain as to whether, at the time of the sale, or when negotiations for the purchase of the milo were still pending, an opportunity was afforded the plaintiffs to examine the article or, stating it in another form, it is not made to appear by the complaint with the requisite degree of certainty that such opportunity was denied the plaintiffs, and therefore the objection to the complaint, because of such uncertainty, does not go merely to the question of the insufficiency of the statement of the facts set forth therein, but to that of the insufficiency of the facts stated to disclose a cause of action. Thus it is clear that the plaintiffs have not by their complaint brought themselves clearly within the terms of the statute by which the right upon which they declare is alone given.

[4] Whether it was within the ability of the plaintiffs to amend the complaint so that it would state a cause of action, under section 1771 of the Civil Code, is a matter as to which, of course, we can venture no opinion or even conjecture. But, conceding that they could, still, the order of the court, on sustaining the demurrer, denying leave to amend the complaint for the second time, cannot be reviewed, since it is not made affirmatively to appear that the trial court, in making such order, abused its discretion, and, further, because it is not shown by the record that the plaintiffs made application for leave to amend after the demurrer was sustained, or indicated in any manner how the complaint could be amended so as to meet the objections raised by the demurrer. Stewart v. Douglass, 148 Cal. 511, 83 P. 699; Varni v. Devoto, 10 Cal. App. 304, 101 P. 934; Carley v. Vallecita Min. Co., 16 Cal. App. 781, 117 P. 1037; Durrell v. Dooner, 119 Cal. 411, 51 P. 628; Prince v. Lamb, 128 Cal. 120, 60 P. 689; Williamson v. Joyce, 140 Cal. 669, 74 P. 290; Murphy v. Murphy, 57 Cal. App. 182, 186, 207 P. 43; Whyte v. City of Sacramento, 65 Cal. App. 534, 224 P. 1008, 1012; Philbrook, Ad'm, etc., v. Randall et al. (Cal. Sup.) 231 P. 739; 2 Cal. Jur., p. 262.

For the reasons stated, the judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

196 Cal. 211

PACIFIC PALISADES ASS'N v. CITY OF HUNTINGTON BEACH et al.
(L. A. 7636.)

(Supreme Court of California. May 28, 1925.)

1. Constitutional law ⊂=87 — Enjoyment of property cannot be interfered with or limited arbitrarily.

Although use of property may be restricted or regulated, in exercise of police power, so far as necessary to protect others from injury from such use, enjoyment of property cannot be interfered with or limited arbitrarily.

2. Municipal corporations ⊂=601—Zoning ordinances must not be arbitrary.

Although municipalities may by zoning ordinances regulate use of property within delineated areas and districts as reasonably necessary to health, safety, morals, and general welfare, zoning ordinances must not impose an unwarranted and arbitrary interference on right to carry on lawful business, make contracts, or use and enjoy property, under guise of police regulations; reasonableness being subject to investigation in courts.

3. Municipal corporations ⊂=63(1)—Ordinances will be upheld, unless clearly unreasonable.

Every intendment will be made in favor of lawful exercise of municipal power in passing zoning ordinances, and power will be interfered with only when clearly unreasonable.

4. Municipal corporations ⊂=626—Zoning ordinance may be unreasonable and discriminatory interference with constitutional rights.

Ordinance prohibiting property owner from installing machinery and operating oil well on its property while in other districts of city more thickly populated and densely settled, and devoted to residence purposes, conduct of like operations is permitted, may be unreasonable and discriminatory, and amount to arbitrary interference with constitutional rights.

5. Statutes ⊂=255—Ordinarily, enactments become operative upon passage.

Ordinarily, legislative enactments become operative upon passage, unless otherwise provided in act itself, and are therefore construed as effective from time of passage through all forms required.

6. Municipal corporations ⊂=107(2)—Approval is condition precedent to enforcement of ordinance.

Where municipal officer has right of veto, his signing ordinance is for purpose of registering approval, and is condition precedent to enforcement.

7. Municipal corporations ⊂=107(2)—Ministerial act of president of city of sixth class in signing ordinance not condition precedent to enforcement.

Signature of ordinance, as required by General Corporation Bill, § 863, by president of municipal corporation of sixth class, under Henning's Gen. Laws 1920, p. 1961, being a mere ministerial act to authenticate action of board, *held* not a condition precedent to enforcement of ordinance.

8. Municipal corporations ⊂=107(2) — Ordinance held effective on publication.

Zoning ordinance of Huntington Beach, a city of sixth class, under Henning's Gen. Laws 1920, p. 1961, in which board provided for publication, and directed that it take effect immediately thereafter, *held* to become effective as provided.

9. Mandamus ⊂=71—Will lie to compel absolute ministerial duty.

In view of Code Civ. Proc. § 1085, writ of mandamus will issue to compel performance of duty which is purely ministerial, though not where act requires exercise of judgment or discretion.

In Bank.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by the Pacific Palisades Association against the City of Huntington Beach and another to enjoin enforcement of an ordinance prohibiting sinking of oil wells. Judgment for defendants on demurrer, and plaintiff appeals. Reversed and remanded, with directions.

Tanner, Odell & Taft, of Los Angeles, for appellant.

Lewis W. Blodget, City Atty., and Rush M. Blodget, both of Los Angeles, for respondents.

WASTE, J. Plaintiff brought an action seeking to enjoin the city of Huntington Beach and its city marshal from attempting to enforce the provisions of an ordinance prohibiting plaintiff from erecting derricks, installing machinery, and drilling oil wells on its own lands within the city limits. The trial court sustained the general demurrer to the complaint, interposed by the defendants, and plaintiff declined to amend. Judgment was entered for the defendants, from which judgment plaintiff appeals.

The appellant is the owner of 13 acres of land located within the boundaries of that portion of the city of Huntington Beach designated and set apart as a residence district in two ordinances to be hereinafter referred to. This land, it is alleged, is of great value for the purpose of producing oil and kindred substances, and of a much less value for residential purposes. The predecessor in interest of appellant was about to enter into leases of the land to persons or corporations who agreed to drill oil wells thereon, and did enter into one lease whereby the lessee agreed to drill four wells, and by the terms of which the owner of the property would reasonably expect to receive a sum in excess of $1,500 per day royalty from the production of oil therefrom. Just prior to the making of this lease, the board of trustees of Huntington Beach adopted an emergency ordinance, subsequently amending same, establishing a business and a residence district in the city, and making it unlawful, among other things, for any person, firm, or corporation to erect, establish, carry on, or maintain within the residence or business districts an oil well or derrick, or the business of drilling or operating for the discovery or production of oil, gas, hydrocarbon, or other kindred substances. The lessee of appellant is ready, willing, and able to proceed with the drilling of wells and the production of oil on the lands of appellant, but he and appellant are prevented from proceeding with their plans by reason of the ordinances referred to; the city threatening to prosecute appellant and imprison its officers, agents, or employees or any persons attempting to proceed with the production of oil under the terms of the lease.

It is alleged that the respondent city arbitrarily and without reason adopted the ordinance prohibiting the drilling of oil on appellant's land, and that its action is unreasonable, arbitrary, and discriminatory. In support of these general averments it is alleged that the property of appellant is proven oil land, and is situate upon the principal oil-bearing district of the city of Huntington Beach. Within 500 feet of appellant's easterly line there are now producing wells, and within 900 feet of its property there are no less than 20 completed wells. Some of these wells are in operation and produce large quantities of oil. Thirty-six blocks of Huntington Beach, lying north and east of appellant's premises, and within the purported residence district, are sparsely populated. The larger part of this territory is vacant and unoccupied by residences; there being not more than 20 houses in that section of the city when the first ordinance was passed. Just east of the eastern boundary line of the established residence district, and not included therein, is the most costly elementary school building in the city of Huntington Beach, and a number of residences. Near the schoolhouse and the residences numerous oil wells have been drilled since the adoption of the ordinances, and derricks and engine houses have been erected and oil-producing machinery installed. In another direction, within 10 blocks of the lands of appellant, there is a section of the city more densely populated than the restricted area, the greater portion of which is occupied by residences, and in which the city has permitted the drilling of oil wells and the production of oil. The erection of oil derricks and engine houses and the drilling of oil wells on its premises will not, appellant alleges, in any way endanger the safety, health, or welfare of the people of Huntington Beach.

[1-3] We are of opinion that the appellant has stated a cause of action. The business of boring for and producing oil is a lawful enterprise. The effect of the ordinance, absolutely prohibiting the maintenance or operation of oil wells within certain designated limits of the city of Huntington Beach, is to deprive the owners of real property within such limits of a valuable right incident to their ownership. While the use to which one may put his property may be restricted or regulated by the state, in the exercise of its police power, so far as it may be necessary to protect others from injury from such use, it is elementary that the enjoyment of the property cannot be interfered with or limited arbitrarily. In re Kelso, 147 Cal. 609, 611, 82 P. 241, 2 L. R. A. (N. S.) 796, 109 Am. St. Rep. 178. It must be taken as very definitely settled in this state that the right to zone may be resorted to by municipalities upon a proper invocation of the police power. Miller v. Board of Public Works (Cal. Sup.) 234 P. 381; Zahn v. Board of Public Works (Cal.) 234 P. 388. But such zoning must be reasonably necessary and reasonably related to the health, safety, morals, or general welfare of the community. A municipality is not permitted, under the guise of regulating business and segregating it to a particular district, to grant a monopoly to business establishments and enterprises already situated in unrestricted districts. In re White (Cal. Sup.) 234 P. 396. The city of Huntington Beach has the unquestioned right to regulate the

business of operating oil wells within its city limits, and to prohibit their operation within delineated areas and districts, if reason appears for so doing. Ex parte Hadacheck, 165 Cal. 416, 420, 132 P. 584, L. R. A. 1916B, 1248. Ordinances having that effect must be reasonable, and must be for the purpose of protecting the public health, comfort, safety, or welfare. Every intendment is to be made in favor of the lawful exercise of municipal power making such regulations, and it is not the province of courts, except in clear cases, to interfere with the exercise of that authority. But, as was recently said by the Supreme Court of the United States, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." Penn. Coal Co. v. Mahon, 260 U. S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321. Therefore, notwithstanding this general grant of power, it is a thoroughly well-settled doctrine that municipal by-laws and ordinances undertaking to regulate useful business enterprises are subject to investigation in the courts, with a view to determining whether the law or ordinance is a lawful exercise of the police power; or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the right to carry on a lawful business, to make contracts, or to use and enjoy property. Dobbins v. Los Anegeles, 195 U. S. 223, 23 S. Ct. 18, 49 L. Ed. 169; In re Application of Throop, 169 Cal. 93, 99, 145 P. 1029; Curtis v. City of Los Angeles, 172 Cal. 230, 234, 156 P. 462.

[4] It is apparent from the averments of the complaint that appellant has attempted to plead a situation analogous to those considered in the two decisions of this court last cited. It has been fairly successful, and presents a case in which a property owner is prohibited by the municipality from installing machinery and operating an oil well on its property, while in other districts of the city, more thickly populated and densely settled, and devoted to residence purposes, the conduct of like operations is permitted. In re Application of Throop, supra, and Curtis v. Los Angeles, supra. For these reasons appellant should be accorded the opportunity to establish, if it can, the unreasonableness and discriminatory character of the ordinance, which, it alleges, amounts to an unwarranted and arbitrary interference with its constitutional rights. The outcome of the controversy will, of course, depend upon the findings of the trial court when the issues have been finally submitted and determined. The demurrer should have been overruled.

[5-8] When the ordinance establishing residence and business districts in Huntington Beach, and regulating business therein, was adopted, it contained a section directing the city clerk to certify to its passage and cause it to be published, the ordinance to take "effect immediately from and after publication." It is alleged in the complaint that the president of the board of trustees did not append his signature thereto, as required by the provision of the General Corporation Bill (St. 1883, p. 270), section 863 of which provides that every ordinance of the city must be signed by the president of the board of trustees and attested by the clerk, and must be published by the board at least once in a newspaper of general circulation published and circulated in the city. Because of this omission, appellant contends that the ordinance restricting its use of its property is null and of no effect. The trial court sustained the contention of the respondent that the signing by the president constituted only a ministerial act, and that the validity of the ordinance did not depend upon his signature.

Huntington Beach is a city of the sixth class, formed under the general act providing for the organization, incorporation, and government of municipal corporations. Henning's General Laws, 1920, p. 1961. In cities of the fifth and sixth classes, formed under the provisions of that act, the legislative power is vested in a board of five trustees. There is no mayor, and there is nothing in the organic act requiring or permitting the submission of ordinances to any executive or other officer for his approval before they become effective. The board is required to elect one of its members president, but his sole power in legislative matters is confined to his one vote as a member of the board. No veto power is given to him as president of the board. Ordinances are not required to be submitted to him for his approval before becoming effective. His act in signing, therefore, is only the performance of a ministerial duty for the sole purpose of authenticating the action of the board. The ordinary rule is that legislative enactments become operative upon their passage, unless there is some express provision of law or a provision in the act itself to the contrary. Gay v. Engebretsen, 158 Cal. 21, 26, 109 P. 876, 139 Am. St. Rep. 67. This rule has usually been construed to make the enactment effective from the time it has passed through all the forms required by law to give it force and validity. 36 Cyc. 1196, cited in Dorr v. Marsh, 184 Cal. 588, 589, 194 P. 1002. It is not contended in this case that the ordinance was not duly published; it bears the corporate seal, and has the attestation of the city clerk and his certificate of its due passage by the board of trustees. The sole question to be determined, therefore, is whether or not the failure of the president of the board to sign the ordinance before it was published renders it an illegal enactment.

The signing of ordinances by the mayor, or other designated officer of a municipality, is for one of two purposes. If, by virtue of the right of veto, such officer is invested with some of the law-making power of the

municipality, his signing is for the purpose of registering his approval of the measure. Without such signature and approval the ordinance is of no effect. But, if the signing is merely for the purpose of authenticating by his signature an ordinance legally passed, the act is purely ministerial, and may be enforced by writ of mandate. San Buenaventura v. McGuire, 8 Cal. App. 497, 501, 97 P. 526, 528; State v. Taylor, 36 Wash. 607, 79 P. 286. There is therefore a broad distinction between a requirement of the approval of a mayor, or other executive officer, in order to give effect to ordinances, and a mere requirement that he shall sign all ordinances; for, while his signature may be, and usually is, the means adopted to designate his approval when his approval is required, if his signature alone is required the element of approval is absent. 21 Am. & Eng. Ency. of Law, pp. 964, 965; McQuillin on Municipal Corporations, par. 691. In such cases, where the signing is required for the purpose of verification, rather than approval, the requirement is held to be directory, rather than mandatory, and lack of signature does not vitiate the measure. 28 Cyc. pp. 356, 357, and cases cited. Dillon on Municipal Corporations (5th Ed.) vol. 2, par. 607, adopts the rule that acts of attestation are directory only in their nature, and a failure to observe them will not invalidate an ordinance or prevent its taking effect.

Appellant relies on the case of City of San Buenaventura v McGuire, 8 Cal. App. 497, 97 P 526, 528, for substantial support of its contention. We find little in the decision to help it. The court was there construing an act requiring ordinances and resolutions passed by the city council, or other legislative body of any municipality, to be presented to the mayor, or other chief officer of such municipality, for his approval. Stats. 1897, p. 190. The act provided (section 1) that the provisions should not apply to cities in which the mayor is a member of the city council, or other governing body. Assuming to act under that statute, the president of the board of trustees of the city of San Buenaventura, a city of the fifth class, organized under the general municipal corporation bill, refused to sign an ordinance duly passed by the board of trustees, and which the president had voted against. On petition for a writ of mandate to compel the president of the board to affix his signature to the ordinance, the court held that, as no veto power is given to the president of the board, and there being nothing in the act under which the city of San Buenaventura was formed requiring the president of the board to perform the duties of a mayor, the act of 1897 did not apply. This proceeding in mandamus was instituted to determine the question whether or not the statute of 1897 had any application to cities of the fifth class formed under the general municipal corporations act. It appears to have been conceded in the case that the duty of the president of the board in signing and authenticating the ordinances of the city of San Buenaventura was a ministerial act, subject to enforcement by writ of mandate, if the special statute did not apply. From the facts in the case, and from such portions of the record as we have been able to examine, we are unable to discover anything that makes the decision authority for holding that the ordinance there under consideration would have been invalid if it had been attested by the city clerk and published as required by the general act.

There is nothing in the statute under which Huntington Beach was incorporated either expressly declaring or indirectly indicating that ordinances duly passed by the board of trustees of cities of the sixth class shall not become effective on their passage. There is not to be found in it any provision that signing by the president, attestation by the clerk, or publication of ordinances are conditions precedent to their becoming valid enactments. These ministerial acts are merely for the purpose of authenticating the action of the board and giving notice of the contents of the ordinances passed by it. Consequently, the signing by the president is not a condition precedent to the validity of an ordinance duly passed by the board of trustees. Commonwealth v. Davis, 140 Mass. 485, 486, 4 N. E. 577; Commonwealth v. Williams, 120 Ky. 314, 86 S. W. 553; People v. Cole, 70 Cal. 59, 60, 11 P. 481. If the board in the instant case had not by its order, declared that the ordinance should become effective only from and after its publication, it would have taken effect, under the general rule, immediately on its passage, and publication thereafter would have been merely a ministerial act to give the people of Huntington Beach notice of its requirements. City of Sacramento v. Dillman, 102 Cal. 107, 111, 36 P. 385. The board having suspended the operation of the ordinance until it was published, we are satisfied that it became effective from and after the date when that was accomplished.

[9] The suggestion is advanced that, because in the instances cited (San Buenaventura v. McGuire, supra, and State v. Taylor, supra), and in other states courts have issued writs of mandate in similar cases to compel the signing of ordinances, the courts must have concluded that the performance of such ministerial acts was essential to the validity of the enactments under consideration. Otherwise, proceeds the argument, the courts violated the rule that "a court does not do the vain and foolish think in ordering an inferior tribunal to do that which accomplishes nothing; it exercises power to issue the writ only when some useful purpose may be accomplished thereby." 16 Cal. Jur. p. 776. In the San Buenaventura Case

it was conceded that mandamus would lie, and it does not appear from the decision in the Washington case that the point was there made. While we are not now concerned with the question, we are not prepared to say that a useful purpose may not be accomplished by compelling the performance of a plain statutory duty, even though it may be ministerial and directory only. The writ of mandamus may be issued to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust or station. Code Civ. Proc. § 1085. It is well settled, of course, that, if the duty an officer is called upon to perform requires the exercise of an act of judgment on his part, his decision is not subject to be reviewed by a proceeding for a writ of mandamus. But, where the discretion ceases, and the act to be done is purely ministerial, the duty becomes absolute, and can be compelled through the application of the writ. Keller v. Hewitt, 109 Cal. 146, 149, 150, 41 P. 871; Dufton v. Daniels, 190 Cal. 577, 582, 213 P. 949.

The judgment is reversed, and the cause is remanded to the lower court, with directions to overrule the demurrer interposed to the plaintiff's complaint.

We concur: SEAWELL, J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.

---

196 Cal. 260

ENGLAND v. WINSLOW. (S. F. 10803.)

(Supreme Court of California. June 12, 1925.)

1. Executors and administrators ⊜96—Agreement between prospective executrix and another, whereby latter became voluntary trustee of money of estate, held valid as between them individually.

An agreement between prospective executrix of estate and defendant, whereby defendant was to collect certain moneys belonging to estate, and to hold it in trust, and to pay it over to whoever became legal representative of estate, thus making defendant voluntary trustee, irrespective of whether authorized, under Civ. Code § 1373, *held* a lawful contract, under Civ. Code, §§ 1549, 1550, between the parties as individuals.

2. Trusts ⊜35(1)—Defendant, collecting, receiving, and holding moneys due estate from others, held a "trustee."

Defendant, undertaking, pursuant to valid agreement with prospective executrix, to collect, receive, and hold certain moneys due to estate from other parties, thereby assumed relation of "trustee," within Civ. Code, § 2219.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Trustee.]

3. Trusts ⊜55—One undertaking to act as trustee, and thereby acquiring possession of property of another, cannot deny validity of trusts.

One undertaking to act in capacity of trustee, and thereby coming into possession of money of another, cannot deny validity of trust under which he has admittedly acted and benefits of which he has received and holds.

4. Trusts ⊜345—Defendant held to have become voluntary trustee as to moneys received by him in course of execution of estate.

Where defendant, pursuant to valid agreement with prospective executrix, voluntarily assumed relation of trustee as to moneys owing to estate by others, *held* that as to such moneys defendant became voluntary trustee of estate, and estate as beneficiary of trust had right to enforce such trust.

5. Trusts ⊜362—That estate not bound by portion of agreement to compensate voluntary trustee of its moneys held not to render trust unenforceable.

Where defendant, pursuant to agreement with prospective executrix, assumed relation of voluntary trustee as to moneys of estate, which he collected, fact that estate was not bound as to portion of agreement as to compensation, did not render a suit by estate against him unenforceable, as defendant's remedy for value of services would be against prospective executrix.

6. Trusts ⊜372(1)—Voluntary trustee of moneys of estate presumed to know that he could not recover compensation from estate.

That portion of agreement between defendant and prospective executrix whereby defendant was to be compensated for acting as voluntary trustee of moneys of estate was unenforceable against estate did not render trust unenforceable, as defendant is presumed to have entered agreement with knowledge that he could not recover from estate.

7. Limitation of actions ⊜103(2)—Limitation does not begin to run in favor of voluntary trustee until repudiation of trust.

Where defendant, as trustee of a voluntary trust, received and held moneys of estate, statute of limitations does not begin to run in his favor until there has been repudiation of his trust.

8. Limitation of actions ⊜103(3)—Voluntary trustee cannot contend that failure to account for moneys received rendered trust wrongful, setting in motion statute of limitations in his favor.

Defendant, receiving moneys of an estate as voluntary trustee, cannot, in suit against him by estate, successfully assert that his mere failure to perform his duty to turn over money to estate rendered trust wrongful so as to set in motion statute of limitations in his favor, as it would serve to defeat provisions of Civ. Code, § 2228 et seq., and section 3517.

9. Limitation of actions ⊜103(3)—Distinct act of repudiation necessary to set statute in operation in favor of voluntary trustee.

Only by the distinct act of repudiation can a trustee of a voluntary trust set statute of

limitations operating in his favor, and mere failure to perform his duty is insufficient.

10. Trusts ⟸362—Portion of agreement permitting voluntary trustee to hold moneys of estate until demanded, if void, held not to effect trustee's duty to account and deliver up money.

Assuming that portion of agreement, whereby defendant, as voluntary trustee of moneys of estate, was to hold such moneys until demanded by legal representative of estate, is void, it would not effect trustee's legal duty to account for and deliver up money, which is subject of his voluntary trust.

11. Trusts ⟸362—Delay of executrix in demanding accounting from voluntary trustee of moneys of estate held not to render trust wrongful.

Delay of executrix of estate in requiring voluntary trustee of moneys of estate to account therefor, even if breach of her duty, would not render trust wrongful as to voluntary trustee, nor could trustee urge such contention so long as he did not repudiate trust.

12. Limitation of actions ⟸102(4)—Repose doctrine of statute of limitations held inapplicable to voluntary trusts.

Rule that plea of statute of limitations is to be favored as a statute of repose is inapplicable to voluntary trusts.

In Bank.

Appeal from Superior Court, City and County of San Francisco; John J. Van Nostrand, Judge.

Action by Mary D. England, as executrix of the last will and testament of Sophia R. Winslow, deceased, against G. B. Winslow. Judgment for defendant, and plaintiff appeals. Reversed.

Hoefler, Cook & Lingenfelter, of San Francisco, for appellant.

Gerald C. Halsey and Frederic T. Leo, both of San Francisco, for respondent.

RICHARDS, J. This appeal is prosecuted by the plaintiff from a judgment of the superior court in favor of the defendant after entry of an order sustaining the defendant's demurrer to the amended complaint. The facts upon which the plaintiff's alleged right of action is founded as set forth in said amended complaint are briefly these: Sophia R. Winslow died testate on May 1, 1919. In her last will and testament Harry D. Skellinger and Mary D. England were named as executor and executrix respectively thereof. Said Skellinger failed to apply for letters testamentary, but Mary D. England did so apply, presenting said will and petitioning for its probate and the appointment of herself as executrix thereof. The court duly admitted said will to probate, and appointed said Mary D. England the executrix thereof on June 17, 1919, and she thereafter duly qualified as such executrix, and has since been acting as such. Belonging to said decedent at the time of her death was certain real estate in the city and county of San Francisco, occupied by six family apartments or flats, and which was the separate property of the decedent, in which the defendant herein, who was the husband and surviving spouse of the decedent, had no interest, and was given no share by the terms of said will. The amended complaint proceeds to allege that the defendant, "during the month of May, 1919, and after the death of Sophia R. Winslow, knowing that plaintiff was one of the persons named in said will to execute the same, agreed with plaintiff that he would collect rents due from tenants occupying said premises during such time as plaintiff desired him to do so, pay the water rates and other expenses necessary to be paid on account of the use and occupancy of said premises, and to hold in trust the net proceeds of such collections until said will should be admitted to probate and plaintiff or some other person be appointed to execute said will, and thereafter in trust until such time as plaintiff or such other person so appointed, should demand of said defendant that he pay over to plaintiff or said other person all of said net proceeds, less a compensation to be paid to defendant for his said services as such collector and trustee, amounting to the sum of 50 cents for each monthly installment of rent collected by defendant from each of said tenants; that pursuant to said agreement defendant, after the death of said Sophia R. Winslow, collected from persons occupying said premises during the months of May, June, July, August, and September of said year 1919, various sums of money which were paid to said defendant by said occupants as rent for the use and occupation of said premises during said months; that the exact amount of moneys so collected and held in trust by defendant is unknown to plaintiff, but plaintiff alleges that the aggregate amount thereof is in excess of the sum of $300; that plaintiff made no demand upon defendant for said accounting and payment over by defendant until the year 1922, but during said year, and prior to the commencement of this action, plaintiff demanded of the defendant that he account for and pay over to plaintiff the moneys so collected by him as rents for the use and occupation of said premises, in accordance with said agreement, but said defendant has at all times refused and still refuses so to do, and has not done so; that the rents so collected by defendant are the rentals of said premises earned and accrued during said months and constitute the only rentals paid for the use and occupation of said premises during such period. Wherefore plaintiff prays that defendant be requir-

ed by the order of this honorable court to account for and pay over to plaintiff all moneys collected by him from tenants and persons having the use and occupation of the properties herein described since the death of said Sophia R. Winslow, in accordance with the terms of said agreement; that plaintiff have judgment against the defendant for the amount of said moneys so collected by him, less said expenses and compensation, together with her costs and disbursements herein incurred, and that she have such other and further relief as to the court shall seem just and proper."

To the plaintiff's said amended complaint the defendant interposed a demurrer upon several grounds, but the two grounds upon which the respondent's reliance is placed upon this appeal are that said complaint does not state facts sufficient to constitute a cause of action, and that said action is barred by several designated sections of the Code of Civil Procedure. The trial court sustained the defendant's demurrer, and ordered judgment accordingly, and the correctness of its ruling in so doing is the sole issue presented upon this appeal.

The plaintiff's amended complaint is upon the face thereof one wherein the plaintiff as executrix of the estate of Sophia R. Winslow, deceased, seeks to have established a trust created for the benefit of said estate in certain money originally and at all times the property of said estate, and of which the defendant became by virtue of the agreement above set forth the voluntary trustee; and to have an accounting as to the proceeds of such trust and general relief. It is the estate of Winslow and not Mary D. England individually which is a party plaintiff in this action. Sterrett v. Barker, 119 Cal. 492, 51 P. 695.

[1, 2] The first question presented is as to the validity of the agreement between Mary D. England and the defendant out of which it is the plaintiff's claim that such trust relation arises. It is admittedly the fact that said agreement was entered into between said parties subsequent to the time when Mary D. England had been named in the decedent's will as an executrix thereof and also subsequent to the death of the deceased, but prior to the time when the said will of the decedent had been admitted to probate. It may be questioned, therefore, whether said Mary D. England, in her capacity of prospective executrix of said estate, had any authority to enter into such an agreement, unless it could be held that she was entitled to do so under the provisions of section 1373 of the Civil Code, which empowers executors before their appointment and qualification to "pay funeral charges and take necessary measures for the preservation of the estate." With this phase of the question we do not deem it necessary to deal, since we are of the opinion that without respect to the ability of said prospective executrix as such to enter into it, or of its binding force upon the estate of Winslow, it was such an agreement as the parties thereto as individuals were under no disqualification to make, and that as between such individuals it meets every requirement to render it a lawful contract under the provisions of sections 1549 and 1550 of the Civil Code. The parties thereto as individuals were capable of contracting, and consented so to do. There was a lawful object, viz., the conservation of the properties of an estate; there was sufficient consideration; and finally, there was an actual agreement by the terms of which the defendant was to proceed to collect certain moneys belonging to the estate of Sophia R. Winslow, deceased, and to hold the same for the use and benefit of and in trust for said estate; and to pay over the same to whoever was to become the legal representative of said estate upon demand. This is, we think, a fair interpretation of the agreement entered into as aforesaid between the defendant and Mary D. England under the terms of which the defendant herein acted in collecting and receiving and thereafter holding the moneys of said estate for which an accounting and recovery is sought by said estate in the present action. It was a good and valid contract in so far as the individual parties to it were concerned. It was, in fact, such an agreement as the executors and administrators of estates are, as a matter of common knowledge, constantly and almost universally making with respect to the affairs and details of estates to which they cannot personally give their attention; as, for example, they employ lawyers to attend to the probate of estates, to bring suits for the recovery or preservation of the property of estates, to collect, hold, and pay over the moneys due estates; they employ servants to perform the manual or clerical labor necessary for the benefit of estates; they contract with real estate and other agents to manage the properties of estates, to collect rents, make repairs, pay charges, and attend generally to those details of administration which are within the line of their special business adaptation, all of which are done and performed, not for the individual benefit of the executor or administrator, but for the use and benefit of the estate. It may be conceded that the estate is not a party to such agreements and is not primarily bound by them, but that fact does not militate against the validity or binding effect of such agreements as between the immediate parties to them. It is not infrequent that by the terms or in the course of such agreements trust relations are created in the course of the execution of which the moneys or properties of the estate come into the possession and under the control of the party to the

agreement who has engaged to act as such trustee. We are of the opinion that this is precisely such a case. The defendant herein, by a perfectly valid agreement between himself and Mary D. England, undertook to act in the capacity of a trustee in collecting, receiving, and holding certain moneys at all times belonging to the estate of Winslow, but due to it from other parties; and agreed to do so in such capacity for the benefit of said estate. As a result of such agreement and of his execution thereof there came into his possession and under his control certain money belonging to said estate. To such a situation it would seem that section 2219 of the Civil Code has direct application. Said section reads as follows:

"Every one who voluntarily assumes a relation of personal confidence with another is deemed a trustee, within the meaning of this chapter, not only as to the person who reposes such confidence, but also as to all persons of whose affairs he thus acquires information which was given to such person in the like confidence, or over whose affairs he, by such confidence, obtains any control."

[3] There is another reason why the defendant herein must respond to the estate of Winslow for this money which he has received and holds in the admitted relation of trustee. One who has assumed the relation and undertaken to act in the capacity of a trustee and who has thereby come into the possession and control of the money or property of another cannot be heard to deny the validity of the trust under which he has admittedly acted and the benefits of which he has received and holds. 1 Perry on Trusts, § 433. "Under no circumstances," says this author, "can a trustee claim or set up a claim to the trust property adverse to the cestui que trust, nor can he deny his title." This author further states (section 245) that a person may become a trustee by construction by intermeddling with and assuming the management of property without authority, and that during the possession and management thereof by such constructive trustees they are subject to the same rules and remedies as other trustees, and cannot avoid their liability as such by showing that they were not in fact trustees, nor can they set up the statutes of limitations. The same learned author declares (section 265) that, if a person by mistake or otherwise assumes the character of trustee, and acts as such when the office does not belong to him, he thereby becomes a trustee de son tort, and he may be called upon to account by the cestui que trust for the assets received under color of the trust. The cases cited in support of these doctrines under the various sections referred to fully sustain the text. In the case of Easterly v. Barber et al., 65 N. Y. 252, 259, the doctrine is thus stated:

"It is a well settled rule in the law of trusts that if a person not being in fact a trustee acts as such by mistake or intentionally, he thereby becomes a trustee de son tort. The rule is thus laid down by a recent writer: 'A person may become a trustee by construction, by intermeddling with and assuming the management of property without authority. Such persons are trustees de son tort as persons who assume to deal with a deceased person's estate without authority are administrators de son tort. * * * During the possession and management by such constructive trustees they are subject to the same rules and remedies as other trustees.' Perry on Trusts, §§ 245, 265, 288; Lewin on Trusts, 244; Hill on Trustees, 173. So if a person, without authority, enters upon an infant's land and takes the rents and profits he may be charged as a guardian or trustee, and so if he takes personal property. Wyllie v. Ellice, 6 Hare, 506; Drury v. Conner, 1 Har. & G. (Md.) 220; Blomfield v. Eyre, 8 Beav., 250. It is plain that this branch of the law does not rest on the strict ground of estoppel as usually expounded in the law books. It rather depends upon a principle of public policy connected with the right administration of justice. 1 Greenl. on Ev., § 210. The principle to be extracted from the cases is that the party acting as trustee shall not be allowed, in a court of justice, to set up, as against parties interested in the administration of the trust, a state of things inconsistent with his assumed character."

In the case of Damouth v. Klock, 29 Mich. 289, it is held that defendants who have assumed without authority to administer an estate, and have done so, are estopped, when called upon either in a probate court or in a court of equity for an accounting, from denying their representative character or their liability to account accordingly. In the case of Saunders v. Richard, 35 Fla. 28, 43, 16 So. 679, 684, the court said:

"The principle has already been stated, that a trustee who has accepted the trust, entered upon the discharge of his duty as trustee, and taken possession of the trust property, cannot in an action brought by his cestui que trust for an accounting for the trust property received by him allege the invalidity of his appointment as trustee."

In the case of People v. Norton, 9 N. Y. 176, 178, it appears that one of the defendants had been acting as trustee under an appointment by a court, and that the other defendant was the surety on his bond. In an action by the cestui que trust for an accounting the defendant undertook to allege the invalidity of the order of appointment on the ground that the cestui que trust had not been parties to or had notice of the proceedings. The court said:

"The true point of the objection to the validity of the change of the trustee seems to be this: That it does not appear by the recital in the bond that the cestuis que trust were parties to or had notice of the proceeding. But this is an objection which neither the trustee nor his

surety can be allowed to make. Lynch got possession of the trust estate under the proceeding by color of which he claimed to be trustee, and Norton voluntarily undertook as his surety that he should faithfully administer the trust. If the proceeding was irregular for want of notice to the children of Mrs. Lynch, they might object to it in a proper manner, for that cause; but Lynch, after having obtained the property upon the pretense of being a trustee, cannot be permitted to deny his liability to account as such. The defendant, who voluntarily became his surety in order that he might take the trust property, is for a like reason precluded from denying his liability as surety."

In the case of Lehmann v. Rothbarth, 111 Ill. 185, the husband of the administratrix of an estate and guardian of minor heirs assumed to act without authority for his wife in collecting and handling the funds of the estate. In an action brought against him by the heirs of the estate for an accounting, it was held that, the defendant having assumed to act as the agent of the administratrix and guardian, and having thereby come into possession of the property of the estate and of the heirs thereof, he was liable to an accounting thereof as a trustee, and could not be heard to allege his want of authority to act in his assumed capacity. In the case of Shearman v. Morrison, 149 Pa. 386, 24 A. 313, it was held that money received by an attorney in fact and trustee for others which was not within the letter of his appointment but which was received by virtue thereof must be accounted for by him to his cestui que trust as a trustee. notwithstanding the irregularity of his appointment as such trustee. The cases might be multiplied indefinitely to the same effect, and it must be regarded as settled law that one who assumes voluntarily to act in the capacity of a trustee and receives and holds the funds of another by virtue of such assumed relation, cannot be heard to allege the irregularity or invalidity of his appointment as such trustee in an action brought by the cestui que trust for an accounting for the proceeds of his trust. In Chaplin on Trusts, 78–192, the same doctrine is laid down; the author declaring that trustees are estopped to deny the regularity of proceedings under which they secured possession of the trust property, citing in support thereof People v. Norton, supra; Johnston v. Smith, 25 Hun, 175, 177; Dodge v. St. John, 96 N. Y. 260; People v. Chalmers, 60 N. Y. 154.

[4] It follows irresistibly that the defendant, by virtue of his said agreement whereby he voluntarily assumed the relation of trustee with relation to the moneys to presently come into his hands in the course of its execution, became as to such moneys the voluntary trustee of the estate of Winslow with respect to such moneys which were at all times the property of the estate; and hence that the said estate as the beneficiary of said trustee had a right to establish and enforce the same in this form of action.

[5, 6] It is however, the contention of the defendant that the trust which the estate is by this action seeking to enforce as a result of said agreement between himself and Mary D. England is unenforceable against him at the suit of the estate, for the reason that the estate is not bound by the portion of said agreement relating to his compensation, and hence he cannot be bound to respond to the estate for the moneys belonging to it which he has collected and received by virtue of the other terms of said agreement. There are two answers to this contention. The first is that as between the defendant and Mary D. England the agreement is good and is enforceable as to all its parts, and, if the defendant has performed any services thereunder, he has his remedy against the latter for the value of such services according to the terms of said agreement; and the other answer is that parties entering into contracts of this character do so with knowledge of the law, and that the parties to this agreement therefore knew that the defendant could have primarily no recourse thereunder to the estate of Winslow for his compensation for services performed for the use and benefit of the estate, but must look to the prospective or actual executrix of said estate in her individual capacity for his reward; and hence that he agreed and undertook to act as a trustee for the benefit of said estate without the right or expectation of compensation directly from it. Having received its property as such trustee and under such understanding, he cannot refuse to render an accounting for such property and to pay the same over to its legal representative on demand and upon the ground stated. In this respect he is in no better or worse position than an attorney for the estate would be who had collected some of its money or property upon an agreement with a prospective or appointive executrix as to the amount of his attorney's fees. In either case the agent or attorney is acting as a trustee of the estate with relation to any of its moneys which may come into his hands as such, and must pay the same over to it, looking for his compensation to the executrix individually with whom the agreement was made.

[7] The next question presented for consideration is that of the defendant's plea of the statute of limitations. But, if our foregoing conclusions are correct to the extent of holding that the defendant is the trustee of a voluntary trust, and that he received and held the moneys of the said estate in that capacity and not otherwise, the authorities are uniform in holding that the statute of limitations does not begin to run in favor of such a trustee until there has been a repudiation of this trust. Schroeder v. Jahns, 27 Cal. 274; MacMullan v. Kelly, 19 Cal.

App. 700, 127 P. 819; Cohn v. Goodday, 191 Cal. 615, 217 P. 756, and cases cited. No repudiation of said trust appears upon the face of the amended complaint herein, at least prior to the alleged demand and refusal of the defendant thereupon to turn over said moneys to said estate or to render an accounting therefor. The present action was commenced shortly after the date of such demand and refusal. The respondent herein, however, insists that this action is not an action for the enforcement of a trust, but is to be deemed an action by said estate for moneys had and received by the defendant for its use and benefit; and that in such form of action his plea of the statute of limitations is available. The amended complaint herein is not, as we have seen, in form an action for moneys had and received, but, even if it could be construed to be such, it affirmatively appears that the defendant received such moneys in the capacity of a voluntary trustee for the benefit of said estate, and, this being so, the uniform current of authority is that, regardless of the form of action, the defense of the statute of limitations cannot be availed of until there has been a repudiation of the trust, and until the statutory period thereafter has expired. 1 Perry on Trusts, § 246; Putnam v. Lincoln Safe Deposit Co., 191 N. Y. 166, 183, 83 N. E. 789; Soar v. Ashwell, 2 Queen's Bench, 390; Goodhue v. Barnwell, Rice, Eq. (S. C.) 198.

[8, 9] The defendant, however, makes the further contention that, conceding that he came lawfully into the possession of the said moneys of the estate, it was his duty to turn the same over to the estate or to the legal representative thereof as soon as the latter was appointed and qualified, and that his possession of such moneys became wrongful immediately upon his violation of his duty and trust in that regard; and hence that the statute of limitations immediately commenced to run. To admit the soundness of this contention would be, not only to violate a cardinal maxim of jurisprudence which forbids any person from taking advantage of his own wrong (Civ. Code, § 3517), but would also be to violate that equally essential rule of equity embodied in section 2228 et seq. of the Civil Code, which requires trustees to exercise the highest good faith with respect to the properties and beneficiaries of the trust, and which forbid trustees to obtain any personal advantage whatever in the course of its administration. To permit this trustee of a voluntarily assumed trust to assert successfully that his mere failure or neglect to perform his duty to account for and turn over the money of the estate in his possession as such trustee rendered his trust wrongful so as to set in motion the statute of limitations in his favor would not only serve to defeat these statutory provisions of the Code, but would have the effect of imperiling every other express or voluntarily assumed trust, no matter how extensive or how sacred, by the mere failure of an erring or neglectful trustee to perform his duty in promptly accounting for or paying over the proceeds of his trust. The only way in which the trustee of an express or voluntary trust can set the statute of limitations in operation in his favor with respect to it or its properties in his hands is by a distinct act of repudiation amounting to a denial of its existence, and no mere tacit failure of the trustee to perform his duty in respect to such trust could or should be held to amount to a repudiation of it so as to set the statute of limitations in motion in his favor and as a result of his own neglect of duty. Janes v. Throckmorton, 57 Cal. 368; Zuck v. Culp, 59 Cal. 142; McClure v. Colyear, 80 Cal. 378, 29 P. 175; Roach v Caraffa, 85 Cal. 436, 25 P. 22; Butler v. Hyland, 89 Cal. 575, 26 P. 1108; Luco v. De Toro, 91 Cal. 405, 18 P. 866, 27 P. 1082. See Odell v. Moss, 130 Cal. 352, 62 P. 555.

[10, 11] Again, it is urged by the respondent herein that under the terms of the agreement out of which or of the execution of which this trust arose, the trustee was entitled to hold the moneys in question until such time as they should be demanded by the legal representative of the estate, and that such an agreement would be void as beyond the power of either the prospective or appointive executrix to make it, and hence that the entire agreement is void. We do not concede that the terms of the agreement contemplated any such prolonged retention of these moneys by the trustee after the appointment and qualification of a legal representative of the estate as would subject the agreement to this criticism, but, even if it were to be so construed and, if so interpreted, this portion of said agreement could be held void, it would not follow that the entire agreement would thereby be violated and the trustee be relieved of all duty to pay over to the estate the moneys belonging to it and which he has come into the possession of under the other portions of said agreement. The clause in said agreement relating to the duty of the trustee to account and pay over to said estate the moneys which he has collected and holds as such trustee upon demand is easily separable from the provisions of said agreement which empower and have enabled him to collect such money, and, even if the said clause in said agreement should be held void, it would not affect the legal duty of the trustee to account for and deliver up the money which is the subject of his voluntary trust. It is, however, urged that it was the duty of the executrix to have immediately upon her appointment and qualification required of said trustee that he account for and pay over said moneys, and that the failure to perform such

duty would render the further holding of such moneys wrongful on the part of the trustee, and thus start the running of the statute of limitations. There is no merit in this contention, for, even if it were conceded that the delay of the executrix would be a breach of her duty to the estate, it would not render the trust wrongful as to the voluntary holding of its funds in that capacity by the trustee, nor could the trustee who was thus holding such funds and benefiting by the delay be heard to urged such contention so long as there had been on his part no repudiation of his trust.

[12] Finally, it is urged that the plea of the statute of limitations is to be favored as a statute of repose. While this is a true doctrine as to those persons who are standing at arm's length in their dealings with each other, it has never been given application to voluntary trusts, since to do so would be to render such statute not a beneficent statute of repose, but a vile instrument of wrong in relation to those who are standing and continuing in voluntarily assumed confidential relations to each other. It has therefore no application to the facts of the instant case.

The judgment is reversed.

We concur: SEAWELL, J.; SHENK, J.; WASTE, J.

196 Cal. 278

HOFFMAN v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11652.)

(Supreme Court of California. June 17, 1925. Rehearing Denied July 16, 1925.)

Mandamus ⊂=3(11) — On failure to show that plain, speedy, and adequate remedy is not available by intervention, mandamus to compel entering order substituting petitioner as trustee in bankruptcy may be denied.

In view of Code Civ. Proc. § 1086, where petition for writ of mandate to compel entry of order substituting petitioner as trustee in bankruptcy makes no showing that plain, speedy, and adequate remedy is not available by intervention, under section 387, petition will be denied.

In Bank.

Mandamus by William Hoffman, as trustee in bankruptcy of the estate of J. Charles King, against the Superior Court of the City and County of San Francisco and Frank J. Murasky, judge, to compel entry of order substituting petitioner as defendant in certain action. Writ denied.

Wallace & Ames, of San Francisco, for petitioner.

PER CURIAM. This is a petition for a writ of mandate to compel the respondents to enter an order substituting petitioner, as trustee in bankruptcy of the estate of J. Charles King, a bankrupt, in place of said King, as defendant, in an action now pending in the respondent court. No showing is presented from which it appears to us that a plain, speedy, and adequate remedy (Code Civ. Proc. § 1086) is not available to petitioner in the premises by intervention (Code Civ. Proc. § 387).

The petition is denied.

196 Cal. 274

CITY COUNCIL OF SAN JOSE v. GOODWIN, City Manager. (S. F. 11622.)

(Supreme Court of California. June 17, 1925.)

Municipal corporations ⊂=956(4) — Primary election held not "general election" within charter as to submission of tax rate ordinance.

Under San Jose charter, § 61, providing that tax rate of $1 per $100 may be exceeded only pursuant to an ordinance submitted and adopted at a general or special election, a first or primary election was not a "general" election in view of sections 9, 10, 13, 18, 19, 20, 21, 22, 24, distinguishing between "general" and "primary" elections.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, General Election.]

In Bank.

Application by the City Council of the City of San Jose for writ of mandate directed to Clarence B. Goodwin, as City Manager of the city of San Jose. Writ denied.

Archer Bowden, of San Jose, for petitioner.

H. G. Hill and Bohnett, Hill & Campbell, all of San Jose, for respondent.

SHENK, J. This is an application on behalf of the city of San Jose for a writ of mandate to compel its city manager to include in his estimate of revenue and expenditures for the fiscal year commencing December 1, 1925, an amount based on a tax rate of $1.30.

At an election, held on May 1, 1922, there was submitted to the electors of said city an ordinance providing that the maximum tax rate for the fiscal year commencing December 1, 1922, December 1, 1923, December 1, 1924, and December 1, 1925, should be fixed at $1.30. The proposed ordinance received a vote sufficient for its adoption, if it was lawfully submitted at said election. The authority for the submission and adoption of such an ordinance is found in section 61 of the city charter, which provides:

"The tax levy authorized by the council shall not exceed one dollar upon each one hundred dollars ($100.00) of the assessed valuation of all real and personal property within the city,

exclusive of the amount necessary to pay the principal of and interest on the bonded indebtedness of the city, except by ordinance approved, or adopted by the affirmative vote of the majority of the people voting at a general or special election." Stats. 1915, p. 1891.

The ordinance in question was submitted and voted on at a first or primary election especially provided for in the charter. It is conceded that such a primary election is not a special election as contemplated by said section 61. The sole question for determination is whether the first or primary election, at which the ordinance was submitted, was a general election within the meaning of said section 61.

The tax levied by the city council must be based on the estimated revenue and expenditures included within a budget submitted by the city manager, and he has refused to submit such a budget based on a tax rate of $1.30. His contention is that the said ordinance is invalid for the reason that it was not submitted to a vote of the people at a general or a special election as required by the charter. On behalf of the city it is contended that as the primary election under the charter is held at stated intervals, and that as all electors of the city were privileged to vote at said election on the question of the approval or rejection of said ordinance, the said primary election was to all intents and purposes a general election as contemplated by said section 61. An examination of other provisions of the charter must be resorted to in order to determine whether a primary election may be deemed a general election for the purpose of the submission of said ordinance.

Section 9 of the charter provides that candidates to be voted for at general municipal elections shall be nominated as therein provided. "The first, or primary, election shall be held on the first Monday in May," etc. Every person desiring to become a candidate for an elective office must, at least 30 days prior to a primary election, file with the city clerk a statement declaring, among other things, that he is a candidate for nomination to the designated office at the forthcoming primary election and requesting that his name be printed on the official primary ballot for nomination at such primary election. In section 10 the petition for nomination of candidates is required to refer to the primary election. In section 13 it is provided that a petition for nomination must be presented to the clerk, within a designated time before the primary election. Sections 18 and 19 provide for a printing of the official primary ballot. Section 20 provides generally for the conduct of the primary election, and that under certain conditions a candidate may, upon receiving a required number of votes at such primary election, be declared elected. Section 21 is headed "General Election" and contains the following provisions:

"If at any election held as above provided there be any office to which the required number of persons was not elected, then as to such office the said first or primary election shall be considered to have been a primary election for the nomination of candidates, and a general election on the second Monday succeeding said first election shall be held to fill said office or offices. The candidates not elected at such first election equal in number to twice the number to be elected to all such offices, who have received the highest number of votes for the respective offices at such first or primary election, shall be the only candidates at such general election; * * * The candidates equal in number to the number of persons to be elected, who shall receive the highest number of votes at such general election, shall be declared elected to such office."

Section 22, under the heading "Rules Governing General Election," provides that all provisions theretofore set forth as to the conduct of an election so far as applicable shall govern the general election. Section 24, relating to elections for short terms, provides, "that on the ballots at the first or primary and general municipal elections, the candidates for such short term shall be listed as for a separate office."

It is apparent that, under the several charter provisions above referred to, the framers of the charter were at pains to distinguish between a primary and a general election. The terms are not interchangeable in any sense. Nor do we think that the fact that all of the officers of the city may be elected at the first primary election would have the effect of converting such primary election into a general election, as contemplated by the charter. The city relies on the case of Bigelow v. Board of Supervisors, 18 Cal. App. 715, 124 P. 554, where it was held that the presidential primary election was not a general election at which a local option question might be submitted under the terms of the local option law. It may be assumed that the essential elements of a general election, as defined in that case may be attached to a primary election under consideration here, but it would not follow that such primary election could, by judicial definition, be transformed into a general election, when the charter by unmistakable terminology clearly distinguishes such elections. A consideration of all of the terms of the charter would seem to make it apparent to the point of demonstration that, under that instrument, a primary election is not a general election as contemplated by said section 61. The organic law of the city authorizes the council to exceed the one-dollar tax rate only pursuant to an ordinance submitted and adopted at a general or special election. As the ordinance in question was not so submitted or adopted, it lacks the sanction of the charter to give it validity.

The peremptory writ is denied, and the alternative writ is discharged.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

---

72 Cal. App. 367

MEYER v. MOORE. (Civ. 2808.)

(District Court of Appeal, Third District, California. April 21, 1925.)

1. Appeal and error ⟹1170(3)—Judgment not reversed, in absence of prejudice from overruling of demurrer.

In action on guaranty of dividends on stock, error, if, any, in overruling demurrer to complaint not stating with technical accuracy that dividends had not been paid, *held* not ground for reversal, in absence of any claim that sum had ever been paid, in view of Const. art. 6, § 4½, prohibiting reversal, in absence of showing that alleged error was prejudicial.

2. Corporations ⟹82—Written contract as to dividends presumptive evidence of consideration.

Under Civ. Code, § 1614, written contract guaranteeing dividends on corporate stock is presumptive evidence of consideration.

3. Corporations ⟹82—Burden of proving want of consideration of written contract is on defendant.

In action on written contract guaranteeing dividends on corporate stock, burden of proving want of consideration is on party seeking to avoid it, in view of Civ. Code, § 1615.

4. Guaranty ⟹4—Guaranty of certain dividends held not collateral undertaking.

Written guaranty by promoter of 8 per cent. dividends on stock, given as inducement for purchase thereof, *held* an independent contract, and not collateral and dependent on any promise of corporation issuing stock, as "guaranty," or "guarantee," does not necessarily import contract of guaranty, but may import an original obligation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Guarantee.]

Appeal from Superior Court, Yuba County; K. S. Mahon, Judge.

Action by H. C. Meyer against W. J. Moore. Judgment for plaintiff, and defendant appeals. Affirmed.

Carr & Kennedy, of Redding, for appellant.

Alvin Weis, of Marysville, for respondent.

PLUMMER, J. Plaintiff had judgment for the sum of $400. From this judgment the defendant appeals. It appears from the transcript:

That the defendant, during the time covered by the proceeding referred to herein, was a stockholder and president of the Ellamoore Candy Company, a corporation organized and existing under the laws of the state of Nevada, and having its principal place of business at the city of Reno, therein. That prior to the 9th day of April, 1921, the defendant had solicited the plaintiff a number of times to invest the sum of $5,000 in the capital stock of the said Ellamoore Candy Company. That the plaintiff was loath to invest in the capital stock of that company, and finally stated to the defendant that he would do so if he had some security. That the defendant at that time was promoting said company and selling the stock thereof. That, after the making of such statement by the plaintiff to the defendant, the defendant executed and delivered to the plaintiff an instrument in writing, in the following words and figures, to wit:

"Marysville, Cal., April 9th, 1921.

"I, W. J. Moore, guarantee 8 per cent. interest on $5,000 investment in Ellamoore candy co payable anualy

"Yours truly W. J. Moore."

That thereupon the plaintiff invested the sum of $5,000 in the capital stock of said candy company, and received therefor two certificates, each representing 250 shares—one issued in the name of himself and one in the name of plaintiff's wife. Nothing having been paid in the way dividends on the capital stock of said corporation, the plaintiff began this action, based upon the written instrument just set forth. The complaint sets forth the plaintiff's cause of action in the following manner:

"II. That on the 9th day of April, 1921, at Sutter, in the county of Sutter, state of California, in consideration that the plaintiff, at the request of the defendant, would invest $5,000 in stock of said Ellamoore Candy Company, the defendant guaranteed by a memorandum in writing, made and subscribed by said defendant, a return and profit of 8 per cent. on said investment, payable annually, and promised to be answerable to plaintiff for the payment thereof.

"III. That plaintiff herein thereupon, and acting on his faith in said guaranty, invested the sum of $5,000 in the stock of said Ellamoore Candy Company, and paid over said sum of $5,000 to the agent of the said company, and received in return therefor his certificate for 500 shares of the stock of said company, of all of which the defendant herein had due notice.

"IV. That said Ellamoore Candy Company has never to this date paid any dividends whatever on said stock, and plaintiff herein has received no return or profit therefrom, either from said Ellamoore Candy Company or from defendant herein. That before the commencement of this action plaintiff demanded of defendant the payment to him of $800, being 2 years' interest on said investment, as guaranteed by defendant, but that defendant refused to pay the same, and has ever since neglected and refused to pay the same or any part thereof."

To this complaint the defendant assigned two grounds of demurrer: (1) That said complaint does not state facts sufficient to constitute a cause of action; and (2) that said complaint is uncertain, in that it does not appear therefrom what, if any, consideration the defendant received for the execution of the written instrument referred to in the second paragraph of plaintiff's complaint. This demurrer being overruled, the defendant answered, denying the allegations contained in the second and third paragraphs of the plaintiff's complaint, and admitted the allegations contained in the fourth paragraph of plaintiff's complaint.

[1] The appellant insists that his demurrer should have been sustained, and sets forth, among other things, that there is no sufficient allegation of nonpayment of the 8 per cent. referred to by the Ellamoore Candy Company, and no sufficient allegation that the defendant had not paid said sum to the plaintiff. As we have stated, the defendant answered, admitting the allegations set forth in the fourth paragraph of the plaintiff's complaint, and, even though it be admitted that the allegations contained in said paragraph are not technically sufficient, as measured by the strict rules of pleading, yet it satisfactorily appears therefrom to the ordinary understanding that no return has been paid to the plaintiff, by reason of said investment, either by the candy company or by the defendant. There is no claim appearing anywhere in the record that such sum has ever been paid by either the candy company or the defendant, and under such circumstances we think that the error of the trial court, if any, in ruling upon the defendant's demurrer upon this ground, falls within the saving provisions of section 4½ of article 6 of the state Constitution, where it is provided:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

The error here is only a matter of technical pleading, and could not, even in the remotest degree, have affected the substantial rights of any of the parties to this proceeding. The general allegation that nothing had been paid, as set forth in the complaint, is admitted, and it cannot be claimed that any injustice was done the defendant, where there is not a scintilla of evidence to indicate anything to the contrary, and no pleading on the part of the defendant, other than the admission to which we have just referred.

[2, 3] As to the second ground of demurrer, the answer is found in section 1614 of the Civil Code, "a written instrument is presumptive evidence of a consideration." We may also add that section 1615 of the same Code places the burden of showing want of consideration to support a written instrument upon the party who seeks to invalidate it or to avoid it.

[4] The appellant next argues that the instrument sued on is a collateral undertaking, and that the guarantor or defendant becomes liable only on the default of the principal. The complaint in this case, as we have said, alleges that the Ellamoore Candy Company had not paid any dividends upon the stock in question, that the plaintiff had not received any profit therefrom, and that the defendant had not paid said guaranteed income, though demand had been made therefor. Considerable learning is exhibited in the argument of counsel, going to show that the liability of a guarantor is secondary, and his contract is collateral to that of his principal; that the principal in this case, the Ellamoore Candy Company, had not promised to pay any profits or dividends whatever to the plaintiff; that all the Ellamoore Candy Company could promise, and the promise that would be implied by law, would be that the directors of the company would conduct the business thereof in a legal manner, and to the best possible interests of the stockholders; and therefore that, as the obligation of a guarantor must be no larger in amount, nor in other respects more burdensome than that of the principal, the defendant in this case assumed no liability whatever by reason of the execution and delivery of the written instrument hereinbefore set forth, as an inducement to the plaintiff to invest the sum of $5,000 in the stock of said candy company. Numerous authorities are cited to support the contentions made by the appellant, but, for the reasons to be hereinafter stated, we think they are inapplicable. We think that the writing set forth in the transcript in this case, taken in connection with the circumstances under which it was delivered, constitutes an independent contract, and is not collateral to any promise on the part of the Ellamoore Candy Company to pay to the plaintiff annually any sum of money whatever. In the case of Hill v. Smith, 21 How. 283, 16 L. Ed. 113, the Supreme Court of the United States had before it the identical question presented here. In that case the defendants executed and delivered an instrument in writing as an inducement to the plaintiff to subscribe for certain shares of stock in the Cincinnati, Newcastle & Michigan Railroad Company, in payment for a right of way through his land, instead of cash upon an agreement, which, after reciting what we have said, read:

"Now, we, the undersigned, in consideration of the premises, hereby guaranty to the said

Henry Hill, that the said stock shall be worth par in three years from the date of this instrument; and if at the expiration of that date said stock shall not be worth par, we guaranty the said Henry Hill that the said Cincinnati, Newcastle, & Michigan Railroad Company shall make up to him or pay him whatever sum the said stock shall be worth less than par, so as to make the said stock worth par to said Henry Hill at that date."

The stock became worthless. It was held by the court that this was not a collateral agreement of guaranty, though the word "guaranty" was used, but was an original covenant on the part of the defendants to induce the plaintiff to accept stock in the railroad company, as payment for his lands, that no suit was required to be first instituted against the corporation, but that the plaintiff was entitled to maintain said action against the defendants upon said written promise, as being an original agreement.

In Moorehouse v. Crangle, 36 Ohio St. 130, 38 Am. Rep. 564, a stockholder and president of a corporation orally promised the plaintiff that, if he would subscribe and pay $500 for shares of the capital stock of the corporation, he should receive 15 per cent. of that amount in a year. It was held that such promise did not amount to a covenant to answer for the debt, default, or miscarriage of another, but was an original obligation. This case quotes with approval the case of Hill v. Smith, supra, and comments upon the use of the word "guaranty" as follows:

"In noticing the word 'guaranty,' which was used in that contract, and which was relied on as importing a collateral contract, it is said this term is usually applied to a collateral undertaking, yet, when taken in connection with the other terms of the instrument, the contract is clearly an original, independent one."

A number of authorities are also there cited in support of the holding in that case. In Kilbride v. Moss, 113 Cal. 432, 45 P. 812, 54 Am. St. Rep. 361, a purchase of the capital stock of a corporation was made at the request of a large stockholder, who, in order to induce the purchase, verbally promised the purchaser to return the money paid by him for the stock should it become worthless. It was held in that case that the promise was an original one and not a guaranty, and the distinction is drawn between a promise which is original and one which is only collateral to the undertaking of a third party. It is there said:

"A contract of guaranty is a collateral undertaking, and cannot exist without the presence of a main or substantive liability to which it is collateral."

There, as here, there is no primary liability on the part of any third person. The candy company, as we have stated, entered into no such contract as is here sued upon, and made no promises such as were made by the defendant in order to induce the plaintiff to purchase shares in the capital stock of the corporation.

The words "guaranty" or "guarantee" do not always import a contract of guaranty. These words are often used in the sense of promise or agree, etc., importing an original obligation on the part of the person executing such contract. 13 Cal. Jur. 87, § 3.

The trial court entered judgment in favor of the plaintiff for the sum of $400, being 8 per cent. upon the par value of the certificate issued in the name of the plaintiff. We think the cases which we have cited are controlling here, and that the various decisions cited by appellant, relating to instances where the contract is not original, have no application.

The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; McDANIEL, Justice pro tem.

72 Cal. App. 363

SWIM v. JUHL et al. (Civ. 5005.)

(District Court of Appeal, First District, Division 2, California. April 20, 1925. Hearing Denied by Supreme Court June 17, 1925.)

1. Frauds, statute of ⊂⊃23(4)—Nonsuit properly granted, where cause was based on oral promise to pay for services of physician already employed.

Where, in action to recover for medical services rendered to daughter, the mother and her husband were joined as defendants because former had promised to pay for such services, and it appeared the agreement was not in writing, and was made subsequent to employing physician, *held* nonsuit on such cause was properly granted; agreement under Civ. Code, § 1624, being void.

2. Account stated ⊂⊃3—Frauds, statute of ⊂⊃23(4)—Failure to reply, on receipt by mother of bills for medical services to daughter, held to create no liability, since her promise was not in writing; attempted account stated can create no liability, where none theretofore existed.

Where medical services were rendered to daughter, and her mother by oral agreement promised to pay therefor, *held* that failure of mother to reply, upon receipt of two or three bills for the services, created no liability as an account stated, since her promise, not being in writing, was void, and an attempted account stated could not create a liability where there was no legal, existing obligation upon which the account could be stated.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by Meurice Swim against Ethel Raye Juhl and others. From an order

granting a nonsuit, plaintiff appeals. Affirmed.

Meurice Swim and Russell P. Tyler, both of San Francisco, for appellant.

David E. Marchus, of San Francisco, for respondents.

NOURSE, J. Plaintiff sued on an assigned claim for medical services alleged to have been rendered the defendant Dorothy E. Bradley. The defendants Ethel Raye Juhl and her husband, Jesse Peter Juhl, were joined, on the theory that the former, who was the mother of Dorothy Bradley, promised to pay for the services rendered her daughter. The Juhls answered, and went to trial before the court sitting without a jury. At the close of plaintiff's case, the court, on motion of these two defendants, granted a nonsuit. The appeal is taken from this order, and is presented on a transcript prepared under section 953a, Code of Civil Procedure.

The complaint was framed on two causes of action—one for the reasonable value of the medical services rendered, the other upon an account stated. On this appeal the appellant concedes the correctness of the ruling as to the first cause of action, because, the employment of the physician having been made by the daughter, and the alleged agreement of the mother to pay in case of the daughter's default not having been in writing, and having been made subsequent to the employment, the mother's contract was void because of the provisions of section 1624, Civil Code, commonly referred to as our statute of frauds.

As to the second cause of action, the evidence is that, after the services had been rendered, and after the daughter had been released from the hospital, appellant's assignor sent a bill for his services to Mrs. Bradley, and, receiving no reply from her, sent two or three bills for the same account to Mrs. Juhl. No reply was received from her and upon this fact the appellant bases his claim of an account stated. The appellant's theory is that, conceding the original contract of the mother to answer for her daughter's default to be void because not in writing, her failure to object to the bills when rendered created a new contract, which was not controlled by the statute of frauds. The answer of the respondent is that an account can be stated only when based upon an existing legal obligation, and, the promise of the mother being void because of the statute of frauds, no valid contract could be created by the purported statement of account. The respondents also argue that the question of the reasonableness of the time within which the mother failed to object to the bill was a question of law for the court and that on this appeal we must assume that the court held that a reasonable time had not elapsed.

Appellant relies on Converse v. Scott, 137 Cal. 239, 70 P. 13, and Bennett v. Potter, 180 Cal. 736, 183 P. 156, holding that an account stated may rest in parol when based on an executed contract. Other cases are cited to the point that an account stated becomes a new contract upon which suit may be based without proof of the original contract. But none of these cases holds that the mere failure to object to a bill rendered can ripen into an account stated, where no legal indebtedness existed at the time. We had occasion to consider this same question in Dawson Terminals Co. v. Rosenberg, etc., Co., 63 Cal. App. 489, 491, 218 P. 782. On this subject we adopted the following language from 1 Ruling Case Law, page 215:

"The rule that an account which has been rendered, and to which no objection has been made within a reasonable time, is to be regarded as admitted by the party charged as prima facie correct, assumes that there was some indebtedness between the parties, for there can no liability on an account stated if no liability in fact exists, and the mere presentation of a claim, although not objected to, cannot of itself create a liability."

In Stimson Mill Co. v. Hughes Mfg. Co., 8 Cal. App. 559, 561, 97 P. 322, 323, it was said:

"An account stated must be founded on previous transactions of a monetary character. * * * It cannot be made the instrument to create a liability where none before existed."

In Auzerais v. Naglee, 74 Cal. 60, 67, 15 P. 371, 373, the Supreme Court said:

"An open account already barred by the statute of limitations cannot be relieved from the bar of such statute by an oral statement of such account, for the reason that under our Code (Code Civ. Proc. § 360) no acknowledgment or promise is sufficient evidence of a new or continuing contract by which to take the case out of the operation of the statute, unless the same is contained in some writing signed by the party to be charged thereby."

[1] There is no essential difference in its application to the question at hand between an obligation barred by the statute of limitations and one void under the statute of frauds. The absence of a writing to answer for the daughter's default rendered the mother's original agreement void, so that there was no legal existing obligation upon which the account could be stated. Though the contract with the daughter for the performance of the services was executed, the contract of the mother to answer for the daughter's default was unexecuted.

[2] As an account stated cannot create a liability where none has theretofore existed (Bennett v. Potter, 180 Cal. 736, 747, 183 P. 156), and as the oral promise of the mother to answer for the default of her daughter was void because not in writing, it follows

that the attempt to state an account without any writing on the part of the party sought to be charged did not create any liability enforceable against her.

Order affirmed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

72 Cal. App. 331

STONE v. CORDUA IRR. DIST.

(Civ. 2881.)

(District Court of Appeal, Third District, California. April 17, 1925. Hearing Denied by Supreme Court June 15, 1925.)

1. Constitutional law ⊜82—Constitutional rights of citizen not abridged unless welfare of public is really and substantially involved.

Constitutional rights of a citizen ought not to be abridged on ground of public policy unless welfare of public is really and substantially involved.

2. Eminent domain ⊜74—Owner of land taken for drainage ditch held entitled to have just compensation made before land taken.

Owner, through whose land drainage ditch had been constructed by irrigation district organized under Irrigation District Act, and amendments thereto without his knowledge or consent and put to public use, *held* entitled to have just compensation made before his land was taken, in view of Const. art. 1, § 14, and Code Civ. Proc. § 1243, that district might bring an action to condemn a right of way for ditch through his land, and take immediate possession thereof, without any substantial interference with public service in which it is engaged.

3. Eminent domain ⊜308—Injunction decree should have gone no further than to restrain irrigation district from using that part of drainage ditch on owner's land.

Injunction decree should have gone no further than to restrain irrigation district from using that part of drainage ditch on owner's land, where part of judgment from which no appeal was taken restrained district from causing water to overflow owner's lands and no damage thereto would result from use of ditch for such length of time as might be reasonably necessary to enable district to acquire right of way by condemnation.

Appeal from Superior Court, Yuba County; Ernest Weyand, Judge.

Suit by W. P. Stone against the Cordua Irrigation District for damages caused by overflow of drainage ditch and for an injunction. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

W. H. Carlin, of Marysville, for appellant.

Crofton & Wetmore and Frank A. Duryea, all of Marysville, for respondent.

FINCH, P. J. The plaintiff owns the southwest quarter of section 29, township 16 north, range 4 east, in Yuba county; the land being outside the boundary lines of the defendant district. The defendant is an irrigation district organized under the California Irrigation District Act (Stats. 1897, p. 254, and amendments thereto). Within the district, in section 19 and the sections northerly thereof, rice is raised on 700 acres of land for the irrigation of which water is furnished by defendant. The Southern Pacific Railroad runs in a northeasterly direction and touches the southeast corner of section 19. The natural drainage of the 700 acres of rice land and certain other lands in the district is in a southwesterly direction through a slough which is west of the railroad. Nigger Jack slough runs in a southwesterly direction in a course nearly parallel with and approximately a quarter of a mile east of the railroad. It enters plaintiff's land near the middle of the north boundary thereof, and a short distance southwesterly from the point of entrance it divides into two branches; the east branch crossing plaintiff's south boundary, and the west branch running westerly to a point near the west boundary and thence southerly to about the middle of the west boundary, where it turns again and crosses the west boundary in a southwesterly direction. The two branches unite again below plaintiff's land. His land was leased to tenants, and he resided in the city of Oakland, Cal.

The defendant endeavored to obtain a right of way for a drainage ditch through lands lying south of section 19, but failing to reach an agreement with the owners of such lands, it was determined to construct a drainage ditch along the south boundary line of section 19 to the southeast corner of that section and thence south to Nigger Jack slough. It caused a letter to be mailed to the plaintiff, addressed to Oakland, requesting a right of way through his land; but for some reason it was not delivered to him and was later returned to defendant. In the month of May, 1920, the defendant constructed the proposed drainage ditch, referred to in the judgment as a "drag-line" ditch along the south boundary line of section 19 and through the embankment of the railroad, thence south to the northwest corner of the plaintiff's land, and thence, without plaintiff's knowledge or consent, in a southeasterly direction through his land for a distance of about 500 feet to the west branch of Nigger Jack slough. The ditch through plaintiff's land was excavated to a depth of several feet and to a width of about eight feet on the bottom. It followed the course of a smaller ditch which theretofore had drained a county road. During the irrigating seasons of 1920 and 1921 such quantities of wa-

ter were turned into the ditch as to cause the slough to overflow and damage the crops growing on plaintiff's land. It does not appear when the plaintiff first learned that the ditch had been constructed through his land. It appears, however, that in December, 1921, the plaintiff and the officers of the defendant discussed the question of damages to the land from the overflow and the matter of securing a right of way through it for drainage purposes. The record does not show when this action was commenced, but the amended complaint was filed July 10, 1922.

The judgment awards plaintiff damages for the flooding of his land and enjoins defendant from discharging "any foreign waters" into Nigger Jack slough "so as to cause said Nigger Jack slough, or any of its branches, at or on plaintiff's land to overflow any of the natural and unleveed banks thereof." The defendant has not appealed from the foregoing parts of the judgment, but has appealed from the following provisions thereof:

"It is further ordered, adjudged, and decreed that the defendant do within thirty days after date of service of a certified copy hereof upon said defendant, effectually and permanently close up that certain opening or siphon constructed by defendant in 1920 through the embankment of the Southern Pacific Railroad, which said opening is a part of the drag-line ditch excavated by defendant along the south line of section 19 * * * to and under said railroad and thence easterly and southerly to the lands of plaintiff hereinafter described, so that no drainage, seepage, or overflow waters shall thereafter be permitted or allowed to flow from the lands west of said railroad through said opening and drag-line ditch to the lands east of said railroad, and so that no drainage, seepage or overflow waters shall thereafter be permitted or allowed to flow from the lands east of said railroad into and through said drag-line ditch to and upon the lands of plaintiff hereinafter described.

"It is further ordered, adjudged, and decreed that said defendant, its agents, attorneys, servants, and employees, and any and all other persons acting in behalf or aid of said defendant, be and they are and each of them is permanently and forever restrained and enjoined from bringing any drainage, seepage, or overflow waters through or under the embankment of the Southern Pacific Railroad and down the drag-line ditch herein referred to and into Nigger Jack slough or on the lands of the plaintiff hereinafter described."

Appellant contends that respondent "did not prevent the work from being done," and that therefore after the completion of the drainage ditch and its use for the public benefit, "injunction will not be permitted, but respondent will be relegated to his action for damages," citing Crescent Canal Co. v. Montgomery, 143 Cal. 248, 76 P. 1032, 65 L. R. A. 940; Fresno, etc., Co. v. Southern Pac., etc., Co., 135 Cal. 202, 67 P. 773; Southern Cal. R. Co. v. Slauson, 138 Cal. 342, 71 P. 352, 94 Am. St. Rep. 58; Barton v. Riverside Water Co., 155 Cal. 509, 101 P. 790, 23 L. R. A. (N. S.) 331; and Southern Pac. Co. v. Los Angeles Milling Co., 177 Cal. 395, 170 P. 829. In Gurnsey v. Northern Cal. Power Co., 160 Cal. 699, 711, 117 P. 906, 911 (36 L. R. A. [N. S.] 185), it is said:

"The Constitution provides that private property may not be taken for public use unless compensation is first paid to the owner. But this condition of compensation to be first paid is solely for the benefit of the owner of the land and, like any other personal right, may be insisted on by him, or waived at his pleasure. He might, when the defendant corporation commenced the construction of its electric power system over his land, have stood upon his constitutional rights and enjoined its entry until he had been first paid for it, or he could have permitted the defendant to enter thereon and perfect the construction of its system for the public benefit. But when he has thus permitted by inaction expenditures to be made and public interests to intervene, he will be deemed to have waived all other remedies which he might have invoked save that of an action for compensation. This rule is not based so much upon the application of the doctrine of estoppel, * * * so that all remedies save one for compensation will be denied him. It is based mainly on the great principle of public policy under which the rights of the citizen are sometimes abridged in the interest of the public welfare. It is applied in a case such as this, when the plaintiff has stood by, without asserting a right which he might have invoked, until the corporation charged with a service, public in its nature, has completed its electric line over his land, and is actually engaged in discharging a public duty, advantageous and important alike to the social and business interests of the community."

In all the foregoing cases the owners had knowingly stood by while expenditures were being made and their lands appropriated to public uses. The inference from the evidence in the instant case is, not that the plaintiff knowingly stood by and permitted the construction of the ditch through his land, but that he had no knowledge thereof until after the ditch was completed. The question then is whether, in a case such as this, an owner through whose land a ditch has been constructed without his knowledge or consent and put to a public use is to be relegated to an action for damages. It has been said that under such circumstances the landowner may be precluded from maintaining an action of ejectment. Jones on Telegraph and Telephone Companies (2d Ed.) § 53. In Lewis on Eminent Domain (3d Ed.) § 929, it is said:

"Where works have been constructed and are in use, the public interest is sometimes urged as a reason why ejectment should not be sustained. But the individual cannot be deprived of his property for the public convenience, and in any case execution can be stayed to enable the defendant to condemn."

In Winslow v. Baltimore & Ohio R. Co., 188 U. S. 646, 23 S. Ct. 443, 47 L. Ed. 635, the company had maintained and operated a railroad, performing a public service, over a right of way held by the company from testamentary trustees who had control of the land. After the expiration of the lease, the trustees refused to renew it, and a few years later commenced an action at law to recover possession of the land. The company then brought suit to enjoin the trustees from further prosecuting the action brought by them. A temporary injunction was issued, but was dissolved and the action dismissed. The Supreme Court said:

"The court ought to keep in force for a reasonable time, say six months, that portion of the injunction prohibiting the trustees from continuing their proceeding to dispossess the company from the land, in order to enable it to condemn such land in proper proceedings for that purpose, which cannot be taken in the present suit. If more time is needed, the trial court may upon application, after notice, extend the time as to it may seem reasonably necessary. If no proceedings to condemn are taken within six months from the issuing of the mandate from this court to the court below, then the injunction should be wholly dissolved."

[1, 2] The only ground that can be urged in support of appellant's contention there being no estoppel against or waiver by respondent, is that of public policy. But the constitutional rights of a citizen ought not to be abridged on the ground of public policy unless the welfare of the public is really and substantially involved. The rule of law announced in Baltimore & Ohio Southwestern Railway Co. v. Voigt, 176 U. S. 498, 20 S. Ct. 385, 44 L. Ed. 560, is applicable in principle to the facts of this case. It is there said:

"It must not be forgotten that the right of private contract is no small part of the liberty of the citizen, and that the usual and most important function of courts of justice is rather to maintain and enforce contracts, than to enable parties thereto to escape from their obligation on the pretext of public policy, unless it clearly appear that they contravene public right or the public welfare."

Article 1, § 14, of the Constitution provides:

"Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner, * * * provided, that in an action in eminent domain brought by the state, or a county, or a municipal corporation, or a drainage, irrigation, levee, or reclamation district, the aforesaid state or political subdivision thereof or district may take immediate possession and use of any right of way required for a public use whether the fee thereof or an easement therefor be sought upon first commencing eminent domain proceedings according to law in a court of competent jurisdiction and thereupon giving such security in the way of money deposits as the court in which such proceedings are pending may direct, and in such amounts as the court may determine to be reasonably adequate to secure to the owner of the property sought to be taken immediate payment of just compensation for such taking and any damage incident thereto."

It has been held that the foregoing provision authorizing the taking of immediate possession is not in conflict with the federal Constitution. Marblehead Land Co. v. Superior Court, 62 Cal. App. 408, 217 P. 536. See, also, Los Angeles County v. Rindge Co. (Cal. App.) 230 P. 468; Crozier v. Fried. Krupp Aktiengesellschaft, 224 U. S. 290, 32 S. Ct. 488, 56 L. Ed. 771; Adirondack R. Co. v. People of the State of New York, 176 U. S. 335, 20 S. Ct. 460, 44 L. Ed. 492; Sweet v. Rechel, 159 U. S. 380, 16 S. Ct. 43, 40 L. Ed. 188. An action in eminent domain is "commenced by filing a complaint and issuing a summons." Code Civ. Proc. § 1243. It thus appears that the defendant may bring an action to condemn a right of way through the plaintiff's land and take immediate possession thereof, without any substantial interference with the public service in which it is engaged. Under such circumstances, public policy does not require the plaintiff to submit to the abridgment of his constitutional right to have just compensation made or paid into court before his land is taken. For obvious reasons, his right to recover damages for the wrongful taking of his property is less valuable than his constitutional right to have compensation therefor first paid into court.

[3] The injunction, however, is too broad in its terms. It enjoins the defendant from taking water through the embankment of the railroad and thence down the drag-line ditch to Nigger Jack slough. This ditch, without going through the plaintiff's land, could be extended southerly to the west branch of the slough through the lands of other owners lying further west. Also, the defendant may condemn a right of way through the plaintiff's land. In either event it would have the right, as against plaintiff, to discharge drainage water through the opening in the railroad embankment and down the drag-line ditch. The injunction should have gone no further than to restrain the defendant from using that part of the drainage ditch which is upon plaintiff's land. That part of the judgment from which no appeal has been taken restrains the defendant from causing water to overflow upon plaintiff's land. No damage, therefore, to crops growing upon the land will result from the use of the drainage ditch through the land for such length of time as may be reasonably necessary to enable the defendant to acquire a right of way by condemnation.

The judgment is modified by striking therefrom the parts from which the defendant

has appealed, except the description of plaintiff's land contained therein, and inserting in lieu thereof the following:

"It is further ordered, adjudged, and decreed that said defendant, its agents, attorneys, servants, and employees, and any and all other persons acting in behalf or aid of said defendant, be and they are and each of them is permanently and forever restrained and enjoined from discharging, or causing to flow, any drainage, seepage, or overflow waters into or through that part of defendant's drainage ditch which is upon plaintiff's land, at any time later than 60 days after this judgment shall become final; provided, that nothing herein contained shall preclude the defendant from at any time prosecuting an action to condemn a right of way through plaintiff's land for a drainage ditch."

As so modified, the judgment is affirmed; the respondent to recover his costs on appeal.

We concur: PLUMMER, J.; HART, J.

---

72 Cal. App. 426

MURPHY-CANTRELL CO., Inc., v. MULCAHY. (Civ. 2869.)

(District Court of Appeal, Third District, California. April 25, 1925.)

1. Trial ⟹397(1)—Failure to find on issue raised both by pleadings and evidence held error.

Where both by pleadings and evidence an issue as to the ownership and removability of certain mechanical appliances was submitted to court, whole question being one of intention, *held* that parties were entitled to a direct finding on such issue, and failure to so find was error.

2. Trial ⟹395(1)—Findings should be framed so as to enable vanquished party to specify particulars in which findings not supported by evidence.

Trial court's findings should be so framed as to enable vanquished party in litigation to specify intelligibly particulars in which findings are not supported by evidence, where such point is made.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by the Murphy-Cantrell Company, Inc., against James Mulcahy for money had and received, in which defendant filed a cross-complaint. Judgment for plaintiff, and against defendant on his cross-complaint, and defendant appeals. Reversed.

A. H. Carpenter, of Stockton, for appellant.

John R. Cronin and Clarence A. Grant, both of Stockton, for respondent.

HART, J. This controversy grows out of an agreement of lease between the defendant, as lessor, and George W. Breaw and C. P. Hamm, as lessees, whereby the former leased to the latter certain real property situated in the city of Stockton, and described as the "south half of lots one and three, block east of Center street," of said city. The lease was executed by the parties on the 7th day of January, 1918, and provided that its force should be operative for a term of five years from January 7, 1918, the date of the execution of the agreement. At the time of the execution of the agreement of lease there was no building on the land, but the lease provided that the lessor should erect one thereon according to plans and specifications approved by both the lessor and lessees, the same to be occupied and used as a garage by the latter. The monthly rental to be paid was $160 for the first two years; $165 for the third year; $170 for the fourth; and $175 for the fifth year. Other provisions of the lease were: That the lessees should not assign the lease, nor let or underlet the premises, or allow any alterations therein, without the written consent of the lessor; that the lessees should (and they did) deposit with the lessor the sum of $350, "as security for the performance of the covenants contained in this lease, and in the event that all the covenants on the part of the parties of the second part contained in this lease are performed, then the said sum of $350 shall be applied in payment of the rent due for the last two months under this lease. The party of the first part shall pay to said parties of the second part four per cent. per annum as interest on said sum of $350 at the end of the 58th month of this lease. If any rent shall be due or unpaid, or if default shall be made in any of the covenants herein contained, then it shall be lawful for the party of the first part to re-enter upon said premises and remove all parties therefrom."

Said lease and all the rights of the lessees were, shortly after the execution of the agreement, transferred and assigned by them to the plaintiff.

The object of this action is to recover from the defendant the sum of $350, deposited by the original lessees with the defendant, as above explained, and to recover the further sum of $80, representing one-half of the rental paid defendant by plaintiff for the use and occupation of the premises for and during the month of May, 1919.

The complaint is in two counts. In the first it is alleged that the original lessees, at the time they transferred and assigned the lease to the plaintiff, also assigned, for and in consideration of the payment by the latter of the sum of $350 to them, the said sum of $350 deposited with the defendant upon the execution of the lease upon the conditions above indicated. It is alleged in said count that the assignment of the lease was

with the express consent of the defendant. In the second count it is further alleged that, on the 1st day of May, 1919, while in possession of the premises under said lease, plaintiff paid to defendant, as rent for said month, the sum of $160, upon the following understanding and agreement with defendant:

That "if plaintiff did not occupy said premises during the whole of said month, he, the defendant, would refund to plaintiff a sum proportionate to that part of said month that plaintiff did not occupy said premises, and for which plaintiff had been paid; that plaintiff, with the consent of defendant, terminated said lease on the 15th day of May, 1919, and did not occupy the premises after said 15th day of May, 1919; that according to the aforesaid agreement there became due plaintiff at said time a refund of $80 upon said month's rent; that plaintiff has demanded said sum of $80 from defendant, but defendant still refuses to pay said sum to plaintiff."

The answer denies all the material averments of both counts of the complaint, and alleges that the lease was assigned to plaintiff by Breaw and Hamm without the written or any consent of defendant; that said Breaw and Hamm, on or about the 14th day of October, 1918, wrongfully and without defendant's knowledge or consent removed from said premises, and "thereafter refused to pay defendant the rental of said premises for the balance of their said term of lease ending on the 7th day of January, 1923, * * *" and "forfeited all moneys theretofore paid by them thereunder, including said $350 mentioned in plaintiff's amended complaint, and that defendant thereupon, as soon as he discovered such breach on the part of said Breaw and Hamm, declared said lease forfeited on the part of said lessees, together with the said sum of $350, which had been deposited with him as security for the full performance of said lease on their part"; that plaintiff entered into the possession of said premises without the knowledge or consent of defendant, and any lease or right to such possession, and that, upon learning that plaintiff had taken such possession, defendant demanded that it remove from said premises forthwith, "or execute a written lease to defendant for a period equal to the balance of time which the said forfeited lease to Breaw and Hamm called for; that plaintiff then and there evaded giving defendant a direct answer to his demand, and replied that the managers of said corporation would see their attorneys, and then give defendant a final answer in a short time; and that, after a delay of about eight months, said managers notified defendant that plaintiff would take no lease of said premises from him, and that defendant thereupon ordered plaintiff to remove from said premises at the expiration of the current month for which rent was paid." It was denied that on the 15th day of May, 1919, "or before the expiration of said lease or at any other or different time, the plaintiff, with consent of defendant, or otherwise, terminated said lease between him and the said Breaw and Hamm," but, as to this, the answer alleged that plaintiff was without right, power, or authority to terminate said lease, "as it was not a party thereto," etc.

By cross-complaint defendant alleged that he was damaged in the sum of $2,195 by reason of the alleged wrongful removal by plaintiff from the building of certain machinery, fixtures, and appliances, "which formed part of said garage building, and which were rigidly attached thereto by bolts, nails, and screws," and also by causing to be destroyed the enamel on the walls of the showroom, and by soaking the floor thereof and the walls of the entire building with grease and oil.

The plaintiff answered the cross-complaint, denying all the allegations thereof, except those as to defendant's ownership of the premises referred to in the lease, the execution of the lease, and the taking from the premises the machinery, all of which were admitted, alleging, however, that it was the owner of said machinery, fixtures, etc.

The court found in favor of the plaintiff on its first cause of action for the sum of $175; found against the plaintiff on its second cause of action; and against defendant on his cross-complaint.

Judgment passed accordingly, and the defendant appeals, contending: That certain material findings are without evidentiary support; that certain findings "are contradictory to the admissions in the pleadings"; and that there was a failure to find on a material issue.

[1] There is a failure to find upon the issue made by the cross-complaint and answer thereto as to the ownership of the fixtures or mechanical appliances installed in the building while it was in the course of erection, or, in other words, upon the question whether the intention of the parties, at the time the said mechanical appliances were installed, was or was not that they were to become a permanent part of the building, or, more accurately speaking, a part of the freehold. The machinery and other appliances referred to constituted those articles of machinery and other appliances which are necessary to the prosecution of a garage and an auto repair business. This was the business for the carrying on of which the original lessees leased the building. The building was, in fact, erected for that special purpose. The fixtures consisted of a small motor, an air pump, drills, shafting, apparatus for electric lights, and many other pieces of mechanical contrivances which, as before stated, are commonly and necessarily used in the carrying on of such a business as the

building was designed for, as indicated above.

The defendant testified that, while the original lessees furnished, at their own expense, said machinery and appliances, he performed the work of installing them in the building, and this he did as the building was in course of construction. He also testified that, at the very time the mechanical and other appliances were being installed, he stated to the original lessees that he desired that it should be understood between them that said fixtures should not be removed, but should remain as a permanent part of the building, and that to this proposition said lessees agreed by saying, "All right." He further testified that the appliances, or the greater part of them, were rigidly or firmly affixed to the building by means of bolts, nails, and screws. The plaintiff's manager, L. B. Murphy, testified that there was but one of the several different pieces of the mechanical appliances attached to the building, and that was the shafting. Thus there arose and exists a conflict in the testimony on the question whether the fixtures were or were not affixed to the building. The fact, however, that the fixtures might have been attached to the building by means of nails, or bolts, or screws, or wire, does not necessarily force the conclusion that it was the intention of the parties that they should become a part of the freehold, but is important because it may well be considered as some evidence of such intention, while the fact that they were not so attached might be considered as some evidence that such was not the intention. In either case, its weight would be determined by the light of other facts or circumstances tending to support either conclusion. Thus it is not only clear that the pleadings present an issue upon the question whether it was or was not the intention of the parties that the fixtures or appliances should become a permanent part of the building and consequently a part of the freehold, but equally clear that evidence, pro and con, was introduced upon that issue. In other words, and briefly, both by the pleadings and the evidence an issue as to the ownership of said mechanical appliances was submitted to the court for decision, and a clear, unequivocal and direct finding upon that issue should have been made.

The only reference to be found in the findings to that issue is the following:

"It is not true that the plaintiff wrongfully and unlawfully removed from said premises, or removed at all, any machinery, fixtures, appliances, or anything else from said garage that it did not have a legal right to do."

[2] The foregoing is rather a conclusion of law than a finding of fact; but, treating it as an attempt to find upon the question whether the parties intended the fixtures to become a permanent part of the building, it wholly fails to reach the mark. No fact was found which supports the conclusion, as thus declared, that the plaintiff "removed any machinery, fixtures, appliances, or anything else from said garage that it did not have a legal right to remove." If, as the testimony of defendant tends to show, there was an agreement between him and the original lessees, that said fixtures were to become a part of and so not to be removed from the building at the expiration of the term of the lease by said lessees or any one succeeding to their rights under the lease, then, obviously, the plaintiff had no right to remove the fixtures. As stated above, however, the whole question was one as to the intention of the parties, and, as also stated, the defendant was entitled to a direct and specific finding upon the question of such intention. This is true, because findings should be so framed as to enable the vanquished party in the litigation to specify intelligibly the particulars in which such findings are not supported by the evidence, where such point is made. The purported finding here, if a finding at all, does not measure up to this test.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 530

NASON et al. v. SHINJO et al. (Civ. 2958.)

(District Court of Appeal, Third District, California. May 6, 1925. Hearing Denied by Supreme Court July 2, 1925.)

Appeal and error ⇐110—Order granting motion for new trial not appealable, where case was tried by court without jury.

Order granting motion for new trial is not appealable, where case was tried by court without jury, Code Civ. Proc. § 963, subd. 2, providing that an appeal lies from an order granting new trial only "in an action or proceeding tried by a jury where such trial by jury is matter of right," and section 663a is inapplicable, providing only for appeal, from orders granting motions authorized by section 663, to set aside or vacate judgments.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by W. R. Nason and another against Harry M. Shinjo and another. Judgment was rendered for plaintiffs, and from order granting defendants new trial, plaintiffs appeal. Appeal dismissed.

A. H. Carpenter, of Stockton, for appellants.

LaFayette J. Smallpage, of Stockton, for respondents.

FINCH, P. J. This is a motion to dismiss the appeal herein. The case was tried before

the court without a jury and judgment was entered in favor of plaintiff for a sum alleged to be due under a lease. On motion of one of the defendants the court ordered a new trial. From this order the plaintiff has appealed. The motion to dismiss is made upon the ground that the order is not appealable. An appeal lies from an order granting a new trial only "in an action or proceeding tried by a jury where such trial by jury is a matter of right." Code Civ. Proc., § 963, subd. 2; Estate of Waters, 181 Cal. 584, 586, 185 P. 951; In re Baird's Estate (Cal. Sup.) 231 P. 744; McGoldrick v. Visalia Midway Oil Co., 58 Cal. App. 280, 208 P. 334.

Appellant relies upon section 663a of the Code of Civil Procedure, which provides for an appeal from an order granting a motion, authorized by section 663, to set aside and vacate a judgment "based upon findings of fact made by the court, or the special verdict of a jury" and to enter "another and different judgment." The motion here in question was not of the character mentioned in that section, but it was a motion for a new trial.

The appeal is dismissed.

We concur: HART, J.; PLUMMER, J.

---

72 Cal. App. 356

FRESNO COUNTY v. SHAW, Recorder of the City of Coalinga. (Civ. 5158.)

(District Court of Appeal, First District, Division 1, California. April 20, 1925. Hearing Denied by Supreme Court June 19, 1925.)

Fines ⊂=20—Fines collected by city recorder in proceedings for violations of state law to be paid to county treasurer; "justice's court."

City recorder of city of sixth class, when exercising jurisdiction in proceedings based on violations of state laws, is acting as justice of peace presiding in "justice's court," and not as a city justice's court, which, under Code Civ. Proc. § 103, is restricted to cities of first to fourth classes, and under Pen. Code, §§ 1457 and 1570, all fines collected must be paid to county treasurer; there being nothing in Pen. Code, § 1461, to the contrary.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Justice Court.]

Application by the County of Fresno for writ of mandate to be directed to A. J. Shaw, Recorder of the City of Coalinga. Writ granted.

Hearing denied by Supreme Court; Lawlor, Richards, and Shenk, JJ., dissenting.

G. R. Lovejoy, Dist. Atty. of Fresno County; and C. M. Ozias, Deputy Dist. Atty. of Fresno County, both of Fresno, for petitioner.

Le Roy McCormick, Dist. Atty. of Tulare County, and Leslie A. Cleary, Deputy Dist. Atty. of Tulare County, both of Visalia, amici curiæ.

A. J. Shaw, in pro. per., Rae B. Carter, City Atty. of Coalinga, W. E. Simpson, City Atty. of Fresno and Clovis, and Arthur Allyn, City Atty. of Fowler, all of Fresno, for respondent.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., amici curiæ.

KNIGHT, J. This proceeding in mandamus was commenced by the county of Fresno to compel the defendant, A. J. Shaw, as the former city recorder of the city of Coalinga, to pay over to the treasury of said county certain fines imposed and collected by him for violations of state statutes.

The city of Coalinga, in Fresno county, is a municipal corporation of the sixth class organized under the Municipal Corporation Act. It maintains a city recorder's court. It is conceded that the entire salary of this office is paid by the city of Coalinga. By statute this court has concurrent jurisdiction with the justice's court of all actions and proceedings, civil and criminal, arising within the corporate limits of said city. The defendant, A. J. Shaw, formerly held the position of city recorder, and as such has collected fines for violations of the state law. Although no longer occupying the position, he still retains in his custody a certain aggregate sum collected by him as fines for violations of state law. He has refused to pay this sum into the treasury of the county of Fresno, and threatens to pay the same into the treasury of the city of Coalinga. This proceeding was instituted to require him to pay said sum to the county

The solution of the questions presented involves the proper construction to be given to sections 1457 and 1570 of the Penal Code. Those sections, in connection with section 1461 of the same Code, were interpreted by the Supreme Court in the case of Prince v. City of Fresno, 88 Cal. 407, 26 P. 606, and the precise question raised here was decided there. Since the decision in that case was rendered, however, certain statutory changes have been made which it is claimed overcome the effect of that decision so that it no longer controls.

At the time of the rendition of said decision section 1457 of said Code provided:

"Upon payment of the fine, the officer must discharge the defendant, if he is not detained for any other legal cause, and apply the money to the payment of the expenses of the prosecution, and pay over the residue, if any, within ten days, to the county or city treasurer, according as the offense is prosecuted in a justice's or police court. If a fine is imposed, and paid before commitment, it must be applied as prescribed in this section."

Section 1461 provided:

"The term 'police courts,' as used in this and the succeeding chapter, includes police judges' courts, police courts, and all courts held by mayors or recorders in incorporated cities or towns."

Likewise, at the same time, section 1570 provided:

"All fines and forfeitures collected in any court, except police courts, must be applied to the payment of the costs of the case in which the fine is imposed, or the forfeiture incurred; and after such costs are paid, the residue must be paid to the county treasurer of the county in which the court is held."

The case above referred to was one brought by the recorder of the city of Fresno; that city being then one of the fifth class. The plaintiff, Prince, presented to the city of Fresno a bill for his fees in cases where fines were collected for violations of a state law. The city refused to pay, and this action followed. The county of Fresno intervened, setting up that, if it were determined that the city was not liable, then the county would be, and that the fines collected by the recorder for violations of the state laws should be paid to the county treasury. The county accordingly prayed that all of the questions raised by the facts which were stipulated be determined by the court. After trial, the court gave judgment that the plaintiff, Prince, pay over to the treasurer of the county of Fresno the fines collected for violations of state laws, and, further, that the county of Fresno pay to the plaintiff for services rendered in cases of violation of state law the same fees and compensation as are allowed by law to justices of the peace in like cases.

The Supreme Court, after noting the provisions of sections 806 and 807 of the Municipal Corporation Act (St. 1883, p. 93), and that concurrent jurisdiction of the recorder's court with justice's court and certain powers of the recorder's court, stated that the main question for determination was whether as to all criminal matters under the Penal Code the action of the recorder is that of a justice of the peace or not. The court then declared that a recorder of a city may have a dual jurisdiction and functions, and may be a justice of the peace as to certain matters and a recorder as to others; that the law under consideration conferred this jurisdiction; and that as to such matters as are given him in charge as a justice of the peace the recorder is such an officer, and not a police judge. The court further declared that, if the recorder imposed fines as a justice of the peace, and not as police judge, such fines by law were subject to be paid over to the county treasurer under section 1570 of the Penal Code, after payment of costs, etc.; and he was entitled to charge and receive from the county for his services such fees as were allowed by law to justices of the peace for like services; and the fines imposed by him were subject to the same disposition as if he had imposed them as such justice of the peace. The judgment was thereupon affirmed.

Since that case was decided, section 1461 of the Penal Code defining police courts has not been changed. Nor has there been any substantial change in those provisions of the Municipal Corporation Act which conferred concurrent jurisdiction upon the recorder's court and under which it was held in the Prince Case that the recorder, when sitting in a criminal prosecution for a violation of a state law, was acting as a justice of the peace and not as a police judge, and that his court was not in such cases a police court.

In 1901 (Stats. 1901, p. 88) section 1457 of the Penal Code was amended to provide that the fine should be paid "to the county or city treasurer, according as the offense is prosecuted for the violation of a state law or a city ordinance, whether in the justice's court or police court." Likewise at the same time and by the same statute section 1570 of the Penal Code was amended to add a proviso thereto requiring "all forfeitures and fines collected in any court for the violation of any city ordinance shall be paid to the city treasurer of the city in which such ordinance is in force."

It is evident that neither of these changes in any way affected the question, and that the fines would continue to be paid as required by the decision in the Prince Case.

In 1905 (Stats. 1905, pp. 176 and 177) sections 1457 and 1570 of the Penal Code were amended to their present reading, as follows:

"1457. Upon payment of the fine, the officer must discharge the defendant, if he is not detained for any other legal cause, and pay over the fine within ten days to county treasurer if the offense is prosecuted for the violation of a state law in a justice's court; provided that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers thereof paid by the city, whether prosecuted for a violation of a state law or a city ordinance shall be paid to the city treasurer of the city in which such court is located; and further provided that all fines and forfeitures collected for the violation of a city or town ordinance, in a justice's court shall be paid over to the city or town treasurer of the city or town in which such ordinance is in force, subject, however, to the provisions of chapter I of title XV of part I of this Code."

"1570. All fines and forfeitures collected in any court, except police courts and city justice's courts, must be paid to the county treasurer of the county in which the court is held; provided, that all forfeitures and fines collected in any court, for the violation of any city or town ordinance shall be paid to the city or town treasurer of the city or town in which such ordinance is in force; and further provided, that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers

thereof, paid by the city, shall be paid to the city treasurer of the city in which such court is located, subject, however, to the provisions of chapter I of title XV of part I of this Code."

It will be noted that, notwithstanding said amendments, section 1457 still plainly provides that fines shall be paid to the county treasurer, "if the offense is prosecuted for a violation of a state law in a justice's court"; and that section 1570 still declares with equal clearness that all fines collected "in any court, except police courts and city justice's courts, must be paid to the county treasurer." Inasmuch as the recorder, when exercising jurisdiction in proceedings based upon violations of state law, is, under the Prince Case, acting as justice of the peace, and not as recorder or police judge, it would necessarily follow that the forum in which he is then presiding must be regarded as a justice's court and not as either a recorder's or a police court. Consequently, applying the portions of section 1457 above quoted, all fines collected while so presiding must be paid to the county treasurer, as "the offense is prosecuted for a violation of a state law in a justice's court." The tribunal in which he presides when acting in state cases cannot be regarded as a "city justice's court," as that term is employed in said section 1570, for the reason that "city justice's courts" do not exist in cities of the fifth and sixth classes; the establishment of those courts being restricted to cities of the first to the fourth classes exclusively. Code Civ. Proc. § 103. And defendant's position is not strengthened by the provisos added to said sections 1457 and 1570, by the amendments of 1905, to the effect "that all fines and forfeitures collected in any police court or city justice's court that is maintained, and the salaries of the officers thereof paid, by the city, whether presecuted for a violation of a state law or a city ordinance shall be paid to the city treasurer of the city in which said court is located," for the reason that the language employed in said provisos, designating the court which may retain fines and forfeitures for the use of the municipality, is no broader in its terms than the language used in the fore part of those sections, which, as we have seen, specify only "police courts or city justice's courts"; and, according to the Prince Case, the recorder's court is neither, when dealing with state cases.

True, all violations of state laws must, of necessity, under the ruling in the Prince Case, be had before one sitting as justice of the peace and not as police judge; but such fact does not totally destroy the usefulness of the provisos added by the amendments of 1905, for the reason that the said provisos are still operative in cities of higher classifications; the law having made distinct provision for police courts and city justice's courts in cities of such higher classifications. Neither can it be said that the construction herein placed upon said sections ignores the provisions of section 1461 of the Penal Code, which declares that the term " police courts" includes courts held by recorders in incorporated cities and towns, because this section, in its present form, was also under consideration in the Prince Case, and it was there held, as already stated, that the term "police courts" applied to courts held by recorders only when prosecutions are had for offenses over which the recorder has jurisdiction as recorder, and not when the offense is one in reference to which the recorder would act as justice of the peace.

For the reasons stated, we think it obvious that, even though, as defendant contends, the purpose of said amendments was to avoid the objections pointed out in the Prince Case, said amendments were couched in terms which wholly failed to accomplish the object sought. We are therefore of the opinion that the law of the Prince Case, in the present situation, is still controlling.

Let the writ issue as prayed.

We concur: TYLER, P. J.; CASHIN, J.

---

72 Cal. App. 799

CITY OF COALINGA, a Municipal Corporation, Plaintiff, v. A. J. SHAW, as City Recorder of the City of Coalinga, Defendant. (Civ. 5151.)

(District Court of Appeal, First District, Division 1, California. April 20, 1925. Hearing Denied by Supreme Court June 19, 1925.)

Application for writ of mandate prayed to be directed to respondent as recorder of the city of Coalinga to compel him to pay into the city treasury certain fines imposed and collected by him. Writ denied.

Hearing denied by Supreme Court; Lawlor, Richards, and Shenk, JJ., dissenting.

Peckinpah & Carter and Gallaher, Simpson & Hays, all of Fresno, Arthur Allyn, City Atty., of Fowler, Rae B. Carter, City Atty., of Coalinga, W. E. Simpson, City Atty., of Fresno and Clovis, all of Fresno, for petitioner.

A. J. Shaw, in pro. per.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Deputy Atty. Gen., amicus curiæ.

KNIGHT, J. This is a proceeding in mandamus, instituted by the city of Coalinga, to require the defendant, former recorder of said city, to pay over to the city treasury certain fines for violations of state laws, collected by defendant while acting in his official capacity. The county of Fresno, which includes the city of Coalinga, also made claim to said fines, and instituted a similar proceeding against the defendant herein to require him to pay said fines into the county treasury. County of Fresno v. Shaw (No. 5158) 237 P. 560. We have this day decided

the latter proceeding in favor of said county of Fresno, and have therein discussed and decided all of the questions involved in the instant proceeding. For the reasons stated in the opinion rendered in that case, the petition for the writ in this proceeding must be denied, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

72 Cal. App. 463

FAUDA v. FAUDA. (Civ. 5079; S. F. 10941.)

(District Court of Appeal, First District, Division 2, California. April 28, 1925. Hearing Denied by Supreme Court June 29, 1925.)

Estoppel ⊂⊃90(1)—Conduct of son, after father's gift to son of interest in business, held to warrant finding that son was estopped from securing accounting.

Conduct of son, to whom father made gift of two-thirds interest in his business, in acquiescing in father's continued control and management thereof for more than two years thereafter, *held* to warrant finding that son was estopped from securing accounting from date of gift until receiver took possession, in view of Code Civ. Proc. § 1962, subd. 3.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by Charles Fauda against C. O. Fauda. Judgment for defendant, and from an order denying a new trial, plaintiff appeals. Affirmed.

A. H. Crook, of San Francisco, for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

CABANISS, Justice pro tem. Appellant brought action for an accounting. Judgment having gone against him, he moved for a new trial, and appealed from an order denying the motion.

A somewhat extended history of the general business dealings between the parties must be given to make clear the issue involved, and later to be determined.

For many years prior to February 2, 1917, respondent owned and operated a drug store known as the C. O. Fauda Pharmacy, and appellant (respondent's son) and Eugenio Fauda (respondent's brother) were employed therein as salaried clerks and pharmacists under respondent's direction. During this period the general conduct and management of the business, including the purchase of store stock, banking of moneys received from sales, and drawing of checks against the bank funds, was in the respondent.

On the date mentioned (February 2, 1917) respondent executed to appellant a bill of sale transferring a two-thirds interest in the drug store and business, good will, business name, leasehold interest, and stock in trade; and at the same time, and in like manner, transferred to Eugenio Fauda the remaining one-third interest. Notwithstanding the form of these instruments, it is admitted that they were without valuable consideration, and that the transferees acquired their respective interests as gifts. The gift to appellant was absolute and unconditioned, and that to the brother, Eugenio, to become operative only upon respondent's death.

The circumstances attending the execution of the bills of sale and deeds to appellant make it apparent that the impending second marriage of respondent and his desire to safeguard appellant's financial interests in the event of respondent's death were the immediately inducing motives impelling the making of these instruments—a fact within appellant's knowledge from the very outset. It is here also noted that the making of the partnership agreement between appellant and Eugenio Fauda, and herein later to be mentioned, was suggested by respondent.

Immediately upon the execution of the bills of sale appellant and Eugenio Fauda executed an agreement, by the terms of which they became copartners in the business and property given them by respondent; appellant contributing to the partnership his two-thirds interest and Eugenio Fauda his one-third interest. The agreement also provided that during the partnership period books be kept, showing money received, paid, and expended, and goods bought and sold by the partners, and "all other matters and things whatsoever to the said business and management thereof in any wise belonging." The agreement further provided that annually or oftener, if desired by either partner, an inventory and accounting be made, showing the state of the business, etc.

For more than two years immediately following execution of the bills of sale and partnership agreement respondent, exactly as theretofore, retained the management and control of the store, in a proprietary way, with the tacit sanction of appellant and Eugenio Fauda, both of whom continued to serve in the place as clerks and pharmacists. For these services they were paid salaries slightly in excess of those received prior to the making of the bills of sale. Respondent, contemporaneously with the bills of sale transaction, also executed to appellant a gift deed to several parcels of land; the donor, however, reserving (dehors the deed) a revocatory right, exercisable at his pleasure. The land thus transferred was mortgaged to secure a bank loan made to respondent, and from time to time following the bills of sale and deed transactions respondent, with appellant's knowledge, drew money from the

store funds with which to make payment upon the debts secured by the mortgage, and in several instances appellant received these payments directly from respondent, and personally made them to the bank. At all times prior to February 2, 1917, respondent, then the absolute owner of the store, kept its books, and continued to do so until his retirement from the place. Respondent's system of bookkeeping, if "system" it may be called, was most informal, and from the entries recorded it would be quite impossible for any one, with the possible exception of the bookkeeper, to get a clear or at all satisfactory understanding of the state of the business, profit, or loss resulting from its operation, etc. This comment applies to the books as kept both before and following the signing of the bills of sale, as no change of bookkeeping methods was made during the latter period. The books were available to appellant and Eugenio Fauda, and were inspected by them, nor did either ever suggest to respondent a change in the bookkeeping system. The relation of the parties to this action and Eugenio Fauda toward themselves and the business remained uninterruptedly as before stated, until on or about June 20, 1919. Shortly before that date serious differences arose between the wife of plaintiff and appellant's stepmother (respondent's second wife), which incidentally marred the affectionate family relations previously existing between father and son.

At the time last mentioned respondent revoked the deeds to appellant, who then for the first time asserted his right under the bill of sale by demanding the immediate possession and control of the store as against respondent. The respondent thereupon brought suit against appellant, alleging in his complaint that it was the purpose and intention of the parties to the bill of sale that it be made revocable at respondent's will, and the prayer was for judgment accordingly. By way of defense of said action appellant alleged that the bill of sale became effective upon its execution, and transferred absolute title to him and the court so found, but appellant did not therein seek an accounting. In the action last mentioned a receiver was appointed by both parties. The respondent surrendered possession to the receiver on or about June 1, 1919, and the instant action seeks an accounting as to moneys received by respondent from the date of execution of bills of sale, March 2, 1917, until the receiver entered into possession of the store.

The trial court, basing its action upon the facts above presented, found that appellant was estopped from securing an accounting, and the action of the court in this behalf is urged by appellant as error.

If upon receiving bill of sale and real property deed appellant had actually said in effect to respondent, "Father, as you have shown your paternal solicitude by protecting me against the possible loss of my patrimony, I therefore suggest that you practically retain management and ownership of the store during your lifetime or until such time as I may avail myself of my rights of ownership," and this invitation had been accepted by respondent, surely in such case appellant would be estopped from maintaining an action for accounting. It may well be that the learned trial judge was of the opinion, as well he may have been, that appellant by his acts, conduct, and omissions as above shown had to all intents and purposes spoken the equivalent of the words quoted. In view of the close blood tie between the parties, and under all the circumstances, respondent may well have taken for granted that his possession and management of the store and right to retain store money as his own had been conceded to him by appellant. All the more would he seem to have been warranted in acting upon this assumption because of the omission of the son to exercise acts of ownership or otherwise demean himself as he would have done had it been his purpose to claim the proceeds of the business. In this connection may be instanced appellant's absolute noninterference with the management of the business, his omission to install a bookkeeping system which would show the state of the business and make possible a determination of the profits to be periodically ascertained and paid over to himself and Eugenio Fauda, pursuant to the provisions of their partnership arrangement.

Inasmuch as appellant in his brief stresses the making of the partnership agreement between appellant and Eugenio Fauda as a circumstance tending to support appellant's contention, our only comment is that the execution of the document in the light of all the facts and circumstances does not make against respondent's estoppel contention, but, on the contrary, tends to support it. The partnership agreement, though executed in the sense of having been formally drafted and signed, was to all intents merely executory, in that neither party to the agreement performed or sought to do so under it as they would have done, and especially in the matter of determining profits or losses, had it been their purpose to exercise their rights conferred by the bills of sale. In brief, by reason of the conduct of appellant, respondent was caused to believe, as appellant must well have known he would be, that he (respondent) was to continue to stand for the time being, and until appellant asserted ownership, in the same relation to the store and profits arising therefrom as prior to the bill of sale transfer. This, we think, warranted the trial court in supporting respondent's estoppel plea. The facts of this case bring it clearly within the estoppel rule

announced in subdivision 3, section 1962, Code of Civil Procedure, which is as follows:

"The following presumptions, and no others, are deemed conclusive: * * * 3. Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

In the few lines of this citation we find the quintessence of an ethical rule old as civilized man's conception of fair dealing and natural equity, and applied in innumerable cases.

As what has been said herein is determinative of this appeal, we will but mention another defense interposed by defendant, namely, that the parties hereto had adjusted all accounts and their business differences generally; and further say in this connection that the finding of the lower court supporting this defense is sustained by the evidence. We forbear discussing this phase of the matter at length only because the point already determined herein seems to us absolutely decisive of this appeal.

For the reasons herein stated, the judgment and order denying plaintiff's motion for a new trial are affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

Opinion of Supreme Court in Bank Denying Hearing.

PER CURIAM. Appellant's petition to have the above-entitled cause heard and determined by this court after judgment in the District Court of Appeal of the First Appellate District, Division 2, is denied.

We are not satisfied that the evidence in this case is sufficient to sustain the defense of estoppel, but, upon an examination of the record, we are of the opinion that the evidence is not legally insufficient to sustain the finding that prior to the commencement of this action the parties hereto had adjusted their accounts and differences.

---

72 Cal. App. 494

LIBBY v. DUNSTON. (Civ. 4373.)

(District Court of Appeal, Second District, Division 1, California. April 30, 1925. Hearing Denied by Supreme Court June 29, 1925.)

Trial ⊜260(1) — Requested instructions on propositions covered by instructions already given will be refused.

Requested instructions, though applicable to evidence, on propositions covered by instructions already given, will be refused.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by W. R. Libby against John Dunston. From a judgment for plaintiff, defendant appeals. Affirmed.

W. I. Gilbert, of Los Angeles, for appellant.

Edgar L. Martin and E. B. Drake, both of Los Angeles, for respondent.

CURTIS, J. This action was brought to recover damages alleged to have been sustained in an automobile collision, and resulted in a judgment in favor of the plaintiff in said action. The appellant requested the trial court to instruct the jury as follows:

"You are instructed that, if you shall find from the testimony that prior to the time of the collision the defendant had been driving and operating his automobile in an ordinarily careful and prudent manner, and with due regard to the regulations governing speed and care in the operation of an automobile, and that prior to the collision, and without fault or negligence on his part, a stranger, driving by, crowded him off the pavement, and that it was necessary, or apparently necessary, for him to leave the pavement in order to protect himself, and that, after having left the pavement he continued to operate his automobile in a careful and prudent manner, but that, because of having been crowded off the pavement, if you should find he had been so crowded, and because of mud on his tires, if you should find there was mud on his tires, he was caused to skid, then I instruct you that the defendant would not be guilty of negligence, and you should so find by your verdict, and, if he was not thus guilty of negligence, then your verdict should be for the defendant."

The court refused to give this instruction, and the sole point made by appellant on this appeal is that the court erred in so refusing to instruct the jury and that such error was so prejudicial of appellant's rights that he is entitled to a new trial.

We will assume for the sake of argument, but without deciding, that the foregoing proposed instruction was justified by evidence properly admitted in the case and that it is free from all other legal objections. The instructions given by the court in the action appear to have fully and correctly covered all essential elements and issues in the case. Appellant has not indicated any issue of law raised either by the pleadings or the testimony upon which the court failed to instruct the jury fully. His sole contention is that he had the right to have an instruction given to the jury, based upon his own theory of the case, provided there was any evidence to support it. With this contention we agree, but this right has been accorded to him, in our opinion, when the court instructed the jury upon all questions of law arising at the trial. Appellant has cited in support of his contention the following cases from the Supreme Court of California: Carpenter v. Ewing, 76 Cal. 487, 18 P. 432; Hunt v. Elliott, 77 Cal. 589, 20 P. 132; Goodwin v. Mc-

Cabe, 75 Cal. 584, 17 P. 705; Buckley v. Silverberg, 113 Cal. 673, 45 P. 804. We think from an examination of these cases that they do not support the position of appellant. The following excerpt from the decision of Swensen v. Bender, 114 F. 1, 9, 51 C. C. A. 627, 635, states in apt language the true rule:

"The general rule with respect to this matter is well settled that instructions on points which have been sufficiently covered by other instructions may properly be refused, although they are correctly drawn and applicable to the evidence. This is so, whether the instructions requested are covered by the general charge, or whether the mode of expression is the same or different. The duty of the court is fully discharged if the instructions embrace all the points of the law arising in the case, in the court's own language."

Judgment affirmed.

I concur: CONREY, P. J.

---

72 Cal. App. 443

NAY v. SUPERIOR COURT OF NAPA COUNTY et al. (Civ. 2993.)

(District Court of Appeal, Third District, California. April 27, 1925. Hearing Denied by Supreme Court June 22, 1925.)

Justices of the peace ⇐155(1)—Right to notice of judgment waived by giving notice of appeal, and second notice of appeal ineffectual.

In view of Civ. Code, § 3513, as to waiver of advantage of law, right, under Code Civ. Proc. § 893, of party to action in justice court to written notice of rendition of judgment, was waived by his giving notice of appeal, which section 974 requires within 30 days after notice of judgment, so that his second notice of appeal, given more than 30 days thereafter, was ineffective, and this though first appeal was dismissed by superior court.

Application by H. L. Nay for writ of mandate to the Superior Court of Napa county and another. Writ denied.

W. F. Cowan and A. W. Hollingsworth, both of Santa Rosa, for petitioner.

Wallace Rutherford, of Napa, for respondents.

PLUMMER, J. This matter is before the court upon petitioner's application for a writ of mandate, commanding the superior court of Napa county and Hon. Percy S. King, as judge thereof, to vacate an order dismissing an appeal by the petitioner, taken by him from a judgment entered in the justice's court of Hot Springs township, in the county of Napa, wherein L. S. Mitchell was plaintiff and N. R. Fowler and the petitioner, H. L. Nay, were defendants.

The facts, as they appear in the pleadings, so far as necessary to be considered in the determination of petitioner's application, are as follows: On the 2d day of December, 1924, after a trial had been had in the above-entitled justice's court, in the foregoing entitled action pending therein, judgment was rendered and entered against the petitioner; thereafter, and on the said 2d day of December, 1924, the petitioner, H. L. Nay, defendant in said action, filed in said justice's court, with the justice of the peace thereof, a notice of appeal to the superior court of the county of Napa, from the judgment then and there rendered and entered against him. Said notice of appeal is in the following words and figures, to-wit:

"[Title of Court and Cause.] Take notice that the defendant H. L. Nay in the above-entitled action hereby appeals to the superior court of the county of Napa from the judgment therein made and entered in the said justice's court, on the 2d day of December, 1924, in favor of said defendant and against said and from the whole of said judgment. This appeal is taken on questions of law and fact both law and fact.

"Yours, etc., A. W. Hollingsworth,
"Attorney for Appellant.

"To the Justice of said Justice's Court, and ——, Esq., Attorney for Respondent.

"Dated December 2, 1924."

On the same day an undertaking was filed in the sum of $100 to cover costs of such appeal. Within due time thereafter, all the records, papers, and files in said action were transmitted by the justice of the peace of said justice's court to the clerk of the superior court of the county of Napa, and were filed by him as records of said superior court. Thereafter, and on the 16th day of February, 1925, upon motion of the plaintiff in said action, upon good and sufficient grounds which we need not consider, the superior court of the county of Napa entered its order dismissing said appeal. That thereafter, and on the 16th day of February, 1925, the petitioner in this case filed a second notice of appeal in the justice's court of Hot Springs township, in the county of Napa, in said action, which notice of appeal is as follows:

"[Title of Court and Cause.] To the Justice of said Justice's Court and said Plaintiff and his Attorney:

"You will please take notice that the defendant H. L. Nay in the above-entitled action, hereby appeals to the superior court of the county of Napa from the judgment therein made and entered in the said justice's court on the 2d day of December, 1924, in favor of said plaintiff and against said defendant, and from the whole of said judgment.

"This appeal is taken on both questions of law and fact.

"Dated February 16th, 1925.

"A. W. Hollingsworth,
"Attorney for Appellant."

And at the same time filed an undertaking to cover costs of appeal. That thereafter, and within five days, all the records and files of said cause were again transmitted by the justice of the peace of said justice court to the clerk of the superior court of Napa county, which attempted appeal was, after motion duly made therefor on the 16th day of March, 1925, dismissed by the said superior court of the county of Napa.

No question is made herein as to the order of the superior court, in relation to the dismissal of petitioner's appeal dated February 16, 1925. The attack is directed as to the second order of dismissal. In the consideration of this order, only one question is involved, to wit: The fact that the justice of the peace of Hot Springs township did not execute and deliver to or serve upon the petitioner a written notice of the judgment made and entered by him in the case of Mitchell v. Fowler and the petitioner herein, and therefore that the petitioner was within the time allowed by law in filing his second notice of appeal.

The petitioner relies upon section 893 of the Code of Civil Procedure, which, so far as this matter is concerned, reads:

"Notice of the rendition of judgment must be given to the parties to the action in writing signed by the justice. * * * Said notice shall be served by mail or personally, and shall be substantially in the form of the abstract of judgment required in section eight hundred and ninety-seven of this Code,"

—and also upon section 974 of the same Code, which gives to any party dissatisfied with a judgment rendered in a civil action in the justice's court 30 days after notice of the rendition of judgment within which to appeal. The answer to this contention is found in the action of the petitioner, which, we think, conclusively shows a waiver of the right to be notified in writing by the justice of the peace of the judgment entered against him. Section 3513 of the Civil Code reads:

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

We do not think it necessary to go into an extended discussion of why the Legislature provided for the giving of written notice further than to say that it was evidently for the purpose of preventing any one from being deprived of the rights given him by the Codes, which might be exercised by the dissatisfied party, after the entry of the judgment, and that there should be a definite record that the dissatisfied party had notice of the entry of such judgment, and that it was incumbent upon him to exercise the rights given him by the Codes within a definite period thereafter.

The filing of a notice of appeal constitutes a written acknowledgment on the part of the appellant that he has notice of the judgment entered against him. In this case the petitioner, immediately after the rendition of the judgment referred to, filed his notice of appeal, which certainly obviated and waived the necessity of the justice of the peace thereafter, and within five days, serving written notice upon him of the entry of the judgment from which he had already appealed.

This very question has been recently decided by the Supreme Court of this state in Hughes v. DeMund, 233 P. 94. The court was there considering the question of the running of time for the performance of a certain act, and used the following language:

"No notice of the entry of judgment is shown to have been given, but the filing by defendant of a notice of appeal on April 2, was the equivalent thereof for the purpose of starting this time running. Fighiera v. Dewhirst, 32 Cal. App. 245, 162 P. 655; Mallory v. See, 129 Cal. 356, 359, 61 P. 1123; Timmons v. Coonley, 39 Cal. App. 35, 179 P. 429."

It has been decided a number of times that, where the statute requires written notice, actual notice is not sufficient, but these cases, and a number of authorities which might be cited, show that, where a party entitled to a written notice files a notice of appeal, or some paper necessitating further proceedings in the action, such proceeding constitutes a waiver on his part of the giving of the notice prescribed by the statute. In view of the authorities above cited, it must be held in this case that the petitioner, by filing his notice of appeal in the justice's court on the 2d day of December, 1924, waived the giving of notice to him by the justice of the peace, and therefore that his second notice of appeal was ineffective for any purpose. The fact that the first appeal taken by the petitioner, the defendant in the action referred to, was dismissed by the superior court, does not alter the situation.

We think the writ should be denied, and it is so ordered.

We concur: FINCH, P. J.; McDANIEL, Justice pro tem.

72 Cal. App. 565

PEOPLE v. CECIL. (Cr. 1239.)

(District Court of Appeal, First District, Division 2. California. May 9, 1925.)

1. Criminal law ⟹829(9)—Requested instruction on presumption of innocence, covered by court's given instruction, properly refused.

Court's given instruction *held* to fully cover defendant's requested instruction on presumption of innocence, and refusal to give requested instruction was not prejudicial.

2. Criminal law ⟹829(18)—Requested instruction, that mere probabilities are not sufficient to warrant conviction, held covered by court's given instruction and properly refused.

Court's given instruction *held* to sufficiently cover defendant's requested instruction that mere probabilities are not sufficient to warrant conviction, but that it must rest on proof of guilt beyond reasonable doubt, and refusal of requested instruction was not error.

3. Criminal law ⟹1175—Incomplete form of verdict held not to require reversal, where no prejudice therefrom shown.

In prosecution for violation of Pen. Code, § 288, though verdict of "guilty of violating provision of section 288 of Penal Code" was not in proper form, because not containing words "charged in the information," *held*, that failure to include such words does not require reversal, where no prejudice is shown to have resulted therefrom.

Appeal from Superior Court, City and County of San Francisco; Harold Louderback, Judge.

Andrew Cecil was convicted of violating Pen. Code, § 288, and appeals. Affirmed.

Spencer G. Prime, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

NOURSE, J. The defendant was tried and convicted upon an information charging him with a violation of the provisions of section 288 of the Penal Code. On the day of arraignment the defendant orally moved for a new trial without assigning any grounds therefor. This motion was denied, and the defendant has appealed from the judgment and from the order denying a new trial upon a record prepared under section 953a, Code of Civil Procedure.

On these appeals but two grounds are urged by the appellant: First, that the trial court erred in refusing to give the jury certain instructions proposed by the appellant; and, second, that the verdict is void because not in proper form. Beyond the suggestion that the appellant was not properly identified by the witnesses for the prosecution, no attack is made upon the evidence. The direct testimony detailing the circumstances of the alleged assault as given by the prosecutrix was sufficient in itself, if believed by the jury, to sustain a verdict of guilty. The testimony of the witnesses who were called by the state to give evidence of corroborating circumstances was conflicting in some respects, particularly as to the methods used by each witness in identifying the accused. But these witnesses, most of whom were young children, gave their testimony in an apparently straightforward manner and all agreed in identifying the appellant as the party who had been in the place where the offense was committed at the time fixed by the prosecutrix. Though the appellant took the witness stand in his own behalf, he did not expressly deny the testimony of the prosecutrix covering the actual commission of the offense. On the other hand, his testimony, which was confined to the matter of identification and the effort to prove an alibi, was of such a nature that the jury must have treated it as an admission of guilt.

[1] The first assignment of error relates to the refusal of the trial court to give certain instructions requested by the appellant. The first of these instructions covered the presumption of innocence and directed the jury to view all the testimony in the light of that presumption throughout the trial of the case. It was refused upon the grounds that the same subject had been covered in instructions previously given by the court. In referring to the instructions which were given, we find the following:

"A defendant in a criminal action is presumed to be innocent until the contrary is proved. And in a case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal. * * * All the presumptions of law, independent of evidence, are in favor of innocence, and every person is presumed to be innocent until he is proven guilty."

This instruction fully covers the subject-matter of the one proposed by the appellant.

[2] The second proposed instruction was to the effect that mere probabilities are not sufficient to warrant a conviction, or that a conviction could not be had upon the weight of the testimony alone, but that it must rest upon proof of guilt beyond a reasonable doubt. The trial court refused to give this instruction upon the ground that the subject-matter had been covered in the instruction which was given and which, after defining reasonable doubt, advised the jury:

"It is not sufficient to establish a probability though a strong one arising from the doctrine of chances, that the fact charged is more likely to be true than the contrary; but the evidence must establish the truth of the fact to a reasonable and moral certainty; a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

We are satisfied that the instruction given to the jury on this subject sufficiently covered the matters contained in the second instruction proposed by the appellant and that no prejudice resulted to the appellant in the refusal to give either instruction.

[3] The second point urged by the appellant is that the verdict is void because the jury merely found the appellant guilty "of the crime of felony, to wit, violating the provisions of section 288, of the Penal Code." The argument is that as the information charged the appellant with the violation of specific acts, it was necessary to the validity of a verdict of guilty to find him guilty of the specific acts charged in the information, and that the verdict which merely found him guilty of violating the provisions of section 288, Penal Code, is not necessarily a finding of the truth of these specific acts. In the argument upon this point the appellant directs our attention to the rule of the cases holding that, when the statute does not define the crime except as the specially forbidden acts define it, a verdict is insufficient which neither refers to the information nor contains a recital of the inhibited acts. It is unnecessary to discuss the authorities which have been cited in support of this rule, as it is well settled, and as we understand it is not questioned by the respondent. In support of the verdict the respondent directs our attention to the fact that the information specifically charged the appellant with a violation of the provisions of section 288, Penal Code, and that the jury found him guilty of that offense. It is further said in argument that the specific acts which are detailed in the information are the same acts which are mentioned in section 288, Penal Code, as descriptive of the offense charged. From this it is argued that the rule applicable to the particular case is that found on page 404, vol. 8, of California Jurisprudence:

"Where the statute in a word specifies and defines the crime, it is sufficient for the verdict so to specify it. Thus, it is sufficient for the verdict to find the defendant guilty of 'forgery' or of 'manslaughter.'"

We are not prepared to follow the state to the extent that the verdict as rendered is free from legal objections. It has been pointed out in numerous cases that in the trial of cases of this nature the verdict should find the defendant guilty or not guilty of the offense "charged in the information or indictment." Though we entertain these views, it does not follow that the judgment should be reversed. At the time of the oral argument, we requested the appellant to point out to us what prejudice resulted to him from the form of the verdict, but he was unable to do so. We have examined the entire record with care and are satisfied from our examination that the appellant was fairly tried and fairly convicted of the offense charged in the information, and we are unable to perceive how any prejudice has resulted to him because the jury in rendering its verdict failed to include in its verdict the words "as charged in the information."

Without approving the form of the verdict, but because no prejudice is shown to have resulted therefrom, the judgment and order denying a new trial are affirmed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

196 Cal. 321

In re LAWRENCE'S ESTATE.

LAWRENCE et al. v. BRAMSTON et al.
(S. F. 11254.)

(Supreme Court of California. June 23, 1925.)

Wills ⇐123(5)—Will held invalid, where neither subscription nor acknowledgment of testator took place before two witnesses present at same time.

Civ. Code, § 1276, requires testator's subscription and acknowledgment of will to be before two witnesses present at same time, and will, which witnesses signed on different days and not in each other's presence, was invalid.

In Bank.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

In the matter of the estate of James Lawrence, deceased. Petition by Thomas Bramston and others for probate of last will and

testament of said deceased, contested by Ann Lawrence and another. From a judgment declaring the will invalid and refusing to admit it to probate, proponent Steinhofer appeals. Affirmed.

T. H. Selvage and Eugene S. Selvage, both of Eureka, for appellant.

Mahan & Mahan, of Eureka, for contestants and respondents.

SHENK, J. James Lawrence died in November, 1922, at Eureka, Humboldt county, leaving estate in California and Minnesota. In December, 1923, Thomas Bramston filed a petition for the probate of the last will and testament of the decedent. In due time Ann and Sarah Lawrence, sisters of the decedent, filed a contest, alleging that the will was invalid and not the will of the decedent for the reason that it had not been executed with the formality required by section 1276 of the Civil Code. The appellants answered. The contestants interposed a demurrer on the ground that the answer did not state facts sufficient to constitute a defense to the contest. The demurrer was sustained without leave to amend. The matter was submitted to the court for decision on the contest and the answer thereto. Judgment was entered declaring the will invalid, and refusing to admit the same to probate. This is an appeal from that judgment by Mrs. Hannah Anderson Steinhofer, a beneficiary under the alleged will.

Maude Fulton and Mrs. Bertha Steinhofer were the subscribing witnesses. The will was signed by the decedent on the 18th day of June, 1921. It is alleged in the contest that at the time the will was signed by the decedent it was signed in the presence of Maude Fulton, who was the only person in whose presence the decedent signed the will, and the only person to whom the decedent at said time acknowledged said written document to be his will, and was the only person who at said time was requested by the decedent to sign the will as a witness; that Mrs. Bertha Steinhofer signed her name to the alleged will more than a week after the 18th day of June, 1921; and that when she signed her name thereto she did not sign the same in the presence of Maude Fulton. It is alleged in the answer:

"That on the 18th day of June, 1921, said Maude Fulton signed the said will at the end thereof, at said testator's request and in his presence, and that at the time of her so signing, said testator declared to said Maude Fulton that the said instrument was his will; that a few days subsequent thereto said Mrs. Bertha Steinhofer signed the said will as a witness thereto at the end thereof, at said testator's request and in his presence, and at the time of her so signing, said testator acknowledged to said Bertha Steinhofer that said will had been made by him and by his authority and declared to her that the said instrument was his will."

It therefore appears that neither the subscription nor the acknowledgment of the decedent took place before two witnesses present at the same time. The precise question was presented in Estate of Emart, 175 Cal. 238, 244, 165 P. 707, 710, L. R. A. 1917F, 866, where this court construed the language of section 1276 of the Civil Code, reviewed the history of the legislation on the subject and said:

"From the language of our statute and this review of its history, we regard the conclusion as unescapable that our law requires the subscription or the acknowledgment to be before the two witnesses present at the same time."

The appellant contends that in Estate of Dow, 181 Cal. 106, 183 P. 794, this court, in the opinion on rehearing, so far discredited the decision in Estate of Emart, supra, as to render the point involved herein an open one. Such was not the case. In Estate of Dow, supra, the will was subscribed and acknowledged in the presence of both witnesses, but the witnesses did not sign the document in the presence of each other. It was held that, under the statute, the witnesses need not sign in the presence of each other. The distinction is pointed out by the court in the opinion on rehearing in that case.

On the authority of Estate of Emart, supra, the judgment is affirmed.

We concur: MYERS, C. J.; SEAWELL, J.; WASTE, J ; RICHARDS, J,; LENNON, J.; LAWLOR, J.

---

196 Cal. 301

In re SPITZER'S ESTATE. (L. A. 8222.)

(Supreme Court of California. June 22, 1925.)

1. Wills ⟸87—Construed to carry out testamentary intent shown by facts and circumstances surrounding execution.

While courts will not make will for decedent, law favors testacy, and instruments bearing character of wills will be given construction necessary to carry out testamentary intent, to discover which courts will examine facts and circumstances surrounding execution.

2. Wills ⟸93—Proponent's testimony held admissible to show testator's intent to make will.

In will contest, proponent's testimony as to decedent's request that proponent draw will, and statements as to disposition of property desired, *held* admissible, not to supply essential elements of will, but to show that matter was in testator's mind when paper offered as will was executed.

3. Wills ⊂⊃93—Testimony as to decedent's declaration concerning letter offered as will held admissible.

In will contest, testimony as to decedent's statements to witness, when asked if he had made his will, that he had written letter to proponent, that his wife would be taken care of, etc., *held* admissible as relating to identical paper sought to be established as will.

4. Wills ⊂⊃87—No fixed rule for determining testamentary intent.

There is no definite, fixed rule by which testamentary intent may be gauged, but each case must stand on its own peculiar facts.

5. Wills ⊂⊃87—Decedent's letter to brother held entitled to probate as will.

Letter from aged invalid to his brother, inclosing deed of property to daughter and her husband, stating that he deeded home place to wife, that she had his insurance, and that he owed her note for sum borrowed, all of which amounted to more than half of community estate, and that balance of estate should go to daughter, and suggesting contingency of death, *held* entitled to probate as will.

6. Wills ⊂⊃87—Rules for determining whether instrument was intended to be testamentary stated.

In determining whether instrument was intended to be testamentary, language will be construed in light of surrounding circumstances, parol evidence of which is admissible, and effect will be given to such intent, if consistent with language of instrument, though informally drawn, consisting of more than one paper, or containing no particular words showing testamentary intent.

7. Wills ⊂⊃384—Construction of will immaterial, on appeal from judgment rejecting probate for want of testamentary intent.

On appeal from judgment rejecting probate of letter as will for want of testamentary intent, proper construction of will is immaterial.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Proceeding by Sherman C. Spitzer to probate the will of A. J. Spitzer, deceased, contested by Sarah W. Spitzer. From a judgment rejecting probate and orders denying letters testamentary to proponent and appointing contestant as administratrix, proponent appeals. Orders and judgment reversed.

Edward R. Milliken, of Pasadena, for appellant.

Merriam, Rinehard & Merriam, of Pasadena, for contestant appellee.

SEAWELL, J. This appeal is from a judgment rejecting the probate of a paper, in form a letter, alleged to be testamentary in character, as the last will and testament of the decedent, A. J. Spitzer; also from an order denying letters testamentary to the decedent's brother, Sherman C. Spitzer, thereunder, and from an order appointing Sarah W. Spitzer the administratrix of the estate. The appellants are said Sherman C. Spitzer and Lulu M. Plane, a daughter of the decedent by a former marriage. Respondent, Sarah W. Spitzer, is his widow.

Upon the death of the decedent, his widow petitioned the court for letters of administration, claiming that the former had died intestate. An amended petition was thereafter filed. A contest and opposition to the probate of will was interposed by the wife, alleging three distinct and separate grounds of contest, to wit: That the will was not executed as a last will and testament; was not testamentary in character; that Sherman C. Spitzer, the proponent, is not an interested party in the estate, since he is not named in the will as devisee, legatee, or heir at law, and that he is a nonresident of California; third, that the said Sherman C. Spitzer failed to file the will within the time allowed by law. The answer specially and generally traverses the allegations of contest and opposition.

At the hearing, the court rejected the probate of the will on the preliminary hearing, holding that the proponent had not made out a prima facie case, inasmuch as the paper failed to show upon its face that it was intended to be testamentary in character. This was the sole issue presented and passed upon by the court. The paper in question reads as follows:

"Pasadena Cal—Aug 4 23

"Dear Bro Sherman

"As I am not able to sit up very long but am better than last week will write you a few lines and send you this Deed of Lewis and Lulu also to say that I deeded Sarah W. S. this homeplace 1661 N Raymond before I was sick worth 7000.00 and as she has my Insurance of 3000.00 also I owe her a note of 4000.00 borrowed and as the Bal is in Abingdon and Pasadena the above amount $\frac{7000}{3000}$ is more than

10000.00

½ have made since we were married. Bal of estate to go to Lulu M Plane. I guess that is California law as to her amt. You can fix things if anything happens All papers here are in State Bank of Pasadena.

"Yours truly A. J. Spitzer"

The facts and circumstances which bore upon the mind of the decedent at the time the letter offered as a will was written, and which show his relations to the parties before the court, may be thus briefly stated:

Sixteen years prior to his death decedent and the respondent widow intermarried. Shortly after their marriage they removed to Abingdon, Ill., where they resided for about 5 years, at the end of which period

they returned to California and resided at Pasadena until the death of decedent, which occurred September 25, 1923. He was past 70 years of age. He left property, real and personal, both in Abingdon, Ill., and in California. It would seem that the estate consists of separate property owned by decedent, and also property of the community. The record indicates that the estate is of the value of about $35,000. Appellant Sherman C. Spitzer, who claims to be entitled to letters testamentary, was a lawyer residing in Chicago, Ill. He never resided in California. He visited his brother at Pasadena about a year before the latter died, at which time several conversations were had with reference to decedent disposing of his property by will. He informed his brother that he had in contemplation the making of his will by which he was to provide for his wife and his daughter, and that he wanted to so arrange his affairs that each should be taken care of. During the conversation, the decedent spoke generally of his property in Illinois and in California, and requested appellant to draw his will, but the latter replied that he was not sufficiently familiar with the community property law of California to undertake the task. He did, however, advise with an officer of a trust company in Los Angeles as to the community property rule in California, and subsequently, upon the advice thus received, informed decedent that, in the absence of a will, the wife would take one-half of the community property. Under the law as it stood on that day the advice was sound. Decedent further informed the appellant that he wanted his wife to have the home, valued at $7,000, and also the proceeds of a certain insurance policy on his life in the sum of $3,000, and it was his further desire that the balance of his estate should go to his daughter, Lulu M. Plane, whose husband was Lewis C. Plane, to whom reference is made in the paper offered for probate. Decedent stated to appellant Spitzer that his wife had considerable property in her own right.

Witness Jenson testified that he had been a close neighbor of the decedent, and had known him more than a year prior to his demise. He had performed service for him, and frequently visited him at his home. In conversations with Jenson, decedent told him that he had been ill for several years, and that he did not expect to recover from the illness from which he was suffering. Not less than 5 days nor more than 9 days from the day on which the paper offered for probate was written, Jenson called on decedent to bid him good-bye, as he was about to leave on a visit to an eastern state. In the course of the conversation, decedent said that he did not suppose he would ever see him (Jenson) again. Jenson asked him if he had made his will. It was admitted by counsel and assumed by the court that the reply of the decedent would have been as follows:

"Yes; everything is all fixed. I have written a letter to my brother, and my wife will be taken care of, and I want my daughter to be taken care of."

An objection was sustained to the introduction of this testimony on the ground that it was incompetent. The relevancy of this testimony and the correctness of the court's ruling will be hereafter considered.

The letter offered as a will is wholly in the handwriting of the decedent, dated and signed by him. It was received by the appellant on August 8, 1923, and placed by him in a chiffonier drawer, where it remained for some time. Appellant's testimony in explanation of his delay in forwarding the letter to the probate court of Los Angeles county is, in effect, that he was not aware that olographic wills were valid in California, and that he erroneously assumed that the California law was the same as the Illinois law, which as he understood it, did not recognize a paper as a will unless it had been formally witnessed and attested as such. He afterwards discovered his mistake, and forwarded the paper, which was denied probate, to Pasadena, to be filed as of record in the estate matter.

[1-4] While it is true that courts will not make a will for a decedent who has failed to do so for himself, it is also true that the law favors testacy rather than intestacy, and will give such construction to instruments bearing the character of wills as is necessary to carry out testamentary intent. They will also examine facts and circumstances surrounding its execution, to the end that the intent of the maker of the paper may be discovered. The testimony of appellant Spitzer was admissible as tending to show a plan or design and the prior intention of decedent. This evidence was not received as tending to supply the essential elements of a will which but faintly appear, but to show that the subject was in the mind of the testator at the time of the execution of the paper offered as a will. Wigmore on Evidence (2d Ed.) vol. 1, p. 352, § 112; Estate of Carson, 184 Cal. 437, 445, 194 P. 5, 17 A. L. R. 239; Whiteley v. King et al., 17 C. B. (N. S.) 756. As to the witness Jenson, the declaration made by decedent to him, and excluded by the court, was shown to relate to the identical paper sought to be established as a will. That would make it admissible. Smith v. Smith, 112 Va. 205, 70 S. E. 491, 33 L. R. A. (N. S.) 1018. There is no definite, fixed rule by which testamentary intention may be gauged. No two cases are alike upon the facts. Cases may be cited establishing as wills papers offered for probate in which the testamentary intent is, perhaps, less apparent than is the intent

shown by the paper offered for probate in the instant case. No good purpose would be accomplished by citing them, as each case must stand upon its own peculiar facts.

[5] The opening sentences of the paper offered for probate are much after the fashion of an ordinary letter writer. That which follows, however, bears the impress of something more than the usual letter written by one brother to another. It will be remembered that decedent was then past 70 years of age, and had been an invalid for several years. His physical strength was waning, and he knew that permanent recovery was not to be expected. His entire thought was upon the disposition that he was about to make of his property. He inclosed a deed of the Illinois property, which was to form part of his estate to be administered upon thereafter. The passing of title to his property was contingent upon the happening of but one event, death. He knew that death alone was to make his acts effective. The paper makes a complete disposition of his estate, to take effect after death. It is very clear, considering his relation to his beneficiaries and the circumstances surrounding his act, that he intended, in the event of his death, that the letter of August the 4th would direct the distribution of his estate to those named in the paper. "Bal of Estate to go to Lulu M. Plane" constitutes a commonplace testamentary clause. "You can fix things if anything happens" suggests the contingency which he thought was very near at hand. In this he was correct, as he lived only about 7 weeks from the day he wrote the instrument. His anticipation of death would be a sufficient reason to prompt him to make his will. Buffington v. Thomas, 84 Miss. 157, 36 So. 1039, 105 Am. St. Rep. 423.

[6] We think the rule applicable to the facts of the instant case is well stated in Estate of Beffa, 54 Cal. App. 186, 201 P. 616, as follows:

"Appellant contends that the instrument is not testamentary in character. A will is a disposition of property to take effect at the death of the testator. 'It is well settled in this country and in England: First, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances. Second, that if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument; and in such cases the particular form of the instrument is immaterial.' Clarke v. Ransom, 50 Cal. 600. 'A will may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible.' Mitchell v. Donohue, 100 Cal. 207 [34 P. 614, 38 Am. St. Rep. 279, 34 P. 615]. 'It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest.' Nichols v. Emery, 109 Cal. 329 [41 P. 1089, 50 Am. St. Rep. 43].

[7] Counsel for both the respondent and the appellant indulge in extensive arguments as to the proper construction that should be placed upon certain clauses of the will. We are not interested in that question at this time. The question here is whether the paper offered is testamentary in character and for that reason is entitled to be admitted to probate. We are of the opinion that it is.

The orders and the judgment herein appealed from are reversed.

We concur: RICHARDS, J.; SHENK, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

---

196 Cal. 289

URRUTIA v. SUPERIOR COURT IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11522.)

(Supreme Court of California. June 22, 1925.)

Mandamus ⇐154(4)—Petition held insufficient to warrant writ compelling trial judge to determine disposition of money in hands of receiver in advance of hearing on merits at settlement of receiver's account.

Petition for mandamus, alleging that, in an extrajudicial interview with judge, latter stated that in his opinion money in hands of receiver, arising from rents received from mortgaged property, should be applied to deficiency judgment, *held* insufficient to warrant granting of writ to compel trial judge to determine disposition of moneys in possession of receiver, in advance of hearing on merits at settlement of receiver's account.

In Bank.

Application by J. M. Urrutia for a writ of mandate, to be directed to the Superior Court in and for the City and County of San Francisco, and the Honorable Franklin A. Griffin, Judge thereof, to compel delivery to petitioner, after settlement of receiver's account, of all money remaining undisposed of in receiver's hands. Writ denied.

Goldman, Nye & Surr, of San Francisco, for petitioner.

Bion S. Gregory, of San Francisco, for respondents.

PER CURIAM. This is a proceeding in mandamus to compel the superior court, in and for the city and county of San Francisco, and Hon. Franklin A. Griffin, judge thereof, to deliver to petitioner, after a settlement of a receiver's account, all moneys remaining undisposed of in the possession of said receiver, instead of making an application of said moneys in partial satisfaction of a deficiency judgment; to compel the said court to discharge said receiver, and to direct the latter to refrain from further interference with any of the property (subject to a certain mortgage hereinafter referred to) which is claimed by petitioner as his property. The cause is submitted upon a demurrer and answer interposed by the judge of the superior court, in response to the issuance of an alternative writ.

The material facts are as follows: On the 15th day of January, 1921, A. F. Rousseau, owner of the Kenilworth apartments, situate in the city of San Francisco, leased the same to one Gorman for a period of 5 years, at a monthly rental of $1,325. As security for the faithful performance of all the covenants and conditions therein contained, including the covenant for the payment of rents, the lessee executed and delivered to the said Rousseau, lessor, a chattel mortgage on all the furniture contained in said building. On the 18th day of January, 1921, Rousseau mortgaged the apartments and hypothecated certain liberty bonds of the value of $30,000 to the Banca Popolare Fugazi, as security for a loan of $100,000 made by the bank to him. The note recited that it was secured by a mortgage of even date and a pledge of bonds. Rousseau sold the real property (Kenilworth apartments), the lease, and the chattel mortgage to one Frinchaboy, who assumed payment of the mortgage and signed the original note, but the Liberty bonds were not assigned. Frinchaboy immediately assigned the lease and the chattel mortgage, and also executed and delivered a second mortgage on the real property, in the sum of $50,615, to petitioner, as security for a pre-existing obligation owing by him to the latter. On August 22, 1922, Frinchaboy conveyed his interest in the property to one Kurkjian, but prior to this Banca Popolare Fugazi, the original mortgagee, assigned the mortgage and the note to one George H. McCarthy and his wife, Mabel E. McCarthy, who eventually assigned a part interest therein to the Bank of Alameda. On the 14th day of June, 1922, the McCarthys and the bank instituted a foreclosure proceeding, making petitioner, who was a second mortgagee and also the assignee of the lease and chattel mortgage, a party defendant. The action resulted in a judgment of foreclosure and sale of the property mortgaged, and, upon an appeal, perfected by petitioner, the judgment was, by the District Court of Appeal, affirmed. McCarthy v. Kurkjian, 65 Cal. App. 569, 224 P. 1016. Pending this appeal, the superior court, on the application of respondent mortgagee, ordered the appointment of a receiver to preserve the property. An application for a writ of supersedeas, attacking said order made by petitioner to this court, was denied on August 2, 1924. Thereafter the District Court of Appeal affirmed the order of the trial court appointing the receiver. McCarthy v. Kurkjian (Cal. App.) 232 P. 161. On the 28th day of May, 1924, after a commissioner's sale of the realty covered by the mortgage, a deficiency judgment in the sum of $9,995.23 was docketed. An application made to the superior court by petitioner, to vacate the said judgment for the alleged reason that it had been prematurely docketed, was denied. Thereafter the receiver filed his account with the superior court, and his prayer is that—

"The court make an order authorizing the undersigned as such receiver to pay the balance of the moneys in his hands to the plaintiffs herein, George H. McCarthy and Mabel E. McCarthy, to apply in partial satisfaction of the deficiency judgment, in their favor herein."

In order to prevent said moneys, consisting solely of rents collected by the receiver from the "Gorman" lease, from being applied to a partial satisfaction of the said deficiency judgment in accordance with the prayer of the receiver's account, and upon information that it was the intention of the mortgagee to continue said receiver in office to collect further rents and apply the same in partial satisfaction of the judgment, petitioner initiated the present proceeding.

It is the contention of the petitioner that the receiver has impounded and is impounding certain rents issuing from the "Gorman" lease, which he intends to apply in partial satisfaction of the deficiency judgment, but that said rents are not subject to the lien of the incumbrance of said mortgage, and, therefore, should not be applied to the satisfaction of the deficiency judgment; that, if the rents were at any time herein mentioned subject to the lien of said incumbrance, either petitioner, as the assignee of the lease and chattel mortgage, has a paramount right to apply the same in liquidation of his own obligation to the exclusion of the first mortgagee, or that the latter has waived the right of so applying the rents in partial satisfaction of the deficiency judgment, inasmuch as, on the 28th day of May, 1924, he voluntarily, and with full knowledge of the existence of said rents, docketed a deficiency judgment in the sum of $9,995.23, and thereby waived the lien or the security of any property which remained unexhausted at that time, citing In re Braun, 51 Cal. App. 202, 196 P. 499; that, unless said receiver is restrained by the intervention of the writ, he will continue in office after the settlement of his account, and

will continue to collect and impound further accruing rents. On the other hand, it is insisted by respondent that the present case is not a proper one for the issuance of the writ of mandamus, inasmuch as petitioner has a plain, speedy, and adequate remedy at law by way of an appeal from the order settling the account of the receiver; that the rents in the possession of the receiver are a part of the security covered by said mortgage, and are available for, and should be applied to, a partial satisfaction of the deficiency judgment by virtue of the "law of the case," as determined by the previous decisions of the cause in the District Court of Appeal, supra; that the mortgagee's right to apply the rents in satisfaction of his deficiency judgment is paramount to the right of petitioner, inasmuch as the mortgage was executed and recorded prior to the assignment of the lease to petitioner; and that he has not waived the privilege of so applying the rents as aforesaid, inasmuch as petitioner has precluded the application of said rents to the deficiency judgment by the perfection of an appeal from the order appointing the receiver and the execution of a stay bond.

In so far as the petition attempts to show any matter which would be material in an application for a writ of mandamus, it may be stated that it is insufficient to warrant the relief sought, inasmuch as it fails to allege such specific facts as would warrant this court in granting the extraordinary remedy of a writ of mandamus to compel the trial court to make a definite adjudication as to the disposition of the moneys in the possession of the receiver, at a time prior and in advance of a hearing of the matter on its merits at the settlement of the receiver's account. In the petition for the writ, counsel avers that he interviewed the judge before whom the proceedings are pending, and said judge "declared to him that he considered said moneys in said receiver's hands should be delivered to said McCarthy in partial extinction of said deficiency judgment." From this extrajudicial interview petitioner concludes "that said order will be made as prayed for unless restrained." If anticipated action of the court, founded upon a tentative opinion such as this situation presents, may be taken as a basis for the issuance of the extraordinary writ, it office would soon become very commonplace, and such practices would eventually have the effect of impeding rather than promoting the remedial procedure of courts. In this connection it will be noted that the answer—verification thereof having been waived—contains the following allegation in refutation of the averment of petitioner as to what the court's ruling upon the pending matter would have been:

"That, after said receiver so filed said petition, the respondent did state that, from the facts *then before him*, it was his *opinion* that the money now in the hands of the receiver, arising from rents received from the mortgaged property, should be applied to the deficiency due on the judgment in said action." (Italics ours.)

From what has been said, it sufficiently appears that the court has not finally passed upon the disputed issue, and we are not permitted to anticipate what its ruling would have been or will be when the question is finally submitted. Furthermore, counsel for petitioner is only advised by counsel for the McCarthys that it is the intention of the mortgagee to have said receiver continued in office, etc. It necessarily follows from what appears before us, that petitioner has failed to state facts sufficient to constitute a prima facie case for relief, and, for aught that any one may be able to foretell, the receiver may forthwith be discharged after the settlement of his preliminary account, or the court may make such further orders as may be agreeable to the justice of the case. The intention of counsel for respondent to press or request the retention of the receiver cannot be regarded as any indication that the court will yield to pressure or requests merely and continue the receiver in office if no substantial reason therefor exists.

From an examination of the record presented, we are of the opinion that it cannot be said that the court has prejudged the main issue to be finally submitted to it for decision. There appears to be no reason why the court cannot freely give that full, careful, and impartial consideration to the questions presented, or to be presented, that the importance of said issues would seem to require.

The application for a writ of mandamus is denied.

---

196 Cal. 294

In re PARSONS' ESTATE.

WHITTEN et al. v. LA PLANTE.

(L. A. 7938.)

(Supreme Court of California. June 22, 1925.)

1. Wills ⟸427—Question of revocation by cancellation or obliteration must be presented and decided when will is offered for probate or by proceeding or contest within one year after will is admitted to probate.

Under Code Civ. Proc. §§ 1327, 1333, making probate of will not contested within one year conclusive except as to persons under disabilities, question of revocation by cancellation or obliteration of whole or part of will under Civ. Code, § 1292, must be presented and decided either when will is offered for probate or by proceeding or contest brought within one year thereafter.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Courts ⟸202(5)—Adjudication as to each step in administration not subject to review in subsequent stage.

Adjudication as to each step in series of different proceedings, contemplated in administration of estates of deceased persons, is final in nature, and not subject to review in subsequent stage of administration.

3. Wills ⟸421—Attack on order admitting will to probate, or contest of validity of will, is not direct attack because made in proceeding connected with administration.

Although order admitting will to probate may be appealed from or admission to probate may be contested and validity of will attacked within one year after admission to probate, attack on order, or contest of validity of whole or part of will, is not direct attack merely because made or instituted in some proceeding connected with administration of estate.

4. Wills ⟸423—On whom judgment admitting will to probate is binding stated.

Proceeding for probate of will is one in rem, and judgment admitting it to probate is binding on all persons interested in will who, being constructively notified to appear at probate, might have come in, and who, had they come in, would have been heard for or against its validity.

5. Wills ⟸423—After one year from admission to probate without contest, will is conclusive evidence as to intent of testator.

Where admission of will to probate was uncontested, and will was annexed to certificate required by Code Civ. Proc. § 1317, attack aimed at will in petition for partial distribution on ground that certain legacies bequeathed to petitioners had been canceled and revoked was collateral, and, such issue not having been raised upon proceeding to probate will where it could have properly been raised, after lapse of more than one year since order admitting will to probate, will is conclusive evidence as to intent of testator, in view of sections 1327, 1333.

6. Wills ⟸427—Denying petition for partial distribution after year from admission to probate held error.

Where question of revocation of legacies by cancellation was not raised in proceedings to probate will, denying petition for partial distribution after lapse of year from admission to probate on ground that legacies which had been marked out, but which could still be read, were canceled was error, in view of Code Civ. Proc. §§ 1327, 1333, making probate conclusive if it, or validity of will, is not contested within year after admission to probate.

7. Executors and administrators ⟸314(8)—Denial of petition for partial distribution held proper, in view of condition of estate.

In view of evidence tending to show insufficient cash in possession of executor to pay expenses of administration, claims presented and allowed against estate, and legacies payable under will, and that it would be necessary to prorate shares of general legatees, refusing petition of legatees for partial distribution was proper.

8. Executors and administrators ⟸314(12)—Decision, based upon judgment of court as to whether condition of estate justifies partial distribution, not reversed.

Decision refusing partial distribution to legatees, based on judgment of court as to whether condition of estate is such as to justify distribution, especially when application is denied by probate judge, will not be reversed on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Petition by Wilfred Whitten and others for partial distribution of the estate of William Parsons, deceased, opposed by William La Plante, executor. From an order denying the petition, petitioners appeal. Affirmed.

James S. Bennett, of Los Angeles, for appellants.

Norman A. Bailie, of Los Angeles, for respondent.

WASTE, J. This is an appeal from an order denying a petition for partial distribution. William Parsons died, leaving a last will and testament which was duly admitted to probate, without objection or contest, and letters testamentary thereon were issued. In due course Wilfred Whitten, Muriel Whitten, and Oliver Whitten filed a petition for partial distribution, alleging themselves to be legatees under the will, and each entitled to $1,000. The respondent executor denied the claims of the petitioners, and filed objections to the granting of the petition on the ground that the provisions of the will making the bequests to the petitioners had been revoked by cancellation or obliteration by the testator. On a trial of the issues thus presented, the court made and entered findings of fact to the effect that the three petitioners were not legatees under the will of Parsons, and denied their petition. From that order this appeal is prosecuted, presenting for determination the question whether the order admitting the will of Parsons to probate was final as to what constituted the testament, or whether certain provisions appearing in the will so admitted to probate may be excluded on petition for distribution.

The due execution of the will by the decedent Parsons is not questioned. The will admitted to probate contains some 14 dispositive provisions. The third, fourth and fifth paragraphs, respectively, provide $1,000 each for these appellants. Across these three paragraphs certain pencil lines or marks appear, which do not obliterate or render illegible any part of the will, and there is no notation or other indication from which the intent of the testator, in making

the marks, may be inferred. Other provisions of the will, of no concern in the present controversy, are more nearly obliterated by heavier pencil markings. The petition for the probate of the will made no mention of these cancellations, if they were intended as such, but prayed for the admission of the document as filed. The testimony of the subscribing witnesses and of the proponents of the will, taken at the time of its admission to probate, is silent as to any changes or alterations made in the document after its execution, and the court made its order in the customary form, unqualifiedly admitting the entire instrument to probate. It was stipulated on the hearing of the petition for partial distribution that each and all of the lines and marks drawn through and across those portions of the will providing legacies in favor of appellants were so drawn by William Parsons subsequent to the execution of the will. Over the objection of appellants, the executor, La Plante, was then permitted to testify that Parsons had stated to him "that he drew lines and marks through certain of the legacies and bequests in said will for the purpose of canceling and revoking the same." On these facts the court below found that the third, fourth, and fifth provisions of the will had been obliterated, canceled, and revoked by the testator, and denied the petition for partial distribution.

[1] It appears from the bill of exceptions that the executors of the last will and testament of William Parsons, deceased, presented to the probate court a document purporting to be, and which they averred to be, the will of said deceased, and for which they sought admission to probate as the decedent's last will and testament. When presented and filed for probate, the document showed a number of erasures and interlineations attested by the initials of the decedent. A number of lines and marks appeared to have been drawn through certain paragraphs of the will, among them the third, fourth, and fifth—the provisions in favor of these appellants. These lines and marks were not attested or noted in any way, and did not obliterate or render illegible or uncertain the plain provisions of the will. Upon the hearing of the petition, which was duly noticed, the instrument was offered for probate in its entirety, and due proofs of its execution were made. No objection or contest of any kind being presented, the judge of the probate court made his findings in the form of the certificate required by law, to which the original will was annexed and made a part thereof, as the statute requires. Code Civ. Proc. § 1317. The testimony of the proponents and of the subscribing witnesses to the will is silent as to any effort or intention of the decedent to revoke or alter any of the provisions of the will. The order admitting it to probate reads:

"That the document heretofore filed purporting to be the last will of said deceased and so alleged to be in said petition be admitted to probate as the last will of said deceased."

The order was never appealed from, nor was any contest of the will after probate initiated within one year after its admission to probate or at all. The petition for partial distribution, upon which the present proceeding arose, was filed after the time for contesting the provisions of the will had fully expired.

[2-4] In seeking a reversal of the order denying their petition for partial distribution, appellants invoke the application of sections 1327 and 1333 of the Code of Civil Procedure, which provide that, when a will has been admitted to probate, and no person, within one year after the probate, contests the same or the validity of the will, the probate of the instrument is conclusive (except as to those under certain disabilities). They do not question the rule that a portion of a will may be revoked by cancellation or obliteration, with the intent and for the purpose of revoking the same, by the testator himself, or by some person in his presence and by his direction (Civ. Code, § 1292), but contend that the question of revocation by cancellation, or obliteration of the whole or of a part of a will, must be presented and decided either when the will is offered for probate, or by a proceeding or contest brought within one year after the will is admitted. The contention of the appellants must be upheld. The probate procedure of this state contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is separate as to the matters embraced within its purview. An adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. An order admitting a will may be appealed from, or the admission of the instrument to probate may be contested, and the validity of the will attacked within one year after such probate, but an attack on the order, or a contest of the validity of the whole or of a part of the will, is not a direct attack merely because made or instituted in some proceeding connected with the administration of the same estate. Estate of Davis, 151 Cal. 318, 323, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105. The proceeding for the probate of the will is one in rem, instituted for the purpose of establishing the status of a written instrument. Estate of Baker, 170 Cal. 578, 585, 150 P. 989. The judgment admitting the instrument to probate is therefore binding upon all persons interested in the will who, being constructively notified to appear at the probate, might have come in, and who, had they come in, would have

been heard for or against its validity. Estate of Allen, 176 Cal. 632, 633, 169 P. 364.

[5] The attack aimed at the will of the decedent Parsons by the respondent was made in response to a petition for partial distribution filed more than one year after the will was admitted to probate—an independent and wholly distinct proceeding from that for the probate of the document. It is therefore a collateral and not a direct attack. Estate of Davis, supra. The respondent resisted the granting of the petition on the ground that "subsequent to the execution of the last will and testament * * * William Parsons, with intent and purpose of canceling each and every provision in said will contained in favor of said petitioners * * * and each of them, did with his own hand draw lines through and across said provisions, and each of them, and did expressly cancel and revoke the same." The issue thus joined was one which could properly have been raised upon the proceeding for the probate of the will. Not having been so raised, and more than one year having elapsed since the order was made, the instrument admitted is now conclusive evidence as to the intent of the testator. In re Maxwell, 74 Cal. 384, 386, 16 P. 206. In the case cited a devise contained in the will was excepted to on petition for distribution, on the ground that it had been obtained by false and fraudulent representations made by the beneficiary to the testator. The court in probate held that the exceptions stated no ground for relief, and this court affirmed the ruling on the ground that such an objection to the devise could not be raised on petition for distribution of the estate.

[6] The cases cited and relied on by respondent deal with questions concerning the construction to be placed on wills, and not with matters which can only arise on application for probate in the first instance, or in properly instituted contests. We conclude, therefore, on this phase of the case, that the lower court was in error in denying the petition of the appellants for partial distribution on the ground that the provisions of the will making the bequests for them had been revoked.

[7, 8] Although the provisions in the will of the decedent, Parsons, in favor of these appellants have not been revoked, it does not follow that their petition for partial distribution must be granted at this time. Evidence was introduced, in opposition to the granting of the petition, that there was insufficient cash in the possession of the executor of the estate to pay the expenses of administration, the claims presented and allowed against the estate, and the legacies payable under the will, and that, after all the assets of the estate were reduced to cash, it would be necessary to prorate the shares of general legatees. On this evidence the probate court correctly held that the estate of the decedent was not in condition to be partially distributed at this time. Estate of Dunne, 65 Cal. 378, 380, 4 P. 379. We cannot well reverse a decision based upon the judgment of the court as to whether the condition of the estate is such as to justify the distribution, especially when the application is denied by the probate judge. Estate of Painter, 115 Cal. 635, 640, 47 P. 700. On this ground alone the order appealed from is affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.

---

196 Cal. 279

RANSFORD v. AINSWORTH et ux. (S. F. 10783).

(Supreme Court of California. June 22, 1925. Rehearing Denied July 20, 1925.)

1. Appeal and error ⊂⊃754(1)—On failure to dispute sufficiency of evidence to justify verdict that collision causing injuries was due to negligence of defendant's husband in driving defendant's automobile, such fact was admitted.

Where it was not disputed on appeal that there was sufficient evidence to justify verdict to effect that collision in which plaintiff sustained injuries was caused by negligence of defendant's husband in driving defendant's automobile, such fact was admitted.

2. Master and servant ⊂⊃330(3)—Inference husband was wife's agent in operating her automobile sufficient prima facie to support verdict against wife for injury.

Where husband operated wife's automobile, her separate property, with her consent, inference arises that he was her agent in operation of it, sufficient prima facie to support verdict in favor of person injured in collision therewith, in absence of substantial proof to contrary.

3. Master and servant ⊂⊃330(3)—Evidence husband operating wife's automobile was acting as her agent held sufficient to make wife liable for injuries.

In action against husband and wife for injuries sustained in collision with wife's automobile operated by husband, evidence that automobile was separate property of wife, and that husband was driving it to carry home family supplies purchased by wife, *held* sufficient to support verdict against wife for injuries sustained in collision therewith, regardless of Civ. Code, § 156, providing that husband is head of family.

4. Master and servant ⊂⊃330(1)—Presumption husband in purchasing and carrying home household supplies was acting for himself as head of family rebuttable.

In action against husband and wife for injuries sustained in collision with automobile,

wife's separate property, operated by husband, presumption arising under Civ. Code, § 156, making husband head of family, that husband in purchasing and conveying home household supplies was acting for himself is disputable, and subject to be overthrown by evidence that wife was furnisher of home, and substantial, if not sole, supplier of household needs.

In Bank.

Appeal from Superior Court, Napa County; R. L. Thompson, Judge.

Action by William R. Ransford against A. G. Ainsworth and wife. Judgement for plaintiff, and defendant Minerva I. Ainsworth appeals. Affirmed.

Russell T. Ainsworth, of San Francisco, Thomas C. Anglim, of Napa, and Chas. S. Peery, of San Francisco, for appellant.

Clarence N. Riggins, of Napa, for respondent.

RICHARDS, J. [1, 2] This appeal is by the defendant Minerva I. Ainsworth from a judgment in favor of the plaintiff and against both defendants for the sum of $2,000, based upon the verdict of a jury in an action to recover damages for injuries received by the plaintiff in a collision between the automobile of the defendant and appellant M. I. Ainsworth while being driven and operated by her husband and codefendant A. G. Ainsworth on and along the streets of the city of Napa. The sole question presented upon this appeal is as to whether the evidence was sufficient to justify the verdict and judgment against the appellant herein. In entering upon this inquiry there are certain admitted facts which should be stated so as to clear the way for the main contention of the appellant herein. It is an admitted fact that the defendants are husband and wife and were living together as such at the time of the injuries complained of and for many years prior thereto, upon a ranch near Trubody station, nine miles north of Napa, which was the separate property of the appellant herein. It is also an admitted fact that the automobile which the defendant A. G. Ainsworth was driving at the time of said collision, and of which he was the sole occupant, was owned by and was the separate property of the appellant herein, and was at the time of said collision being driven and operated by her said husband with her consent. It is admitted, because not disputed upon this appeal, that there was sufficient evidence to justify the verdict of the jury to the effect that the collision in which the plaintiff suffered his said injuries was caused by the negligence of said A. G. Ainsworth in the driving and operation of the appellant's said automobile. Based upon these admitted facts there is a proposition of law which is also conceded to be correct by the briefs and arguments of the appellant herein. It is that an inference arises from the foregoing facts that the husband was the agent of his wife in the driving and operation of her car at the time of said collision, and that such inference would be sufficient prima facie to support the verdict herein, in the absence of substantial proof sufficient to destroy such inference. The cases which support this admittedly correct rule of law are the following: McWhirter v. Fuller, 35 Cal. App. 288, 170 P. 417; Grantham v. Ordway, 40 Cal. App. 758, 182 P. 753; Maupin v. Solomon, 41 Cal. App. 323–326, 183 P. 198; Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358; Dierks v. Newsom, 49 Cal. App. 789, 194 P. 518; and Fahey v. Madden, 56 Cal. App. 593, 206 P. 128.

In the case first above cited this court in denying the petition for a hearing before it stated the rule to be as above set forth, and such statement of the rule was followed in the later cases. While the appellant herein concedes the foregoing to be the correct rule with relation to the inference and its effect arising from the foregoing admitted facts, she contends that such inference has been overthrown by positive and sufficient proof that her husband and codefendant was not acting as her agent in the driving, operation, and use of said car at the time of said collision, but that, on the contrary, he was engaged solely upon his own business and affairs in the use and operation of her car at said time; and hence that there was and is no room in this case for the doctrine and inference of agency to be given application. This contention requires a further examination into the facts of this case as disclosed by the record herein.

In addition to his reliance upon the foregoing inference as sufficient, prima facie, to support the verdict and judgment in his favor, the plaintiff herein offered certain evidence tending substantially to show, not only that said defendant A. G. Ainsworth was at the time of said collision operating and using the car of the appellant with her consent, but that in so doing he was engaged in doing things which were matters of her business and concern. The evidence of the plaintiff's witnesses tended to show that, while the appellant had owned the automobile in question for several years, she did not drive it herself, but that it was generally driven and operated by her husband, and that said automobile was used and generally was so driven and operated by her said husband in connection with the varied activities of the family household in which such vehicles are customarily used and operated; as, for example, the evidence showed that groceries purchased for the family use were not delivered at the ranch by the store where purchased, but were conveyed there by means of her automobile, which her husband gen-

erally used in making such deliveries. The evidence offered by the plaintiff further showed, without contradiction, not only that the ranch upon which the defendants resided was the separate property of the appellant, but that the store account for goods and provisions for the household were carried in the name of the appellant; that this arrangement had been made several years previously upon the insistence of the proprietors of the store and upon the appellant's express direction expressed in a letter which was introduced in evidence, and in which she directed that all goods ordered by her husband, A. G. Ainsworth, should be charged to her account; that such family supplies were usually ordered by A. G. Ainsworth, and charged to the account of his wife; that bills therefor were annually presented and paid by her checks; that the ranch upon which the defendants resided had formerly been conducted as to its productive activities by the appellant as her separate property, but that for some years past its lands had been rented to Chinese, who operated the same under a lease. It does not clearly appear as to whether or not these lessees paid cash rent, but it does appear that the proceeds of the ranch in the form of crops were handled by the Napa Fruit Company, whose manager testified that the accounts for such proceeds were carried by his company in the name of Mrs. Ainsworth: that all of the checks were payable to her; and that all instruments in relation thereto were made out in and signed by her name. It was thereupon stipulated by respective counsel to be a fact "that A. G. Ainsworth acted for his wife in business transactions and in the handling of the business; that he handled the proceeds of the crop, collected the proceeds, and did everything with reference to the crop as though he were the owner; * * * that her share of the proceeds has been collected by A. G. Ainsworth in the name of Minerva I. Ainsworth, deposited to her name in the bank; and that he has acted for her in his dealings with the fruit company and his dealings with the bank have been likewise." It was also, and in this same connection, stipulated by the parties that Mrs. Ainsworth paid Mr. Landen (the proprietor of the store) from the proceeds of these checks which came from the ranch, and that Mr. Ainsworth acted for her in so doing. The plaintiff then called a witness, Mr. Landen, the proprietor of the store in question, who produced the store books, showing that certain goods and merchandise had been purchased on the date on which the collision occurred, consisting of a quantity of groceries, chiefly canned goods, and two loaves of bread, and which had been charged to the account of M. I. Ainsworth, and the bill made out therefor in her name, and sent to her, and that the same had been paid. This witness further testified that nearly all of the purchases of goods for the household were made by Mr. Ainsworth in this manner, and that, since the store did not deliver goods at that distance, the goods were usually taken out by Mr. Ainsworth in the machine. This witness also testified that on several occasions goods had been so ordered and charged and shipped to the defendants' daughter in Oakland. Following his testimony the plaintiff produced three witnesses who testified that immediately after the collision they had looked into the back of the car Mr. Ainsworth was driving and had seen there certain articles of merchandise. These three witnesses were in agreement in testifying that they saw there two loaves of bread. Two of them testified to seeing there other articles in wrapped-up packages having the appearance of canned goods, while one of them testified to seeing some vegetables there. With this evidence the plaintiff rested his case, and, after making a motion for nonsuit, which was denied, the defendants placed the defendant A. G. Ainsworth upon the witness stand, who, while admitting that he was the driver of the car in question at the time of said collision, and that it was the property of his wife, and that he was operating the same with her consent, denied that he was in any manner or to any extent attending to her business or affairs at said time. He testified that he had driven into town in said automobile to attend solely to certain matters of his own concern; one of these was to consult his physician as to his own ailments; another was to meet his brother, whom he expected to arrive on the train, and the last was to purchase and ship on his own account certain groceries to a sick friend in San Francisco. He testified that as to the groceries he purchased the same at said store and had them all packed for shipment to their destination and sent them there by Wells Fargo Express; that he made no other purchases whatever and had no goods or groceries or other merchandise in his machine at the time of the collision; and that he had gone to the post office, and was on his way home when the collision occurred. He further testified that at the time of the purchase of said groceries he directed that they be charged to himself personally; and that he personally delivered the box containing the same to Wells Fargo Express. He apparently had in court and while so testifying a shipping receipt from the express company showing the shipment by him of a box on that day weighing 55 pounds, but he did not offer such shipping receipt in evidence, nor testify further as to its contents, with respect, particularly, to the name of the consignee or the destination of the shipment. He further testified that Mrs. Ainsworth had for several months past been in Oakland assisting in the care of a sick

grandchild; that he had gone down occasionally, but usually remained on the ranch; that the automobile was driven by him generally when there, but was also used by different members of the family when needed.

Upon the cross-examination of Mr. Ainsworth his deposition, taken before the trial, was produced, from which it appeared that upon his first examination thereon he had given the other reasons stated for his visit to town on the day of the collision, but had not mentioned the episode of the grocery purchase or shipment, and that, upon being particularly questioned as to such purchase, stated that he had no recollection of any such transaction. It was only after he learned that plaintiff's counsel had gone to the store and ascertained the fact as to the grocery purchase on that day that the witness changed his testimony in that regard and gave the explanation as to his having sent the goods to a sick friend in San Francisco. He further admitted upon cross-examination that his sick friend was no relation of his, nor in any way dependent upon him, and that he had never done such a thing before. Mr. Ainsworth further admitted on cross-examination that he had no regular vocation, no bank account, and no property, except an interest in his mother's estate, which did not stand in his name, but from which he stated that he received a monthly income, the amount of which was not given.

Mrs. M. I. Ainsworth was also called as a witness for the defendants, and testified that at the time of the collision and for several months prior thereto she had been in Oakland attending upon her sick grandchild; that she knew nothing whatever as to the collision until some time thereafter, nor of the movements or transactions of her husband on that day, and particularly nothing as to the grocery transaction; that she owned the ranch and the automobile, which was used as a pleasure car by the family; that the ranch was leased to Chinese, and required no personal attention whatever; that as to the groceries and other merchandise bought for the home on the ranch Mr. Ainsworth looked after and handled all these things, and that she did not handle any of those matters herself, but that Mr. Ainsworth personally attended to them. Upon the cross-examination of this witness it developed that she knew very little about the management of the ranch, the ordering of household supplies, or the payment of the bills, and less about the possession of any definite income of Mr. Ainsworth except that derived from the proceeds of the ranch, which she received in the form of checks and either deposited in the bank or gave to her husband to deposit in her name; her husband having no bank account. The disposal of these proceeds she sums up as follows:

"Well, it is paid at the end of the year. I don't know exactly; I couldn't tell exactly how it is paid. Sometimes it is divided up with the Chinese, and the balance is divided up and paid against our bills, and I guess I may say that some of the bills are paid in checks, and then in case we do not put it in the bank sometimes they are paid in cash."

From this quite unsatisfactory statement of the situation it is difficult to avoid the conclusion that the main, if not only, reliance of the Ainsworth household was upon the proceeds of the ranch, and that the collection and distribution of these was left almost wholly in the hands of Mr. Ainsworth, who, aside from these proceeds, had no definite or sufficient income of his own with which to meet the household or family expenses. There was but one other witness called for the defendants upon this phase of the case, viz., the housekeeper at the Ainsworth home, who undertook to testify that on the day of the collision when Mr. Ainsworth came home he brought no groceries in the machine, but as to this her testimony was of little value, since she depended entirely upon her recollection as to a particular date nearly a year before the trial, and admitted that she did not see the machine or its contents when it came home on that day.

[3] It is the contention of the appellant from the foregoing state of the evidence that the inference of agency arising from the admitted fact that Mr. Ainsworth was at the time of the collision operating Mrs. Ainsworth's automobile with her consent is entirely overthrown by the evidence offered to the effect that at said time he was not acting upon any matter of business or concern of his wife, but was engaged in using it solely upon matters of his own personal business or concern. The appellant correctly states the law in that regard, as laid down in the case of Spence v. Fisher, 184 Cal. 209, 193 P. 255, 14 A. L. R. 1083, but the difficulty with the appellant's contention lies, not with the law, but with its application to the facts of the particular case. In the case of Spence v. Fisher, supra, the evidence was clear and uncontradicted that the 19 year old daughter of the owner of the automobile, who maintained it for the general convenience, use and pleasure of his family, was, at the time of the injury, caused by her negligent driving of the same, using the car solely for the pleasure of herself and her guests. This case is in entire harmony with the cases of Fahey v. Madden, supra; Maupin v. Solomon, supra; Dierks v. Newsom, supra, and the other cases above cited, with relation to the sufficiency of the inference of agency prima facie to sustain a verdict in the absence of clear and uncontradicted proof to the contrary. In the case of Dierks v. Newsom, supra, the District Court of Appeal, while applying the rule for which the appel-

lant herein contends to the facts of that case, held that the evidence offered to rebut the inference of agency was neither clear nor uncontradicted, but was substantially conflicting, and that in such a case the inference of agency was not overthrown. In the case of Grantham v. Ordway, supra, it was held that the inference of agency arising from the operation by another of the defendant's car with the latter's consent would not be overthrown by evidence which was conflicting, and which was not free from justifiable doubt. In the case of Randolph v. Hunt, supra, the same doctrine was applied, and this court upon petition for hearing herein denied said petition upon the ground that the evidence whereby the defendant sought to relieve himself from the effect of the inference of agency was conflicting, and, when resolved by the jury against the defendant, would not be reviewed by this court. This case comes clearly within the rule laid down and adhered to in the foregoing cases. The evidence upon which the appellant relies to overcome the inference of agency arising from the operation of her automobile by her husband with her consent at the time of the plaintiff's injuries is neither clear nor uncontradicted. If, in fact, her said husband was engaged in conveying to her home goods and merchandise which he had purchased on her account and as her agent at the store which was accustomed to furnish such supplies to him only as such agent and upon her credit, the inference would not only be not overthrown, but would be supported by such a state of facts. While it is true that the defendant A. G. Ainsworth testified most positively to the contrary, there is the testimony of three witnesses which not only contradict but discredit the said witness; and there is also other testimony and other circumstances which, if believed by the jury, would utterly overthrow his evidence in that regard. This evidence and these circumstances were presented to the jury in the plaintiff's main case, and it cannot be said, therefore, that the plaintiff's only reliance for a verdict was upon the inference of agency arising from the fact that the defendant A. G. Ainsworth was operating his wife's automobile with her consent at the time the plaintiff's injuries were received. There was considerable proof presented upon the plaintiff's main case tending to show, not only that the defendant A. G. Ainsworth had for years been acting as the general agent of his wife in the collection and expenditure of the proceeds of her separate property, but that he was acting in that capacity at the very moment of the collision in the conveyance by the use of her automobile of family provisions which he had purchased with such proceeds to the family home which his wife was thus maintaining upon the ranch which was her separate property and estate.

[4] It is, however, contended by the appellant that under the law, as laid down in section 156 of the Civil Code, the husband is the head of the family, and that, this being so it must be presumed that he was acting as such, and not as the agent of his wife in purchasing and conveying household supplies to the family home. It is true that, in the absence of any showing to the contrary, such a presumption would arise and would prevail; but this is a disputable presumption, and is subject to be overthrown by evidence that the wife is in fact the furnisher of the family home, and the substantial, if not sole, supplier of the needs, sustenance, support, and luxuries of the household. There was sufficient evidence in this case, if believed by the jury, to sustain its conclusion establishing these facts, and, this being so, the presumption would be overthrown. We are satisfied that the evidence in this case, considered as a whole, was sufficient to support its verdict in the plaintiff's favor, and, this being so, the judgment is affirmed.

We concur: SHENK, J.; WASTE, J.; LENNON, J.; SEAWELL, J.; LAWLOR, J.

---

72 Cal. App. 393

McCARTHY v. GRIDER et al. (Civ. 2860.)

(District Court of Appeal, Third District, California. April 23, 1925. Rehearing Denied May 25, 1925. Hearing Denied by Supreme Court June 22, 1925.)

1. Tender ⟹11—Code sections held inapplicable, where payment of money is required by party making offer, and latter not able to comply.

Code Civ. Proc. §§ 2074, 2076, and Civ. Code, § 1496, relating to tenders, are applicable only in those particular instances specified therein, and have no reference to other essentials of valid tender, nor where transaction, as to which offer is made, requires payment of money by party making offer, and latter is not able to comply with offer in that particular.

2. Tender ⟹11—Inability of offerer to perform evidence that offer not made in good faith.

Under Civ. Code, § 1493, an offer involving payment of money as condition precedent to performance of reciprocal act by offerer must be made in good faith, and, where offerer is not able to perform, such inability is indubitable evidence that offer is not made in good faith.

3. Tender ⟹11—Offerer must be both willing and able to perform according to terms of offer.

Under Civ. Code, § 1495, a party making an offer must not only be willing but able to perform according to terms of his offer.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Tender ⟸11—Statutory requirements that offer be made in good faith and offerer able to perform held not dispensed with by other provisions.

Code Civ. Proc. § 2074, and Civ. Code, § 1496, dispensing with actual production of money when offer is made in writing, but not accepted, does not dispense with requirements of Civ. Code, §§ 1493, 1495, requiring offer to be made in good faith, and that offerer be able to perform according to terms of his offer.

5. Vendor and purchaser ⟸170—Facts held to show that vendee's offer of performance invalid because of his inability to perform according to terms thereof.

A tender by vendee, under contract of sale of land, requiring payment of money to make good offer, as condition to conveyance of legal title by vendor, *held* invalid and without legal force, where vendee was not able to perform according to offer, in that he did not have sufficient amount of money to comply with terms of offer.

6. Tender ⟸15(1)—Right to object to offer because of fatal infirmity may arise independent of statute, and is available to offeree.

The right to object to an offer to perform some act because of a fatal infirmity therein, not constituting valid ground of objection, under Code Civ. Proc. § 2076, arises independent of statute, and is always available to whom offer is made.

7. Tender ⟸11—That offeree unprepared to perform no justification for offerer's inability.

The fact that offeree is unprepared to perform does not furnish any justification for offerer's inability to perform, nor change what would otherwise be an ineffectual offer into a bona fide and effective tender.

Appeal from Superior Court, Stanislaus County; L. W. Fulkerth, Judge.

Action by T. G. McCarthy against C. K. Grider and another to rescind contract for the purchase of real property. Judgment for plaintiff, and defendants appeal. Reversed.

Hawkins & Hawkins and J. W. Hawkins, all of Modesto, for appellants.

R. B. Maxey, of Modesto, for respondent.

HART, J. The defendants, prior to and at the time of the transaction upon which this action is founded, were the owners of lots 30 and 31, block No. 515, of the city of Modesto, in the county of Stanislaus. On the 1st day of September, 1920, the defendants and the plaintiff entered into and executed a written contract, whereby the former sold to the latter said lots for the sum of $4,800, of which the sum of $1,000 was to be and was paid upon the execution of said contract, and the balance to be paid in monthly installments of $30 or more until January 1, 1921, "at which time said monthly installments shall be increased to $35 or more for each month," deferred payments to bear interest at the rate of 7 per cent. per annum. The contract provided that the vendee should be let into immediate possession of the premises; that time shall be of the essence of the contract; that, if the vendee failed to pay any of the installments as stipulated within 30 days after the same became due, the vendors shall be released from all obligation to convey said property, in which event the vendee shall forfeit all right to said property, and all payments theretofore made by him shall be deemed rental for the use of the premises while in the possession of the vendee. The contract proceeds:

"The vendors, upon receiving payments, at the times and in the manner hereinbefore specified, agree to execute and deliver to the said vendee, or to his assigns, a good, sufficient, and marketable deed, free and clear of all liens and claims, and incumbrances, except permitted or suffered by said vendee.

"The said vendors further agree that upon payment of twenty-four hundred ($2,400.00) dollars of said purchase price, in the manner hereinbefore specified, by said vendee, they, the said vendors, will convey the title to the said premises, as set forth in the paragraph immediately preceding, upon the execution by the said vendee and his wife, of a deed of trust on said premises to secure the unpaid purchase price. Said deed of trust shall be a first lien upon said premises, and shall be executed according to the same terms as are stated in this contract for payment of balance due, and interest to be paid semiannually in addition to the monthly installments paid during the six months."

The total sum of $1,984 was paid by plaintiff to defendants under said contract and, upon grounds which will presently be stated, this action was brought by the former to obtain a decree rescinding, canceling and setting aside said contract and a judgment for the moneys paid by the plaintiff to the defendants under and according to the stipulations thereof, with interest on the sum of $1,000—the initial payment under the contract—from the 1st day of September, 1920. The plaintiff was awarded judgment as prayer for, and the defendants appeal.

It will be noticed that the contract provides in effect that the vendee may pay any sum on the lots in excess of the specified monthly installments, from which it is manifest that he could have paid the entire indebtedness at any time had he desired to do so.

The amended complaint, after recapitulating the provisions of the contract to the effect that, upon the payment by the plaintiff of the sum of $2,400 on the purchase price of the lots, the defendants would execute to the former a "good, sufficient, and marketable deed, free and clear of all liens and claims, and incumbrances," etc., alleges that on the 28th day of December, 1921, the plaintiff tendered

to defendants the sum of $890; said sum being the amount necessary to make the payments total the sum of $2,400, thereby entitling the plaintiff, under the terms of the contract, to a deed from defendants conveying the property to him, and that, at the same time, the plaintiff deposited "with the American National Bank of Modesto a deed of trust, duly executed and acknowledged by the plaintiff and his wife, on the premises," as required by the contract of sale. The complaint further alleges:

"That subsequently thereto and on or about the 6th day of January, 1922, defendants herein tendered to plaintiff a deed to said lands and premises hereinabove described; that said deed was a bargain and sale deed in the usual and customary form, and subject to the payment of taxes levied or assessed against said property."

The complaint, proceeding, states that, upon the tender by defendants of a deed to said property, plaintiff caused the title to the lots to be investigated by an abstract company, with the result that it was disclosed that on the 13th day of August, 1921, Clara E. Newport and others had brought an action in the superior court of Stanislaus county against one W. H. Hatton, the defendants, and others to obtain a decree quieting title in favor of plaintiffs therein and against the defendants herein to certain lands, including the lots involved in this controversy, and that said action of Clara E. Newport and others against defendants herein and others "is still pending and undetermined and constitutes a lien or claim or incumbrance against said property"; that a lis pendens in said Newport action was filed for record and recorded on the 13th day of August, 1921. It is further alleged:

"That on or about the 7th day of January, 1922, plaintiff herein notified defendants of the claim, lien, or incumbrance existing against said property, and demanded a title thereto in conformity with the terms of the agreement hereinbefore specified, but to perfect same defendants have, and do now still fail and refuse so to do.

"That on or about the 18th day of January, 1922, plaintiff herein surrendered the possession of the said lands and premises to defendants herein, rescinded the contract dated September 1, 1920, and demanded from the defendants the return of the moneys heretofore paid to defendants under and by virtue of the terms of the said agreement."

The answer specifically denies the allegations of the complaint, except one or two, which, with certain qualifications in the nature of an avoidance of the effect thereof, it admits.

It appears that the case of Newport v. Hatton et al., above referred to, was founded upon an alleged fraudulent transaction, whereby the plaintiffs therein were wrongfully divested of their title to a certain body of land within which the lots in question are embraced. The demurrer to the complaint in said action was sustained without leave to amend, whereupon judgment was rendered and entered in favor of the defendants therein and from which the plaintiffs therein appealed to the Supreme Court. That court, in disposing of the appeal, affirmed the judgment as to all the respondents (defendants) other than W. H. and Ora D. Hatton, and, as to the latter, reversed the judgment. Newport et al. v. Hatton et al., 66 Cal. Dec. 351. Within due time, however, a petition for a rehearing was filed and granted, and, upon a reconsideration of the appeal, the judgment was reversed as to all the respondents, and the "cause remanded, with directions to the trial court to overrule the demurrers of the various defendants." Newport et al. v. Hatton et al., 231 P. 987.

On December 29, 1921, the plaintiff served the defendants with a written notice, which, after referring to the provisions of the contract of sale to the effect that therein it was stipulated, among other things, that, upon the payment by plaintiff of the total sum of $2,400 of the purchase or contract price of the lots, the defendants would execute and deliver to plaintiff a good, sufficient, and marketable deed to said property, free and clear of all liens, claims and incumbrances, upon the execution by plaintiff and his wife of a deed of trust to and upon said premises, to secure the unpaid balance of the purchase price, contained the following:

"You will therefore take notice that I have this day deposited with the American National Bank of Modesto the moneys to pay the balance due under the terms of said contract to you, together with a deed of trust, for the sum of $2,400 due on or before 3 years, payable to your order, payable in monthly payments or installments of $35 or more, each month, with interest from date until paid at the rate of 7 per cent. per annum, said interest to be paid semiannually."

The notice further stated that plaintiff had been and was then ready to pay any interest which might become due on the unpaid balance of the purchase price from September, 1921, to the date of the execution of the deed, and then demanded from defendants a deed conveying to plaintiff the property free from any and all liens, incumbrances, etc.

In reply to said notice, the defendants, on January 6, 1922, served upon plaintiff a written notice, tendering a deed conveying said lots to plaintiff, conditioned for the payment by plaintiff to defendants of the sum of $890, as principal and the sum of $77.63 for interest to the date of the execution of said notice, and the delivery to defendants by plaintiff of a deed of trust on said lots, together with a promissory note for the unpaid balance of the purchase price. Said notice stated that defendants "will immediately place said deed

in escrow with the American National Bank of Modesto to be delivered to you (plaintiff) upon the conditions herein stated." Accordingly, on the 6th day of January, 1922, the defendants delivered to the bank above named a deed, conveying the lots to the plaintiff, to be held in escrow by said bank and delivered to plaintiff upon the latter's compliance with the conditions specified in the notice to plaintiff from defendants, and last hereinabove referred to. The said deed so delivered to the bank was accompanied by instructions to the bank in accord with the said notice from defendants to the plaintiff.

Thereafter the plaintiff addressed and delivered to defendants a letter in which he stated that the latter had failed to comply with the provision of the contract of sale that they (defendants) would, upon the payment by plaintiff of the total sum of $2,400, convey to the latter, by deed, the lots in question, free and clear of all liens, claims, incumbrances, etc., and that, therefore, he refused "to accept the deed to this property at the present time" for the reason just stated, and calling the attention of the defendants to the report of the Stanislaus Land & Abstract Company upon the title to said lots. By said letter the defendants were further notified that they would be allowed 5 days in which to perfect the title to the property, and that, "failing therein, the agreement heretofore made and dated September, 1920, will be rescinded, and a demand made upon you (defendants) for the return of the moneys heretofore paid thereunder." This letter was accompanied by the report of said abstract company on the status of the title to the property. By said report it was shown that the action in which Clara E. Newport and others seek a judgment quieting their alleged title to the lots as against Hatton, the defendants herein and others had been brought and was then pending in the superior court of Stanislaus county, and that a notice of lis pendens had been and was still recorded in the office of the county recorder of Stanislaus county.

On the 18th day of January, 1922, the plaintiff served a notice in writing on the defendants that he rescinded the contract of sale and that he surrendered possession of the premises to defendants. Accompanying said notice of rescission was a quitclaim deed to the premises, conveying same to defendants. Said notice stated that the ground of the rescission was that defendants had, through their own fault, caused the consideration for said contract of sale to fail, in that the "title thereto is not a merchantable title, and for the further reason that the title * * * is not clear of all liens and claims and incumbrances," etc. Demand was also made in said notice for a return to plaintiff of all moneys paid by him to defendants on account of said contract of sale; the payments made being itemized therein.

The defendants, in answer to the said notice of rescission, on the 19th day of January, 1922, notified the plaintiff, by letter, that they refused to rescind said contract, and to accept the quitclaim deed to said premises executed by plaintiff quitclaiming said property to defendants, and that they refused to pay to plaintiff the sum of $1,984, as demanded by plaintiff and which constituted the sum paid by the latter on the purchase price. At the same time the defendants returned to the plaintiff said quitclaim deed.

There are many points urged for a reversal of the judgment, but, as we view the case, the points made and the argument supporting them on the one hand and confuting them on the other cover a wider range than that within which we are justified in circumscribing the consideration of the appeal.

There is no claim, nor could such a claim be well founded, that there is not sufficient support for the finding and the conclusion of law that, by reason of the action of Newport et al. v. Hatton et al., to quiet title to certain lands of which the lots in question were a part, which action was pending and undetermined at the time plaintiff offered to complete the payment of the sum of money entitling him to a deed to the property (and which was still pending at the time of the institution of this action), there then existed a claim against and, consequently, a cloud upon the title to the lots, and that, therefore, defendants were without ability to convey a marketable or merchantable title to the lots. But the defendants urge the contention, among others likewise pressed upon us, that the offer of plaintiff to them, dated December 28, 1921, to complete the payment of the sum of $2,400, which payment, either by the installments specified or otherwise, would, according to the terms of the contract of sale, entitle the latter to a deed from defendants conveying the lots to him, did not constitute a valid offer or tender, for the reason that, when the offer was made, the plaintiff was without ability to make it good. To this proposition the plaintiff counters with the contention that, inasmuch as defendants failed to object to the offer on that ground or for that reason, at the time the same was made, they waived said objection or the right to urge said objection, and are, as a consequence, estopped from now making such objection. This position of the plaintiff is founded on his construction or conception of the meaning and intent of sections 2074 and 2076 of the Code of Civil Procedure.

The first of the sections named reads:

"An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property, is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property."

See, also, section 1496, Civ. Code, to the same effect.

The section secondly mentioned provides:

"The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount or kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards."

[1-4] It will be observed that both of the above sections are exclusive as to the matters as to which objections to an offer to perform an act are required to be made at the time such offer is made on penalty, if not made, of being bound to a presumptive waiver and its corollary, an estoppel. In other words, those sections are applicable only in those particular instances expressly specified therein, and have no reference or application to other essentials of a valid tender. At any rate, they have no application where the transaction as to which the offer is made requires the payment of money by the party making the offer and the latter is not able to comply with the offer in that particular. One of the essentials of a valid offer where it involves the performance of an act which calls for the payment of money as a condition precedent to the performance of a reciprocal and concurrent act by the party to whom the offer is made is that it "must be made in good faith" (Civ. Code, § 1493), and where the offer of performance is made by a party who is at the time of the offer not able to perform it in that particular; that is, if at the time he is without the money necessary to make the offer good and knows it, such inability is indubitable evidence that the offer is not made in good faith. But our Code goes further and declares that—

"An offer of performance is of no effect if the person making it is not able and willing to perform according to the offer." Civ. Code, § 1495.

By this provision the party making the offer must not only be willing but able to perform according to the terms of his offer. It is true that, by section 2074 of the Code of Civil Procedure and section 1496 of the Civil Code, where an offer to perform is made in writing, but is not accepted, the actual production of the money is not necessary, but these sections do not dispense with the requirements of sections 1493 and 1495 of the Civil Code. Doak v. Bruson, 152 Cal. 17, 91 P. 1001. That case quotes approvingly the following from Ladd v. Mason, 10 Or. 314:

"Surely the justice and good sense of the Legislature should not be impugned by such a construction of this provision as would place its framers in the position of having intended to provide a mode whereby a party might make a valid tender if his offer should not be accepted, without the readiness or ability to make it good, in the event of its acceptance."

Again, in that case, our Supreme Court likewise quotes the following excerpt from Holladay v. Holladay, 13 Or. 523, 11 P. 260, 12 P. 821:

"This statute dispenses with the necessity of actually producing the money with the offer, 'but this does not dispense with the necessity of the party having the money in fact.' "

See, also, Allen v. Chatfield, 172 Cal. 60, 68, 156 P. 47; Kuhns v. Chicago, etc., Co., 65 Iowa, 528, 22 N. W. 661; Shugart v. Pattee, 37 Iowa, 422; McCourt v. Johns, 33 Or. 561, 53 P. 601.

[5] The evidence, without conflict, shows that plaintiff was not able, at the time his offer of performance was made, to satisfy or make good said offer in the particular mentioned. Indeed, the plaintiff himself does not claim that he had on deposit in the bank named in his written offer the money requisite to make good the offer of performance. In fact, he admitted that he then had no money in the bank at all and practically admitted that he had no money anywhere sufficient in amount to comply with the terms of his offer.

C. D. Swan, an officer of the American National Bank of Modesto, with which the deed of trust executed by plaintiff in favor of defendants was deposited, testified that plaintiff, about the time the latter served on defendants the writing containing the pretended tender, deposited with the bank, to be by it held in escrow, a promissory note, in favor of defendants for the balance which would remain unpaid on the purchase price after the $2,400 had been paid, together with a trust deed to said lots for the benefit of the Griders or to secure said promissory note, but that he did not then deposit in the bank the money with which to make good his tender, that is, to make up the said $2,400; that plaintiff did not at that time have any money on deposit in the bank for any purpose. The witness stated, however, that at or just prior to the depositing of said note and deed of trust with the bank a party by the name of Way called at the bank with plaintiff and stated that if the bank would let plaintiff have a sufficient amount of money to complete the $2,400 payment, so that the latter would be in a position to make good his tender, he (Way) would indorse plaintiff's note to the bank for the money so loaned. To this proposition Swan, for the bank, assented, but, so the witness stated, the arrangement thus proposed was never carried out. No note was ever executed by plaintiff and Way in favor of the bank and no money was ever deposited in the bank by either for the purpose of satisfying the tender or for any purpose. Swan further testified that the bank would

not have loaned the money to plaintiff on his unsecured note, nor would the bank have loaned plaintiff the amount required to complete the $2,400 payment on a second mortgage on the lots. In brief, neither at the time the tender was made, nor at any time immediately succeeding that event, did the plaintiff have available the necessary amount of money with which he could complete the $2,400 and so make good his offer, and at no time after the service of his written tender on defendants or before bringing this action did he show his ability to make such payment.

Way did not testify, but, so far as the record shows to the contrary, his proposal to indorse plaintiff's note at the bank for the amount required to complete the $2,400 payment was merely that of a volunteer. He was to be an accommodation indorser only. He was under no legal obligation to indorse or become a party to any note which plaintiff might have offered the bank to evidence a loan of money sufficient to make good his tender. In actions by brokers to recover commissions for procuring a purchaser of property, it is requisite, to support such actions, that it be shown that such proposed purchaser is ready, able, and willing to make the purchase, and where it appears in any such action that the purported ability of the purchaser to make the purchase is wholly dependent upon the verbal promises of a third party, without consideration, to assist him in securing the money necessary to make the purchase, then the latter is not shown to be able to make such purchase, and the broker is hence not entitled to recover. He has not shown that he produced a purchaser either able or ready to purchase. Merzoian v. Kludjian, 183 Cal. 422, 191 P. 673, per Lawlor, J.; 4 Cal. Jur. 591, note 1; A. L. R. 528. The principle thus stated is, of course, applicable to any case where, as here, an offer to perform an act carries with it the necessity for the payment of money to make good the offer of performance as a condition to the performance of a concurrent condition by him to whom the offer is made.

Measured by the rules of law above set forth, it is clear that the undisputed evidence shows that the so-called offer or tender by the plaintiff was entirely invalid or without legal force or effect.

[6] The authorities cited by counsel for the respondent deal with cases which fall entirely within the terms of section 2076 of the Code of Civil Procedure, and are not in point here. There is, as has been shown, no objection here to the amount of the money tendered, or the trust deed or the sufficiency thereof. The objection is, as pointed out above, that the plaintiff was wholly without ability, financially, to make good his purported offer to pay the defendants the sum of money specified therein and which it was necessary for him to pay to entitle him, under the contract of sale, to a deed to the premises. The right to object to an offer to perform some act because of a fatal infirmity therein which does not come within those constituting valid grounds of objection thereto under section 2076 of the Code of Civil Procedure or other sections of our Codes arises, of course, independently of statute, and is always available to him to whom the offer is made.

[7] To what has been said above it may be added that the fact that the party to whom the offer is made is also unprepared to perform, does not furnish any justification for the inability of the offerer to perform, nor "change what would otherwise be an ineffectual and shadowy form into a substantial, bona fide, and effective tender." Doak v. Bruson, 152 Cal. 17, 23, 91 P. 1001, 1004.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 481

QUADRO v. WIDEMANN. (Civ. 5042.)

(District Court of Appeal, First District, Division 2, California. April 30, 1925.)

1. Landlord and tenant ⟸326(1)—Landlord, leasing farm to tenant for portion of crop, bound to bear his own loss, where crop damaged by rain.

Where landlord leased farm to tenant for a portion of crop raised, he was bound to bear his own loss, when tenant on sale of crop was compelled to accept reduced price, because crop had become damaged by rain.

2. Frauds, statute of ⟸17—Promise to answer for debt of third person must be in writing.

Promise to answer for the debt of a third person falls within Civ. Code, § 1624, and must be in writing.

3. Appeal and error ⟸1011(1)—Frauds, statute of ⟸159—Whether plaintiff's oral agreement to answer for debt of third person was original promise was question of fact, and, evidence being conflicting, trial court's decision was conclusive thereon.

Whether plaintiff's oral agreement to answer for debt of a third person was made on consideration that defendant cancel obligation of original obligor, and therefore an original promise, within Civ. Code, § 2794, and not required to be in writing, was a question of fact, and, evidence being conflicting, trial court's decision in plaintiff's favor was conclusive on appeal.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by M. S. Quadro against C. H. Widemann. Judgment for plaintiff, and defendant appeals. Affirmed.

Albert Mansfield, of Redwood City, for appellant.

J. E. McCurdy, of San Mateo, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $592.09, in an action for money had and received by defendant for the use of plaintiff. The facts which gave rise to the action are as follows:

The plaintiff had rented certain land from the defendant and was to pay a crop rental of one-third of the crop raised. A written agreement had been entered into between plaintiff and McGill & Co., by which the latter was to furnish seed to plaintiff and purchase the crop of peas raised upon the land at the rate of 8 cents per pound, after receiving from said crop an amount equivalent to the seed furnished. The defendant signed this contract between plaintiff and McGill, thus providing for the sale of his share of the crop. The contract also provided that 90 per cent. of the purchase price should be paid when the peas were delivered to McGill & Co. and the balance after they were recleaned.

When plaintiff delivered the peas to McGill & Co. under this contract, the company would not pay for the peas until they had been examined, because they were defective and not fit for seed. Later McGill & Co. refused to pay for the peas at the contract price, because they had been rained on and their value greatly impaired. After some negotiations, and the commencement of an action to recover the purchase price of the peas, plaintiff gave defendant an order requesting him to settle with McGill & Co. After some delay defendant finally settled the claim upon the basis of 4½ cents a pound for the peas.

[1] The questions involved upon the appeal arise with reference to various counterclaims set up by the defendant. Two of these claims were allowed and two were disallowed. One of the latter sought to charge plaintiff with the difference between the price at which the peas were contracted to be sold (8 cents per pound) and the price which defendant finally received for his portion of the crop (4½ cents per pound). The position of appellant with reference to this claim is that the plaintiff should have collected for the peas at the contract price when they were delivered to McGill & Co. and because he failed to do so the defendant was forced to take a reduced price. The answer to this is that the plaintiff testified that McGill & Co. would not pay for the peas upon delivery because they were damaged. Apparently the condition of the peas was such that McGill & Co. were not legally obligated to pay the contract price for the same, because an action was brought by plaintiff, and negotiations entered into between the parties, and the defendant himself undertook to make the collection and all without avail. Defendant was finally compelled to agree to compromise the claim and accept 4½ cents a pound. By the contract between the parties hereto the defendant was to receive a portion of the crop, and, when the crop became damaged by rain, defendant was bound to bear his own loss. There is no merit in this counterclaim, and the trial court so concluded.

[2, 3] Another counterclaim arose out of an alleged oral agreement of plaintiff to answer for the debt of a third person. Such a promise falls within the provisions of section 1624, Civil Code, and must be in writing. Appellant seeks to meet this obstacle by contending that the record shows plaintiff's promise was made upon the consideration that defendant cancel the obligation of the original obligor, and therefore was deemed an original promise. Section 2794, Civ. Code. This was a question of fact upon which the evidence was conflicting, and the trial court has decided the same in favor of the plaintiff. This determination finds support in the testimony of the plaintiff and of his brother, corroborated by the conduct of defendant in attempting to collect the debt from the estate of the original debtor after the time of the alleged substitution of obligors. The question, being one of fact, is closed upon appeal.

The judgment is affirmed.

We concur: NOURSE, J.; PRESTON, Justice pro tem.

---

72 Cal. App. 406

PEOPLE v. JORDAN. (Cr. 1185.)

(District Court of Appeal, Second District, Division 1, California. April 23, 1925.)

1. Criminal law ⊂⊃442—Marriage certificate properly excluded, in absence of proof of signature of person authorized to perform marriage ceremony.

To render marriage certificate admissible, proof of signature of person by whom it purports to have been signed and of his authority to perform marriage ceremony is necessary, and, on failure of such proof, certificate was properly excluded.

2. Criminal law ⊂⊃598(4)—Continuance to obtain additional evidence to render marriage certificate admissible held properly denied.

Where defendant in prosecution for bigamy had ample time to prepare for trial and knew that he would have to affirmatively prove that marriage was void by reason of prior subsisting marriage, *held*, that court did not abuse his discretion in refusing to grant application for

continuance, not made until major portion of evidence was introduced, in order to enable defendant to obtain testimony which would render a marriage license and certificate admissible in support of his defense.

3. Criminal law ⊜655(1)—Trial judge's expressions of impatience held not prejudicial.

Statements of court consisting chiefly in expressions of impatience, not containing any expression indicating opinion of judge concerning guilt or innocence of defendant, were not seriously prejudicial to defendant.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

J. A. Jordan was convicted of bigamy, and appeals. Affirmed.

C. I. Rosin, C. R. Morfoot, and L. M. Powell, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. The information charged that the defendant committed the crime of bigamy by marrying one Sadie Kessler while he was the lawful husband of Grace Jordan. The defendant was convicted and sentenced. The appeal is from the judgment and from an order denying his motion for a new trial.

The defense presented by appellant was and is that the marriage to Grace Jordan was void by reason of a prior subsisting marriage of defendant to one Cora Leak.

After the defendant had testified to some facts tending to prove his marriage to Cora Leak, he offered in evidence an exemplified copy of a marriage license purporting to have been issued by a county judge in Mayes county, Okl., and which had indorsed thereon a certificate of marriage purporting to have been signed by "H. A. Pearce, Christian Minister." It was certified by the county clerk that said instrument was "a full, true and correct copy of marriage license and certificate as the same appears of record and on file in my said office."

[1] Appellant's first point on appeal is that the court erred in sustaining the district attorney's objection to said marriage license and certificate, which objection was that no proper foundation had been laid for its admission in evidence. But we think that the ruling of the court was correct. There was no testimony of any witness who saw the certificate of marriage signed by Mr. Pearce, and there was no evidence of the genuineness of the signature. A marriage certificate does not prove itself. Proof of the signature of the person by whom it purports to have been signed and of his authority to perform the marriage ceremony is necessary. The record of such an unacknowledged private writing as this is not made evidence of the truth of the recitals contained in it. People v. Le Doux, 155 Cal. 535, 550, 102 P. 517; People v. Spitzer, 57 Cal. App. 593, 208 P. 181.

[2] The court did not err in refusing a continuance for the purpose of enabling the defendant to send to Oklahoma for testimony to establish the additional facts which would have made admissible in evidence the said marriage license and certificate of marriage. The record shows that the defendant had ample time to prepare for the trial of the case. Both he and his attorneys knew that he would make the affirmative defense to which we have referred. Therefore they knew, or should have known, that they would have need of testimony to establish the facts of that defense. The application for a continuance was not made until after a large part of the evidence in the case had been heard by the jury. The circumstances as shown by the record do not indicate any abuse of discretion by the court in its refusal to grant a further continuance of the trial.

[3] Finally, it is claimed by appellant that he was prejudiced by certain remarks of the court, made in the presence of the jury, and that the court erred also in refusing to instruct the jury to disregard those remarks. The statements referred to could not have been seriously prejudicial to the defendant. They did not contain any expression indicating an opinion of the judge concerning the guilt or innocence of the defendant, or concerning the truth or falsity of any of the evidence. The statements chiefly consisted in expressions of impatience arising out of the fact that defendant had caused subpoenas to issue for the attendance of certain witnesses, and then had not caused those witnesses to testify. It may be conceded that the defendant should not have been criticized for his conduct of the case in relation to those witnesses.

The judgment and order are affirmed.

I concur: CURTIS, J.

---

72 Cal. App. 433

ANDERSON v. PALLADINE et al.

(Civ. 2891.)

(District Court of Appeal, Third District, California. April 25, 1925.)

1. Judgment ⊜743(2)—When only declaring ownership of "timber" under deed, meaning as used in deed may be inquired into.

Judgment that defendant was the owner of the timber standing on land at certain time, notwithstanding it had not been removed in time provided by deed thereof, not attempting to define word "timber," court, in proceeding for injunction, based on violation of judgment, could examine into and ascertain the meaning of the word as used in deed.

2. Appeal and error ⟸1195(3)—Opinion on former appeal law of case.

Ownership of parties to land and standing timber thereon being distinctly set forth in the opinion of appellate court, such opinion is law of the case, in proceeding for injunction, based on violation of judgment of trial court entered pursuant to such opinion, though the judgment be interlocutory.

3. Logs and logging ⟸3(7)—Deed of standing timber imports right of removal only in proper manner.

Deed conveying standing timber and conferring right to remove it, while placing on land the burdens unavoidably incident to cutting and removal, imports only right to remove in the usual, customary, and proper manner, as understood and applied in logging and lumber business.

4. Logs and logging ⟸3(7)—Proper manner of removing standing timber, pursuant to conveyance, may be ascertained from United States government rules.

In ascertainment and application of proper manner for removal of timber suitable for merchantable purposes, pursuant to a conveyance thereof, resort may be had to United States government rules.

5. Injunction ⟸190 — For violation of judgment by manner of removal of standing timber, removal may not be permanently enjoined.

While, if defendant in its logging has violated judgment fixing its ownership of standing timber, with right to remove it, it is liable to plaintiff, owner of the land, for any damages therefrom, and may be restrained from so violating the judgment, and from removing the timber in other than proper manner, which the order may define and set forth, it may not be permanently enjoined from removing the timber, thus working an entire forfeiture of its timber.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action by Gustaf Anderson against A. G. Palladine and others. From the judgment granting perpetual injunction, defendant Sanger Lumber Company appeals. Reversed, with directions.

Peckinpah & Carter, of Fresno, for appellant.

F. E. Cook and Frank Kauke, both of Fresno, for respondent.

PLUMMER, J. On the 6th day of April, A. D. 1887, the plaintiff, then being the owner of the lands and premises hereinafter described, executed and delivered to the grantors of the appellant a certain instrument of conveyance, transferring title to certain timber situate in Fresno county, described as follows, to wit:

"All the timber now growing and standing on the northeast quarter of section 22, in township 13 south, range 28 east of Mt. Diablo base and meridian, together with the right and privilege of free and undisturbed ingress and egress in, upon and from said real property at any and all times within 10 years from the date of this grant, to cut and remove from said parcel of land the timber hereby granted from time to time as said grantees may elect, and together with the right to construct logging roads, tramways, trails, and railroads and such other ways and means as said grantees may require to enable them to cut and remove said timber, and together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant."

No attempt was made by any of the grantees of the plaintiff to remove said timber prior to the institution of this action in the year 1915. At about this time the plaintiff began this action to quiet his title to the above-described premises, and to have it adjudged and decreed that the defendants possessed no right, title, or interest therein, or to the timber then standing and being on said premises. Judgment went for the plaintiff, and the defendants appealed. This appeal was heard and determined in Division 1 of the District Court of Appeal, First Appellate District, and reported in 39 Cal. App. 256, 178 P. 553. In this opinion, the judgment of the trial court was reversed and the rights of the respective parties in and to the premises adjudged and decreed to be as follows: That the plaintiff was the owner of the lands and premises described in his complaint and that the appellant, Sanger Lumber Company, was the owner of the timber standing and being on the premises at the time of the execution of the instrument before referred to. In the opinion of the appellate court rendered in this cause, the trial court was further directed to proceed according to the views expressed in said opinion entering judgment for the plaintiff quieting his title as prayed for, subject to the ownership of said timber by the appellant, with the right in the appellant to remove the same from the above-described premises within such reasonable time as the court might determine, and to enter an interlocutory decree to that effect, fixing the time for appellant to remove the timber from said land, and further providing that, if the appellant failed so to do, the plaintiff might remove the same, and further providing for determining and adjudging the cost and expenses, and also providing that the trial court should retain jurisdiction of the cause for the purpose of an accounting between the parties, in the event that appellant failed to remove the timber within the specified time.

Upon the going down of the remittitur, the trial court entered judgment, in accordance with said opinion, as follows, to wit:

"That the said defendant Sanger Lumber Company is the owner and holds title to all of the timber standing and growing on the north-

east quarter (N. E. ¼) of section twenty-two (22), in township thirteen (13) south, of range twenty-eight (28) east, Mt. Diablo base and meridian, situate in the said county of Fresno, which timber was standing and growing thereon on the 6th day of April, 1887, and now remains thereon, together with the right and privilege of free and undisturbed ingress to and egress from, and upon and from, said real property to cut and remove said timber, at any and all times on and before the 31st day of December, 1924, as to that portion thereof on the northerly and easterly slope of said lands toward Hume lake and the mill and equipment of said defendant, and as to the remaining portion of said land at any and all times on or before the 31st day of December, 1926.

"That in cutting and removing said timber the defendant shall observe and comply with the rules of the United States government now in force relative to the cutting and removal of timber from lands of said government where timber is sold to purchasers thereof, and said defendant shall leave standing and being on the land hereinabove described all young trees which have grown thereon since the 6th day of April, 1887.

"That, if the said defendant shall fail, refuse, or neglect to so cut and remove the said timber from said land within the time hereinabove specified therefor, the plaintiff shall have full right to remove, and may remove, and sell the timber at the expense and for the benefit of said defendant, accounting to said defendant for the net proceeds thereof, and that if the said timber be not so cut and removed from said land by the defendant, within the said time, then, if plaintiff shall cut and remove same, said plaintiff shall be entitled to retain and may retain, from the proceeds of his sale of the said timber, the actual cost and expense of cutting and removing same; and if any of said timber be cut and removed from said land, either by the plaintiff or by the defendant, after the expiration of the time herein specified and allowed to the defendant for such cutting and removal by said defendant, then the plaintiff shall also receive such an amount as will reasonably compensate him for loss of the use and occupation of the soil from the time of the expiration of the period herein fixed by the court for such removal by the defendant up to the time of the actual removal thereof, which amount shall hereafter be determined by the court on application therefor.

"That this court shall have and retain full jurisdiction of this cause for the purpose of an accounting between the parties in the event the said defendant fails to remove its said timber from said land within the time herein specified therefor.

"That the court shall also have and retain jurisdiction of this cause for the purpose of hearing evidence and determining as to any damage or injury having been caused to the plaintiff at any time by said defendant in its performing the work of cutting and removing the timber from said land in the manner or at a time other than as herein authorized, and that either party to this action, at any time when occasion shall require, may apply to the court for a hearing in that respect, and for the determination of the damages, if any, so caused to or suffered by the plaintiff, and the amount to be paid plaintiff by the defendant by reason thereof, or by reason of any act or thing done or omitted by said defendant, at any time in cutting or removing said timber from said land.

"That the consideration of the question of loss to the plaintiff of the use and occupation of said land after the expiration of the period of time hereinabove specified, the damage, if any, that may be done by the defendant to the young trees of recent growth on said land, and an accounting as to any cost or expense incurred by the plaintiff in removing said timber on the failure of the defendant so to do as herein provided for, is reserved by this court, and shall be determined by this court as occasion therefor may hereafter arise, and as a proper application be made therefor by either party hereto."

After the entry of this judgment, the Sanger Lumber Company proceeded with the work of removing the timber from the described premises, and cut and removed therefrom all the timber standing and being on 40 acres thereof. The judgment last herein referred to was entered on or about the 16th day of May, 1923. Thereafter, and on or about the 25th day of June, 1923, upon affidavits made and filed in said cause, praying for an order that the defendant the Sanger Lumber Company be required to appear before said court to show cause why it was not in contempt for violating the provisions of said judgment, and for a temporary restraining order, prohibiting the further cutting and removing of timber during the hearing of said matter, and that the said defendant Sanger Lumber Company be prohibited, restrained, and enjoined from tearing, devastating, and destroying the young growth and trees under a certain size standing on said premises on the 6th day of April, 1887. The said trial court issued a temporary restraining order and order to show cause. Thereafter a hearing was had upon said affidavits and order to show cause. Whereupon oral and documentary testimony was introduced and thereafter the court entered the following order or judgment, to wit:

"Now therefore, by reason of the law and the findings of fact aforesaid, it is ordered, adjudged, and decreed that the motion of plaintiff above named for a permanent restraining order be and the same is hereby granted.

"It is further ordered and decreed that a permanent injunction issue out of the above-entitled court directed to the defendant Sanger Lumber Company forever restraining and enjoining the defendant Sanger Lumber Company, its servants, agents, and employees from entering into or upon or in any manner conducting any logging operations upon the real property belonging to the plaintiff herein and more particularly described as follows, to wit: The northeast quarter of section 22, in township 13 south of range 28 east, Mt. Diablo base and meridian."

A permanent injunction was thereupon issued, in conformity with said order or judgment. In the findings supporting this latter judgment of the court, it is found and de-

termined by the court that the Sanger Lumber Company had not conducted its logging operations in accordance with government rules and regulations, in that said company had made use of what is known in the lumber trade as a high-lead line, which said high-lead line was placed at an elevation of approximately 90 feet above the ground, whereas, the rules and regulations provide that said line shall not be placed at an elevation greater than 35 feet above the ground, and further, that the said Sanger Lumber Company had violated the terms of the interlocutory judgment of said court, in that said defendant, without excuse or cause in conducting its said logging operations, made a barren waste of approximately 40 acres of the real property hereinabove described, in that all saplings and undergrowth standing and being on said real property were unnecessarily and without cause or excuse uprooted and strewn upon the ground; that said defendant had cut and removed from said real property trees which were not of a merchantable kind, character, or size on the 6th day of April, 1887. The court further found that the word "timber," as used in the instrument of sale first hereinabove referred to and also in the judgment of the court, had reference only to merchantable timber or timber capable of being converted into lumber suitable for building purposes, and included only standing trees which were at least 12 inches in diameter then being and standing on the ground on the 6th day of April, A. D. 1887, and that defendant did not own any timber standing and being upon said premises which had become merchantable since said date, and that in its logging operations the Sanger Lumber Company was only entitled to remove from said premises timber that was of the diameter before mentioned on the 6th day of April, 1887.

In the judgment entered by the trial court, in accordance with the opinion and directions contained in the opinion of the appellate court, supra, the word "timber" is used without any definition or further explanation than the mere use of the word, and the exact legal rights of the parties in and to the timber on said premises left in doubt. Under its interpretation of the judgment, the Sanger Lumber Company proceeded to take everything from the 40 acres referred to that could be converted into a merchantable commodity at the date of its logging operations, irrespective of the long lapse of time and the incident growth of the trees on said premises between the date of the execution of the instrument conveying title thereto and the year 1923, when the logging operations were being conducted. The trial court, upon the hearing of the application for an injunction, interpreted and applied the meaning of the word "timber" as meaning trees suitable for being converted into lumber adapted for construction or manufacturing purposes, etc., and having found that the Sanger Lumber Company was taking other trees therefrom, and also unnecessarily damaging the young growth on said premises, permanently enjoined the appellant from further logging operations. It is from this injunctive order or judgment that the Sanger Lumber Company appeals.

[1] On the part of the appellant it is argued that the judgment to which we have referred, fixing the rights of the parties in and to the premises, is a final judgment, and on the part of the respondent that the judgment is wholly interlocutory. We do not think the determination of this question is necessary for a decision in this case. Irrespective of whether the judgment entered by the trial court pursuant to the opinion of the appellate court is final or interlocutory, the legal rights of the parties are therein set forth and the law of the case concerning the legal rights of the parties, we think, fixed and determined by the appellate court in the opinion to which we have referred. The appellate court finds in its opinion that the plaintiff is the owner of the soil, subject to the ownership of the Sanger Lumber Company in and to the timber standing thereon. Other matters contained in the opinion relate to the manner in which the rights of the respective parties may be exercised and conserved. The Sanger Lumber Company is there determined to be the absolute owner of the timber that was standing upon said premises at the date of the execution of the instrument conveying title to its grantors. It will be observed that that instrument gave to the plaintiff's grantees certain rights and privileges, to wit:

"To cut and remove from said parcel of land the timber hereby granted from time to time as said grantees may elect, and together with the right to construct logging roads, tramways, trails, and railroads and such other ways and means as said grantees may require to enable them to cut and remove said timber, and, together with all other rights and privileges necessary for the full enjoyment by said grantees of this grant."

This necessarily imposed upon the lands and premises certain easements and conferred upon the plaintiff's grantees the right to do the things therein specified, the doing of which would undoubtedly impose burdens upon the lands belonging to the plaintiff. Whether the judgment which we are considering be considered as final or interlocutory, it did not attempt to define the word timber, and, in determining whether the Sanger Lumber Company was proceeding in accordance with the judgment of the court to remove the timber, and in ascertaining whether it was violating any of the provisions of said judgment, we think the court had jurisdiction to examine into and ascertain the meaning of the word timber as used in the

instrument of conveyance under which the appellant claims title. In the case of Balderson v. Seeley, 160 Mich. 186, 125 N. W. 37, 136 Am. St. Rep. 428, 19 Ann. Cas. 1049, timber is defined to mean that sort of trees which is proper and suitable to be used in the construction of buildings, etc. This case, as reported in Ann. Cas., supra, contains in an extended note a large number of cases supporting the interpretation hereinbefore stated and followed by the trial court and also holding that the word timber does not denote trees which are suitable only for firewood, cordwood, and the like.

[2] It is further argued by the respondent that the opinion of the appellate court, supra, is not the law of the case, and that the judgment of the trial court entered in accordance therewith, being interlocutory, does not finally fix and determine the rights of the parties. In this, we think, the respondent is in error. The ownership of the parties in and to said property is distinctly set forth in the opinion of the appellate court, and likewise clearly set forth in the judgment, but whether so clearly set forth in the judgment of the trial court as might have been done, we think the law of the case, as declared by the appellate court, is final. See, also, 2 Cal. Jur. p. 954, etc.

[3, 4] The right to remove the timber to which the appellant acquired title, as herein stated, was conferred in the instrument conveying title, and it placed upon the land incidents and burdens necessarily attendant upon the cutting and removal of such timber. The damages unavoidably incident thereto must be held to have been necessarily within the contemplation of the parties when the title was conveyed. This, however, we do not think imports an absolute right. It only imports the right to remove the timber in the usual, customary, and proper manner, as those terms are understood and applied in the logging and lumber business, and we think resort may be had to the United States government rules and regulations in the ascertainment of and the application of the proper manner for the removal of timber suitable for merchantable purposes.

[5] If the appellant in this case, in its logging operations, has in any particular violated the judgment fixing its ownership in the timber referred to, to the damage of the plaintiff, it is certainly liable to respond to him for such damages, and the appellant may also be restrained from conducting its logging operations contrary to the provisions and conditions of said judgment, but this did not authorize the trial court to enter a judgment or order which, in effect, constitutes an entire forfeiture of the property belonging to the appellant, to wit, the timber as defined by the trial court standing and being on said premises, which was standing and being on said premises on the 6th day of April, 1887, and also that the trial court is authorized to enter an order prohibiting the removal of any of said timber other than in accordance with the approved methods and under rules and regulations by the trial court to be fixed and determined, and that the method of removal should be such as may best and most clearly protect and conserve the property rights of the respective parties. The judgment to which we have referred also reserves the right to ascertain and fix damages, and, in view of the fact that some 38 years have elapsed since the appellant's grantors acquired ownership in and to the timber standing on said premises, we think the trial court, sitting as a court of equity, authorized to take into consideration the changed conditions and the fact that there may be trees standing on said premises of considerable value now belonging to the plaintiff and to provide for the removal of the timber belonging to the appellant in such manner as may least injure the same, and also further provide that said timber shall not be removed by the appellant other than in accordance with the directions specified and set forth in the court's order.

The appellant further insists that the record shows that the plaintiff, since the entry of the judgment herein, pursuant to the opinion of the appellate court, supra, has parted with all interest and ownership in and to the 40 acres upon which the logging operations under consideration have been conducted. However, there is testimony to the effect that the lumber company has crossed the boundary lines of said 40 acres and taken some timber on land still belonging to the plaintiff, and the manner of the operations conducted on the 40 acres would at least furnish a basis from which the court could determine the kind of operations that would be continued, unless restrained by the orders of the court.

The judgment granting a perpetual injunction against the removal of timber found to belong to the appellant is hereby reversed, and the trial court directed to make and enter such judgment and orders as may be necessary to provide for the removal of the timber belonging to the appellant as may be best calculated to preserve the rights of all parties interested in the premises, and to prohibit the removal of such timber in any other manner.

We concur: FINCH, P. J.; McDANIEL, Justice pro tem.

72 Cal. App. 484

BROYLES v. MAHON et al. (Civ. 2719.)

(District Court of Appeal, Third District, California. April 30, 1925.)

1. Schools and school districts ⟸22—Statute, providing for annexation of common school districts to high school district, held constitutional.

Pol. Code, § 1734b, providing for annexation of common school districts to high school district, *held* constitutional.

2. Certiorari ⟸21—Writ of review held proper procedure to determine whether board of county supervisors acted in excess of its jurisdiction in annexing common school districts to high school district.

Though creation of high school district by annexation of common school districts to original high school district may be legislative act, writ of review *held* proper remedy to determine whether board of county supervisors acted in excess of its jurisdiction in annexing such school district, since proceedings pursuant to legislative act granting right to exercise powers only upon certain conditions and upon ascertainment of certain facts by board and notice to interested parties were of a judicial character.

3. Evidence ⟸10(6) — Judicial notice taken that common school districts were within certain distance from high school district.

In proceedings to annul resolution of county supervisors in annexing certain common school districts to high school district, *held*, evidence was not required to prove that portion of common school district was within 10 miles of high school district, as provided by Pol. Code, § 1734b, since board could take judicial notice of such distances.

4. Schools and schools districts ⟸42(2)—Voting for resolution, which recommended annexation of common school districts to the high school district, held to comply with statute.

Voting by supervisor in support of resolution, which stated he had recommended annexation of certain common school districts to high school district, *held* a sufficient recommendation for annexation required by Pol. Code § 1734b.

Appeal from Superior Court, Butte County; J. O. Moncur, Judge.

Certiorari by Chester Broyles against A. H. Mahon and others, constituting the Board of Supervisors of Butte County, and others, to annul a resolution of the Board annexing certain school districts. From a judgment for plaintiff, and from an order denying a new trial, defendants appeal. Reversed, with instructions to dismiss writ.

William E. Rothe, of Chico, and Clinton W. Johnson, of Gridley, for appellants.

W. H. Carlin, of Marysville, and Davids & Snyder, of Chico, for respondent.

McDANIEL, Justice pro tem. This is an appeal from the judgment of the superior court of the county of Butte, and from an order denying a motion for new trial. The hearing in the court below was upon a return to a bill of review directed to defendants. Plaintiff sought to have annulled a certain resolution of the board of supervisors of the said county, adopted on the 24th day of August, 1921, purporting to annex certain named common school districts to the Chico high school district, under the provisions of section 1734b of the Political Code.

The findings omit a few items of fact which, however, are shown by the return. These omissions will be noticed later. The names of the 17 common school districts will be omitted from the copy of the findings following:

Findings.

"The above proceedings came on regularly for trial before the court on the 12th day of May, 1922; W. H. Carlin and Davids & Snyder appeared as counsel for plaintiff, and J. R. Robinson, district attorney of the county of Butte, state of California, appeared as counsel for defendants; the cause was tried by the court upon the petition or complaint of plaintiff, and the return made by defendants to the alternative writ of certiorari issued by this court in said matter on the 6th day of May, 1922; and the cause was duly presented to the court and argued by respective counsel; and the court having duly considered the evidence and being fully advised in the premises, now finds the facts as follows:

"I. The defendants, A. H. Mahon, F. L. Roohr, C. E. Porter, H. W. White, and James Craig, during all the times in said complaint and herein mentioned, were and now are the duly elected, qualified, and acting supervisors, and all five thereof are, and during all the times herein mentioned did, and now do constitute the board of supervisors of said county of Butte.

"II. The defendants, George E. Canfield, E. B. Copeland, Thomas Crew, C. L. Stolp, and Henria Compton now are, and during all the times herein mentioned were, the duly elected, qualified, and acting members of the board of education, and that during all the times in said complaint and herein mentioned did, and now do, constitute the board of education of Chico high school district in the county of Butte, state of California.

"III. The defendant, Irvin Passmore, during all the times in said complaint and herein mentioned was, and now is, the duly elected, qualified, and acting county superintendent of schools in and for the county of Butte, state of California.

"IV. During all the times in this complaint and herein mentioned each and every of the following named school districts [naming them] was a common school district duly and regularly organized, constituted, and existing in the county of Butte, state of California. On the 24th day of August, 1921, said board of supervisors of said county of Butte pretending to act under the authority of section 1734b of the Political Code of the state of California, and

not otherwise, did pass and adopt a certain resolution in words and figures following, to wit:

" 'Hearing on Proposed High School District Annexations. 11 o'clock a. m. This being the time fixed for the hearing on the recommendations of the county superintendent of schools as to the various annexations of grammar school districts to the nearest high school district, the board now proceeds with the hearing. After due consideration of evidence presented to this board, and after recommendation of the county superintendent of schools, and also the recommendation of each supervisor in whose supervisorial district the following named school districts are situated, it is moved by Supervisor Porter, seconded by Supervisor White, that (certain-named school districts) each be and they hereby are annexed to and made a part of the Chico high school district.'

"V. Said defendants, members of the board of education of said Chico high school, acting with and by the direction and approval of defendant, Irvin Passmore, county superintendent of schools of said county of Butte, at the date of the filing of the complaint in this action were about to and intended to take action in connection with said resolution passed by said board of supervisors of said county of Butte, and organize a high school district with the purpose and intent of having said board, when organized, exercise jurisdiction over, not only said Chico high school as the same existed prior to the 24th day of August, 1921, but also over the whole territory comprised by said Chico high school district and said above-mentioned 17 common school districts, and by the exercise of such jurisdiction cause taxes to be levied and assessed upon all land situate in all of said common school districts and collect such taxes from the owners of said lands to be thereafter expended in connection with the management and control of an alleged high school district which shall include not only said Chico high school but all of said 17 common school districts aforesaid.

"VI. Plaintiff is a citizen of the United States, a resident of said Rock Creek school district in said county of Butte, and owns real estate situate therein and the same is and at the date of the filing of said complaint was taxable for school purposes in said district.

"VII. No evidence was introduced at said trial as to whether or not the nearest point of any of said common school districts was more than 10 miles from said Chico high school district.

"VIII. Notwithstanding the recitals in the said return of the proceedings had by and before the board of supervisors of said county of Butte, upon the passage of said resolution aforesaid, the record of the proceedings of said board upon the passage of said resolution does not show that the supervisor of said county of Butte, in whose district said common school districts above mentioned are located, recommended the annexation of any of said common school districts to said Chico high school district, except that it appears from said record that he, with the other supervisors of said county, voted for the passage of said resolution.

"As conclusions of law from the foregoing facts the court finds: That said board of supervisors were without jurisdiction to pass said resolution annexing said common school districts to said Chico high school district, and that said resolution purporting to annex said common school districts to said Chico high school district be annulled and set aside."

The amended return established several facts not referred to in the foregoing findings, the essential ones being that the board received the recommendation in writing of Irvin Passmore, county superintendent of schools of Butte county, dated August 5, 1921, marked Exhibit A, recommending the annexation of the various school districts to the several high school districts therein named; that proof of publication of notice of the hearing, as provided in said section 1734b, was duly made; that thereafter the matter of the annexation of the said school districts, under the recommendation of the county superintendent of schools, and pursuant to said notice, came on regularly for hearing before said board on the 24th day of August, 1921, at 11 o'clock a. m., said board being then in regular session, and that at said time said matter was called for hearing before said board, all of said members of said board of supervisors were present at said hearing; and the votes for the adoption of the resolution were unanimously "aye"; that no sworn testimony was taken, but after consideration and discussion, said resolution of annexation was passed and adopted by said board, Exhibit D, attached to and part of the return, being a true copy of the minutes of said meeting on August 24, 1921, duly entered in the official minute book.

Appellants claim that the trial court erred in the following particulars, to wit: (1) In deciding that the board of supervisors of Butte county did not have jurisdiction to annex common school districts to high school districts in accordance with the provisions of section 1734b of the Political Code, without proof that the districts so annexed were within less than 10 miles of the high school district to which it was annexed; (2) in holding it was necessary to prove facts before the board of supervisors of which the board had judicial knowledge without proof; (3) in holding that said action of the board of supervisors was judicial (it is argued that the act of annexation was a legislative act and not reviewable by certiorari); (4) in not dismissing the writ.

[1] Respondent, in support of the judgment of the lower court, attacks the constitutionality of section 1734b of the Political Code, basing his argument upon a claimed lack of due notice to the taxpayers; and, though pointing to no specific provision of the Constitution violated, contends that section 1734b, under which the board of supervisors acted in the case at bar, in attempting to annex the several elementary school districts named in the record, is inconsistent and in conflict with other Code sections, and gave no authority to the board of supervisors to annex the districts to the Chico high school

district, which was and is a city high school district.

He also contends that if Political Code, section 1734b, is constitutional, the board of supervisors, in its proceedings culminating in the adoption of the resolution of annexation, acted without or in excess of its jurisdiction, because no evidence was received by it to show that the several school districts are within the 10-mile limit specified in the statute, a jurisdictional omission or failure of proof which he deems fatal. The court below held against respondent's attack upon the constitutionality of section 1734b. The recent cases of People v. San Bernardino High School District, 62 Cal. App. 67, 216 P. 959; Board of Education San Rafael City v. Davidson, 190 Cal. 162, 210 P. 961; Antelope School District v. McClellan, 55 Cal. App. 244, 203 P. 147, seem to meet and overcome all the respondent's objections to said section 1734b, and to uphold its constitutionality.

In People v. San Bernardino High School District, supra, the constitutional questions are thus stated:

"It is contended that section 1734b of the Political Code is unconstitutional in the following respects: (1) That it places the power of annexation in the hands of officials having no legislative authority; (2) that it is special legislation in that it provides for annexation only to high school districts that are governed by an appointive school board; (3) that it subjects annexed districts to taxation and local government without representation; (4) that it subjects annexed districts to taxation for outstanding bonds of the high school district."

In Board of Education v. Davidson, supra, quoting from page 167 (210 P. 963), it is said:

"We conclude, therefore, that under the state school law as followed by the charter of San Rafael it is contemplated that outlying and adjacent elementary school districts may be annexed to a city high school district for high school purposes, and that the district so consolidated is to be under the government and control of the city board of education, and the annexed territory becomes part of the city for the purpose of electing such board."

We determine that the lower court was right in upholding the constitutionality of the said section 1734b.

[2] Was the hearing upon writ of review in the lower court a proper proceeding to determine the question whether or not the board of supervisors acted without or in excess of its jurisdiction? For the purposes of this discussion we believe the answer should be in the affirmative. It may be conceded that the creation of the proposed Chico high school district, as it will be after the annexation of the common school districts, is a legislative act; but it appears to be the law that where the Legislature delegates legislative power to a local board and provides that it can be exercised only upon certain conditions and upon the ascertainment of certain facts by such board, after notice and hearing to interested parties, the proceeding thus authorized is of a judicial character which may be reviewed by writ of review. Imperial Water Co. v. Supervisors, 162 Cal. 14, 120 P. 780; 4 Cal. Jur. 1074, and citations note 19.

In view of the conclusion we have formed upon the merits of the return and the findings of fact, it is unnecessary to examine with meticulous care this question as to the propriety of the proceeding under section 1068, Code of Civil Procedure, in the court below. There are two points which seem to have caused the trial court by its judgment to invalidate the resolution of annexation. They are indicated in findings VII and VIII.

Paragraph VII refers to matters upon which the board of supervisors could make a determination without receiving testimony, because it can take judicial notice of its own orders, records, fixed geographical facts, such as boundaries of school districts established by its own orders or by the general law.

In Anderson v. Board of Dental Examiners, 27 Cal. App. 336, 149 P. 1006, we note this language:

"It has been held that courts will take judicial notice of their records and officers [citing many cases]. Judicial notice is based upon convenience and expediency, and its application is not confined to courts of record. Thus it has been held, with respect to proceedings in a municipal court, instituted for the express purpose of enforcing municipal ordinances, invested with full jurisdiction for that purpose, that the ordinances are the peculiar law of the forum, and the court is bound to take judicial notice of their existence. * * * There are in addition to courts certain boards and special tribunals for determining certain classes of rights; and while they are not strictly courts, they partake of their nature, and their findings partake of the nature of judgments. The jurisdiction of such bodies rests upon the same basis as inferior courts; and they, too, may take judicial notice of certain matters. * * * Learning in the law is not one of the qualifications required of the members composing the board; and to hold under these circumstances that the board's investigations should be conducted according to technical legal rules would have the effect of seriously impairing the successful performance of the duties for which that body was created [citing cases]."

Counsel for appellants cited numerous authorities upon this point on pages 4 and 5 of their opening brief.

As above indicated, we believe that finding VII is surplusage and may be disregarded, if in fact it means to refer to the hearing before the board of supervisors. If it refers to the hearing in the superior court, it is equally immaterial, because evidence in that court upon the question mentioned in the finding as to the 10-mile limit would have been inadmissible as dehors the record. Hoffmann v. Superior Court, 79 Cal. 475, 21 P. 862; Borchard v. Board of Supervisors, 144 Cal. 10, 77 P. 708.

[3] It is apparent therefore that error occurred if the finding indicates it to be the lower court's view that proof was requisite upon that provision of section 1734b, stating "that no common school district shall be annexed, unless the nearest point of such common school district lies within 10 miles of a high school district," because the board could, and no doubt did, take judicial notice of the distances.

Upon the second proposition also we are satisfied error occurred which culminated in wrong conclusions and judgment.

Finding VIII is peculiar in form and statement in the part which is negative and precedes the exception contained in the final clause. That negation in the finding appears, inferentially, to have been given much weight by the court, which in our opinion was not warranted. Not only does an examination of the minutes disclose (see page 100 of the transcript) that, prior to the adoption of the resolution, a full discussion and consideration of the features and requirements of the section were had by the board of supervisors and that, consequently, the finding is inaccurate and unsupported by the evidence as to that first clause, but its implication of a failure of proof upon a material prerequisite to the act of annexation is wrong, and the error is reflected in the judgment of annulment. The exception in the second clause of the finding embodies the only matter of weight or substance in it, and, in effect, is contradictory of the first, overcoming the implication and inaccuracy, or, at least, revealing an inconsistency between the two clauses.

[4] When each supervisor cast his vote in support of the resolution which stated he had recommended annexation, he must be presumed to have done so. In truth, by that affirmative vote he then and there was making the required recommendation. There is no specified form of recommendation required. It might be manifested orally or in writing or by a vote.

It will be noted that the resolution itself recited as follows:

"After due consideration of evidence presented to this board, and after recommendation of the county superintendent of schools, and also the recommendation of each supervisor in whose supervisorial district the following named school districts are situated, it is moved by Supervisor Porter, seconded by Supervisor White, that," etc., (naming the said respective school districts), "each be and they are hereby annexed to and made a part of the Chico high school district."

The record of the vote shows the affirmative vote of all five supervisors. This recital of the recommendation, voted upon by each supervisor, carries in itself conclusive proof that he recommended the annexation. This is too clear to require further argument or citation of authorities. We are of opinion therefore that the court's finding did not include a correct finding upon some of the material facts and omitted others, which, however, are shown by the return and stand undisputed.

We determine as follows: (1) That section 1734b, Political Code, is constitutional in all respects. (2) That every step, required thereby of the board of supervisors in these matters of annexation of school districts, was taken: (a) The county superintendent of schools made his recommendation in writing to the board of supervisors for annexation. (b) August 24, 1921, at 11 o'clock a. m., was fixed as the time for the hearing by said board of the matter of said annexation, and notice was ordered to be published. (c) That due notice to all parties interested was published at least once a week for two successive weeks in a newspaper of general circulation published in the county; that such notice stated the time when and the place where the board of supervisors was to act and gave the names of the common school districts to be affected by the action of the board (see page 113 et seq. of transcript, down to and including page 116). (d) That a hearing on said August 24, 1921, was duly and regularly held before said board of supervisors. (e) That said resolution hereinbefore set out was duly and regularly adopted, after full consideration and determination of all jurisdictional matters.

It follows that the proceedings before the board of supervisors in all respects were regular and valid, and that the judgment of said superior court, declaring them canceled and invalid, should be reversed.

The motion for a new trial was not argued nor pressed in this appeal. No ruling thereon need be made.

The judgment is reversed, with instructions to the superior court to dismiss the writ of review.

We concur: FINCH, P. J.; PLUMMER, J.

PEOPLE v. BARTON. (Cr. 1167.)

(District Court of Appeal, Second District, Division 2, California. April 25, 1925.)

1. Criminal law ⟸742(1)—Credibility of witnesses for jury.

Where disputed questions of fact are presented by conflicting testimony, it is solely within jury's province to determine credibility of witnesses and truth or falsity of their evidence.

2. Criminal law ⟸814(3)—Instruction, as to admissibility of evidence of other acts between defendant and prosecutrix, held misleading and prejudicial, where only one act testified to.

In prosecution for rape, where prosecutrix testified to but one act, an instruction, that evidence of other acts between defendant and prosecutrix both before and after time charged in information, is admissible to prove adulterous disposition of defendant, *held* misleading and prejudicial.

3. Criminal law ⟸678(1)—Election not required, where but one act testified to.

Where, in prosecution for rape, prosecutrix definitely testified that but one act occurred, district attorney could not be required to make an election.

4. Criminal law ⟸1137(5)—Defendant, opening inquiry as to other acts by defendant, cannot complain of similar testimony by state.

Where defendant, in prosecution for rape, first elicited, on cross-examination of prosecutrix, testimony as to improper familiarities with her in presence of other persons, and with another young woman in prosecutrix' presence, defendant cannot complain of similar testimony elicited by state on redirect examination.

5. Criminal law ⟸371(9)—Evidence of other improper familiarities properly admitted to show disposition of defendant, and probability of commission of act charged.

In prosecution for rape, evidence of improper familiarities by defendant with prosecutrix, and with another young woman, was admissible for purpose of showing disposition of defendant, and probability of commission of act with which he was charged.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

James O. Barton was convicted of rape, and he appeals. Reversed.

Frank W. Allender, Marshall A. Stutsman, both of Los Angeles, W. L. Mason, of San Pedro (Scarborough & Bowen, of Los Angeles, of counsel), for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. It was charged by information that the appellant committed rape upon a girl of the age of 11 years on or about the 15th day of September, 1921; and by a second count he was also charged with having committed an assault upon the same child with intent to commit rape. A jury found him guilty as charged in the first count, and acquitted him on the charge of attempted rape. A motion for new trial having been denied, this appeal is taken from the judgment and order denying said motion.

The prosecuting witness was one of two adopted daughters of appellant and wife, and she testified that she came from Montana to San Pedro, Los Angeles county, in the year 1917, and that she lived in a tent at the latter place, until the defendant built a garage, wherein she slept thereafter. She testified that she became 11 years of age on September 27, 1921, and that appellant had taken indecent liberties and indulged in lascivious conduct with her person ever since she was about 8 years old, but that he had had actual intercourse with her only once, and that it occurred about two weeks before her eleventh birthday.

Many grounds are assigned for reversal, including alleged insufficiency of the evidence to support a conviction, and asserted errors of the trial court in its rulings during the trial, and in giving and refusing instructions. From the view which we take of the case, it is apparent, as we shall hereafter show, that it must be reversed, and doubtless certain features complained of will not recur upon another trial. We shall therefore devote our attention only to points which require rulings at this time.

Although the testimony of the prosecutrix, if believed by the jury, may be said to have been accompanied by incriminating circumstances, yet without it there was little evidence of guilt; such being the fact, we are constrained to analyze and subject to close scrutiny the principal factors which apparently led to the conviction.

[1] The prosecutrix testified, and it was the theory of the prosecution, that appellant slept in the garage with his daughter, and that the act complained of occurred therein, but appellant stated positively that there had been no bed in the garage for months preceding the date of the alleged offense, and that all of the girl's testimony in this regard was false. Other witnesses corroborated him in this, and swore that the principals in the case occupied beds in different parts of the house during all of this period. Appellant argues that the prosecutrix was discredited by this evidence, but disputed questions of fact were thus presented, and it was solely within the province of the jury to determine, as to the credibility of the witnesses, and as to the truth or falsity of the evidence.

Barton emphatically asserted that he had at all times felt, and exhibited an attitude and course of conduct, of the most properly affectionate and fatherly character toward the prosecutrix, and that had the people been

required to elect upon a specific act and date upon which they would ask the jury to base a verdict, he would have been enabled to meet and refute any such charge.

[2] One ground urged by appellant as sufficient for a reversal appears to us to be well taken. The court instructed the jury as follows:

"Evidence of other acts of sexual intercourse between the defendant and the prosecutrix, and other improper familiarities on the part of the defendant toward, and with, the prosecutrix, both before and after the time charged in the information, is received and admitted in evidence to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that the acts of sexual intercourse, charged and relied on in the information, were committed and for no other purpose."

While this instruction has been upheld in a number of cases as proper where the evidence warrants it, and particularly where there has been testimony to the effect that more than one act of sexual intercourse has taken place between the defendant and the prosecutrix, under the circumstances of the instant case we believe that the instruction was not only erroneous, but was calculated to mislead the jury in a manner prejudicial to the substantial rights of the defendant. This instruction is susceptible of the construction that by it the court intended to indicate to the jury that, in its opinion, there had been introduced evidence of more than one act of sexual intercourse, in fact, of acts "both before and after the time charged in the information." While the language of the instruction may be regarded as a statement of an abstract principle of law and therefore properly used in instructing the jury where the testimony is susceptible of the interpretation that acts other than that charged in the information have occurred between the defendant and the prosecutrix, it should not be used where, as in this case, the evidence does not allow of that construction.

In one of the answers given by the prosecuting witness it was positively stated that only one act of intercourse occurred, which was on the 13th day of September, 1921, and this, therefore, was the sole basis of the charge. However, it appears that in other parts of her examination the questions put to her by the prosecutor, and her answers thereto, were so framed that the jury might easily have been misled into the erroneous notion that other acts of intercourse had taken place between the defendant and herself. The following is an example of such testimony:

"Q. (By the district attorney.) When was the last time that you recall that you had an act of intercourse with your father? A. Well, that was two weeks before my birthday in 1921.

"Q. That is, this one that you are now testifying to was the last act that you recall? A. Yes, sir."

When asked over how long a period of time before this act of September 13, 1921, she had had intercourse with her father, the prosecutrix replied that she could not say exactly, but that he had slept with her since she was eight years old, that she did not wish to tell an untruth, but that she knew that it occurred on September 13th. We are not in accord with appellant's statement that the instruction above quoted declared that other acts of intercourse had occurred both before and after the date charged in the information, but we think that the jury could, under the circumstances of this case, and probably did, infer from the evidence and the instructions of the court that there were other acts. They were at least encouraged by this instruction to assume that such was the fact. It should be noted that the instruction quoted did not inform the jury that they should determine for themselves whether or not there were other acts, and that if they found them to have occurred that evidence thereof should be considered merely for the purposes stated; but it carried a strong inference that evidence of other acts of sexual intercourse had been received and admitted in the case, to prove the adulterous disposition of the defendant, and as having a tendency to render it more probable that he was guilty. It is our conclusion, therefore, that, in view of the condition of the record to which we have called attention, the instruction was misleading and prejudicial.

[3] One of the points relied upon by appellant is that the court refused to require the prosecution to elect as to which act of intercourse it relied upon for a conviction. As we have stated, although the testimony of the prosecuting witness is quite ambiguous, she nevertheless definitely testified that but one such act occurred; consequently this case is not one where the district attorney could be properly required to make an election.

[4, 5] Exception is taken to the rulings of the trial court permitting the prosecutrix to testify that in 1923 appellant indulged in improper familiarities with her in the presence of other persons, and with another young woman, in her presence. It appears that this testimony was elicited upon redirect examination after counsel for appellant had opened the door therefor by cross-examination. The point, therefore, is without merit. People v. Knight, 62 Cal. App. 143, 216 P. 96. Evidence of this nature was not offered in an attempt to convict appellant of another or different offense, and was admissible merely for the purpose of showing the disposition of defendant, and the probability of his committing the act with which he was

charged. People v. Martinez, 57 Cal. App. 771, 208 P. 170.

Other grounds for reversal are assigned, which we do not deem to be tenable, since they have repeatedly been decided in earlier cases, but, for the reasons which we have stated above, we think the judgment and order appealed from should be reversed, and it is so ordered.

Judgment and order denying motion for new trial reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

72 Cal. App. 543

PEOPLE v. ERBEL. (Cr. 847.)

(District Court of Appeal, Third District, California. May 7, 1925.)

1. Intoxicating liquors ⟸236(13)—Evidence held to show that liquor fit for beverage purposes.

Testimony that liquor containing 50 per cent. of alcohol by volume was jackass brandy, by one who smelled and tasted it, together with fact that manufacture was conducted secretly, *held* sufficient to show that liquor was fit for beverage purposes within meaning of statute.

2. Intoxicating liquors ⟸242—Judgment imposing prison sentence and fine for first offense held void.

Under Volstead Act, § 29 (U. S. Comp. St. Ann. Supp. 1923, § 10138½p), court is without power to impose a direct prison sentence and a fine for first offense of manufacturing intoxicating liquor, and judgment doing so is entirely void.

3. Criminal law ⟸913(4) — That judgment void does not require new trial, but sentence may be imposed in accordance with law.

That judgment of conviction is entirely void does not render a new trial necessary, as trial court has power to call defendant before it and impose a sentence in accordance with law.

Appeal from Superior Court, Del Norte County; Warren B. Tryon, Judge.

Chris Erbel was convicted of unlawfully manufacturing intoxicating liquor, and appeals. Reversed for erroneous sentence, and remanded, with directions.

John L. Childs and George W. Howe, both of Crescent City, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was convicted of the crime of unlawfully manufacturing intoxicating liquor, alleged in the information to be "fit for use for beverage purposes." His motion for a new trial was denied. This appeal is from the judgment and the order denying a new trial.

[1] It was stipulated at the trial that the liquor in question contained 50 per cent. of alcohol by volume, but it is contended that there is no evidence to show that it was fit for beverage purposes. One of the men engaged with the defendant in manufacturing the liquor testified that it was jackass brandy. He described fully the process of manufacturing the liquor and the ingredients used for that purpose. Neither the process described nor the ingredients used would have any tendency to render the liquor unfit for beverage purposes, but indicated rather the ordinary case of the illicit manufacture of corn whisky. The operations were conducted with as much secrecy as possible; the plant being located in the woods, and the utensils were hidden in the brush when not in use, thus indicating a consciousness that the manufacture of the liquor was unlawful. The sheriff of the county testified that he smelled and tasted the liquor, and that it was jackass brandy. In the absence of anything to the contrary, the evidence is sufficient to show that the liquor was fit for beverage purposes within the meaning of the statute.

[2, 3] Apparently, through inadvertence, the judgment is void. It provides that the defendant "pay a fine of $750, or in lieu thereof to be confined in the county jail * * * for six months; and for further punishment to be confined in the county jail for 30 days, unless sooner discharged." The information did not charge a prior conviction. Section 29 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½p), provides:

"Any person who manufactures or sells liquor in violation of this title shall for a first offense be fined not more than $1,000, or imprisoned not exceeding six months."

While for a first offense of unlawful manufacture of liquor a court may impose a fine, with the alternative of imprisonment at a given rate per day until the fine is satisfied, not exceeding a total of six months, or a direct jail sentence, the court is without power to impose a direct prison sentence and a fine for a first offense. The judgment is entirely void. Ex parte Gilmore, 71 Cal. 624, 12 P. 800; People v. Conley, 27 Cal. App. 362, 365, 150 P. 412, 413. It is unnecessary, however, to order a new trial. The judgment being void, the trial court has power to call the defendant before it and impose a sentence in accordance with law. People v. Conley, supra; People v. Johnson, 71 Cal. 384, 392, 12 P. 261; People v. Sama, 189 Cal. 153, 207 P. 893; People v. Bassetti, 58 Cal. App. 390, 395, 208 P. 696.

The order denying a new trial is affirmed, and the judgment is reversed and set aside, with direction to the trial court to render and enter an appropriate judgment.

We concur: McDANIEL, Justice pro tem.; PLUMMER, J.

---

72 Cal. App. 386

PEOPLE v. ELDRIDGE. (Cr. 1220.)

(District Court of Appeal, First District, Division 1, California. April 23, 1925.)

1. **Criminal law ⟸535(2)—Conviction supported by proof of corpus delicti and confessions.**

Proof of corpus delicti by victim's testimony, and of defendant's connection therewith by his confession and that of a companion, setting forth the circumstances of defendant's participation, and signed by defendant after agreeing to its truth, is sufficient to sustain conviction for robbery.

2. **Criminal law ⟸736(2), 1158(4)—Voluntariness of confession primarily for trial court, and conclusion supported by substantial evidence not disturbed.**

Voluntariness of confession, of which there was preliminary proof, but which defendant claimed was the result of fear of officers, is primarily for the trial court, and its conclusion having substantial support in the evidence will not be disturbed.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

John Eldridge was convicted of robbery, and he appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant, John Eldridge, was charged jointly with Clifford Miles and Charles Davis with the crime of robbery. Davis demanded and was granted a separate trial, but the charges against him were subsequently dismissed without trial. Miles and Eldridge were tried together, and Miles was convicted, but the jury disagreed as to Eldridge. Upon a second trial Eldridge was convicted, and he prosecutes this appeal from the judgment.

It appears from the record that on the night of April 2, 1924, about 11:30 o'clock, one Henry Waxman was held up by three men, on Willow avenue, between Laguna and Octavia streets, San Francisco, and robbed at the point of a revolver. Immediately following the robbery he telephoned to the police department from his home near by, and upon arrival of an officer gave descriptions of his assailants. About four hours later complaint of a different nature was made to the police department by a woman concerning the conduct of Eldridge, pursuant to which said officer, accompanied by said woman, proceeded to a house on Sutter street, where Eldridge roomed, and there found Davis in bed, but Eldridge apparently was not there. The officer, observing fresh footprints on the window sill, left the room temporarily to search the rear of the premises. Upon returning he knocked at the door of the room, and the door was opened by Eldridge, who was undressed as if about to retire. The officer asked Eldridge who had been with him the night before, and Edridge first stated that no one had been with him, but afterwards said that he and Miles had been together. Eldridge was then taken to a house on another street, where Miles was found in bed. Eldridge and Miles were then taken to Waxman's home, arriving there about 4 o'clock. Upon being confronted with the two defendants, Waxman immediately identified Miles, positively, as one of the robbers, but was unable to recognize Eldridge as being one of the other two. Both men were then taken to prison, and later, according to the testimony of the police officer, admitted participation in the crime, implicating Davis as the third man. Subsequently the defendants were taken to the office of the detective bureau in the same building for the purpose of having their confessions reduced to writing and signed by them. While their statements were being prepared Eldridge sat near a desk with Police Sergeant McLaughlin, and Miles was seated about 6 or 7 feet away at another desk beside Police Sergeant Hughes. After the statement of each defendant was prepared and signed by him, Miles signed the statement made by Eldridge, and the latter, after reading Miles' statement, said it was true, and likewise signed it. The confession of Miles is as follows:

"Room 7, Hall of Justice, April 3, 1924. Statement of Clifford Miles. My true name is Clifford Miles, age 26 years, 5 feet, 8 inches, 127 pounds, born Galveston, Texas. On April 2, 1924, about 4 or 5 p. m., I went by 1892 Sutter street. I went up to Eldridge's room, No. 20, and saw Eldridge and Davis. They were talking about pulling a job—an unlawful job. They asked me if I wanted to work and get off in the morning with some money. They told me of some of the jobs they pulled. They asked me if I had a gun. I said, 'Yes, but it's in a pawn shop.' They asked me if I could get it, and told me to hock my coat and get the gun. Davis said if I could not hock the coat, to take his watch and sell it. I went out to sell my coat, and a Jew in a hock shop on Golden Gate offered me $2.80, and finally gave me $4 for it. I then got my gun for $3.50 at Fillmore Loan Office. I went back to their room, and the bullets in my gun would not fit his. About 9 p. m. I met Eldridge on Sutter street and Webster street. We went back to his room. We talked and went out for a walk and Davis took my gun. Around a park, or soon after we left a park near Eddy street, two men came up an alley (both white). Davis pointed the gun at them and said: 'Stick up your hands.' Both did so. Eldridge and Davis then searched them. They got some money. I don't know how much. Me and Davis went down the

street. Eldridge walked the two men down the street. He then came back (Eldridge). * * * Then Davis went across the street and disappeared. Eldridge also went across the street. I kept on till I got to Webster street and then to Sutter street and I went to a restaurant to eat. Before I went to eat I went up to Eldridge's room and we split the money. I got $4.10 I think. I ate and met a negro who sold me a pint of whisky for $1, and I went up to Eldridge's room and drank some of the whisky. Eldridge and I then went up to a Mrs. Davis' room, 1872 Sutter street, and we drank up all the liquor we had left. We went to the restaurant, had something to eat and back to Mrs. Davis' room. I lit the lamp. Mrs. Davis wanted a razor Eldridge had previously taken from her. After a little quarrel all of us had, I went home. I don't know whether Eldridge went. I went to bed, and at 5:10 a. m. the law came and took me out. Eldridge and Mrs. Davis were with the law. This is the first holdup I ever was on. This is a true statement, made free and voluntarily, without promise of reward or immunity, and know it will be used against me in court. Witnesses: Richard O. Hughes, Detective Sergeant 689, George J. McLaughlin, Sergeant 437, John L. Eldridge. [Signed] Clifford Miles, 1788 Sutter street."

The following is the confession made by Eldridge:

"San Francisco, April 3, 1924. A statement made by John L. Eldridge, residence 1892 Sutter street, room 20. I want to make a truthful statement about the robbery and burglary charges against me. The man I saw with you in Judge Golden's court this morning is the man that Clifford Miles, George Davis, and myself robbed last night of $1.60. I did not use the gun. There was a gun used. I don't know if it was Miles or Davis that used it. We three colored men also robbed Raymond Foz, I believe, after reading the police report No. 95,354. Thinking it over we may not have robbed Foz. If he is a Filipino, the second man we robbed last night looked like a Filipino. It may be him. Mary Davis, living on Sutter street, about three doors from me, was out with Miles and me. * * * This statement I make free and voluntarily and without any force or violence being used against me or any promises being offered me. I have read this statement, and it is a true one. [Signed] John L. Eldridge. George J. McLaughlin, Sergeant 437. Richard O. Hughes, Detective Sergeant 689. Clifford Miles."

In connection with Eldridge's confession it was shown that Sergeant McLaughlin, who prepared Eldridge's statement, had in fact appeared in court with Waxman, the victim of the robbery, on the morning of the day this statement was written and signed. Later and during the trial appellant repudiated his written confession, claiming that it had been signed by him under an apprehension of fear that physical violence would be inflicted upon him by the police officers if he did not sign the same. In denying participation in the robbery, he claimed that he was elsewhere at the time the crime was committed. The alibi offered by him, however, was not supported by any other witness nor by any corroborating circumstance.

[1] The principal ground urged for a reversal of the judgment is that the evidence is legally insufficient to sustain a conviction, counsel for appellant contending "that the two matters upon which the conviction are predicated are these, first, there was a crime committed; second, Eldridge confessed to the crime; and", counsel for appellant say, "We submit that these two facts alone are not sufficient to support a verdict of guilty."

[2] With this contention we are unable to agree. The corpus delicti was clearly and positively established by the testimony of the victim of the robbery, and appellant's connection with and participation in the crime was shown by his own confession, and by the one made by Miles, which he also signed, after stating, as before mentioned, that it was a true statement. Preliminary to the introduction in evidence of said written confessions, proof was made to the effect that said confessions were freely and voluntarily made, and that the defendants were informed that said confessions if made could be used against them at the time of trial. The question, therefore, of whether said confessions were free and voluntary, or were the result of inducement, coercion, intimidation or duress exerted by the officers, was one peculiarily within the province of the trial judge to decide upon the facts, and, inasmuch as the conclusion reached by him has substantial support in the evidence, it will not be interfered with on appeal. People v. Grafft, 61 Cal. App. 7, 214 P. 273; People v. Fouts, 61 Cal. App. 242, 214 P. 657; People v. Wheaton, 64 Cal. App. 58, 220 P. 451.

It matters little whether Miles' confession with Eldridge's signature attached to it be considered as a part of the latter's confession, as appellant contends, or whether it be considered as the separate statement of Miles containing declarations not made in Eldridge's presence, for the reason that Miles' confession sets forth in detail the circumstances of the participation of Eldridge in the commission of the robbery, and of his movements and operations on the night in question, to the truth of which Eldridge agreed before he signed the Miles confession. It would therefore appear that in either event he was bound by it, and, if believed by the jury, was legally sufficient without corroboration to justify a verdict of guilty.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

72 Cal. App. 391

PEOPLE v. MILES. (Cr. 1211.)

(District Court of Appeal, First District, Division 1, California. April 23, 1925.)

Criminal law ⟸1158(4) — Voluntariness of confession primarily for trial court, and conclusion supported by substantial evidence not disturbed.

Whether a confession, of the voluntariness of which there was preliminary proof, was the result of intimidation, as claimed by defendant, is primarily a question for the trial court; and its conclusion, being supported by substantial evidence, will not be disturbed.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Clifford Miles was convicted of robbery, and he appeals. Affirmed.

Oscar Hudson, of San Francisco, for appellant.

U. S. Webb, Atty. Gen. and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. An appeal by defendant, Clifford Miles, from a judgment of conviction of the crime of robbery. This is a companion case to People v. Eldridge, (No. 1220, this day decided) 237 P. 770. As stated in the opinion rendered in that case, Eldridge, Miles, and one Charles Davis were jointly charged with robbing one Henry Waxman, shortly before midnight, on April 2, 1924, on Willow avenue, between Leguna and Octavia streets, San Francisco. The victim of the robbery positively identified Miles as one of the perpetrators of the crime, and, moreover, Miles made a written confession setting forth the circumstances of the preparation for and the execution of the crime, and of the movements and operations of himself and his two associates on the night in question. All of this evidence is set forth in the opinion in the Eldridge Case, and it will therefore be unnecessary to again narrate it here. But, in addition to the evidence therein stated, as against Miles, the pawnbroker with whom Miles had previously pawned his revolver was produced as a witness. He testified, in corroboration of the confession made by Miles, that on the day of the robbery Miles wanted to pawn an overcoat, but that he refused to lend him any money on it; that Miles then took the coat away and in a few minutes returned with money with which he redeemed the revolver. And it was also proved as against Miles that on the night the crime was committed, while the officer was in Miles' room waiting for him to dress, Miles observed the officer searching the bureau drawers, and inquired as to what he was doing. The officer replied that he was "looking for a gun." Miles then said that he "never had a gun; got no use for a gun." Later, at the city prison, after he had confessed, Miles informed the officers where, in his room, he had placed the revolver; and thereupon the officers searched the room and found the revolver where Miles stated he had hidden it.

Eldridge and Miles were represented by the same counsel, who has submitted their cases on appeal in one brief. In view of the positive identification of Miles by the victim of the robbery, the only point apparently made in support of the Miles appeal is that his written confession was obtained through the use of intimidation. But, as stated in the opinion in the Eldridge Case, preliminary proof was made that the confession was free and voluntary, and that both defendants were apprised of the fact that said confessions, if made, could be used against them at the time of trial. The question, therefore, of whether said confessions were the result of the use of intimidation as claimed by the appellant was one primarily for the consideration of the trial court, and since, there is substantial evidence in the record to the effect that said confessions were freely and voluntarily made, the conclusion reached by the trial court in admitting them in evidence will not be disturbed. People v. Wheaton, 64 Cal. App. 58, 220 P. 451.

The record discloses no error, and the judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

72 Cal. App. 503

CITY OF FRESNO v. FRESNO IRR. DIST. et al. (Civ. 2893.)

(District Court of Appeal, Third District, California. May 2, 1925.)

1. Waters and water courses ⟸231—Land of municipality not expressly exempt from assessment by irrigation district.

Land of municipality situated within irrigation district is not expressly exempt from assessment by such district.

2. Municipal corporations ⟸426—Public property exempt from assessment when actually appropriated to public use.

Public property is exempt from liability to assessment for public improvements only when it is actually appropriated to public use.

3. Waters and water courses ⟸231—Municipal property used for sewage disposal held not liable to assessment by irrigation district.

Property of municipality used for sewage disposal was not shown to be devoted to a private use, so as to render it liable to assessment, by irrigation district because certain portions thereof were used for agricultural and horticultural purposes, and that an income was pro-

duced from such activities, where use was still made of such areas for disposal of sewage, and hence they retained their character as property devoted to public use.

4. Waters and water courses ⟸231—That irrigation district could assess portions of municipal property would not render portion used for sewage disposal liable to assessment.

That irrigation district could properly assess portions of property of municipality, used for agricultural and horticultural purposes, would not render remaining portion, which was in use as part of sewer system, and which could be separately designated from former portions, liable also to assessment.

5. Waters and water courses ⟸231—City not required to object to assessment of exempt property by irrigation district.

City was not required to attempt to have its lands excluded from irrigation district, or after assessment was levied to appear before board of directors of district and object to assessment in order to avoid assessment, where property was exempted therefrom.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Suit by the City of Fresno against the Fresno Irrigation District and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Harris, Johnson, Willey & Griffith and Harris & Hayhurst, all of Fresno, for appellants.

H. M. Johnston, City Atty., of Fresno, for respondent.

JONES, Justice pro tem. This action was brought by plaintiff to obtain a decree quieting its title to certain lands, and to enjoin the defendants from selling said lands for the payment of an assessment levied thereon by the defendant district and from levying any tax or assessment against the lands. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action against them or either of them, which demurrer was overruled.

The defendants did not answer the complaint, and judgment was then rendered in favor of the plaintiff, from which judgment the defendants have appealed.

In brief, the complaint alleges as follows: That the plaintiff is, and since October 27, 1885, has been, a municipal corporation; that the defendant the Fresno irrigation district is, and since July, 1920, has been, a public irrigation district organized under the laws of the state of California, and that the defendant Will Sutherland is, and ever since the organization of the said district has been, the collector of said district; that the plaintiff owns, and since April 6, 1907, has owned, certain real property situate within said district and consisting of 812 acres of land; that an assesment of said lands (excepting a 12-acre tract, which was by mistake assessed to another person) for the year 1921 was made by the assessor of said district; that the directors of the district then levied an assessment on the lands within said district, including the lands of the plaintiff; that the assessment on its lands was not paid by plaintiff; and that the defendant Sutherland, as the collector of the district, was proceeding to sell said lands for the assessment, percentages, and costs.

The construction and maintenance of a system of public sewers by the plaintiff are then alleged, which system consists of a number of mains and laterals within the city, an outfall sewer about five miles long from the southwest corner of the city to and upon the property here involved, the sewer farm, consisting of said real property upon which are constructed two septic tanks, and a number of ditches and lines for distribution of the effluent from the septic tank to and upon said lands; that the solids in the sewage are dissolved by bacterial action in the septic tanks, and the sewage is discharged therefrom in liquid form and distributed over and upon the land so that it may sink and percolate into the soil. It is further alleged: That said "tract is not sufficient for the disposal of the discharge from said city, and that plaintiff is leasing 160 acres of land at a rental of $4,800 per year, for flowage of said sewage. That of said 812 acres 545 acres are not cultivated in any respect, but are covered with wild grasses, and are used principally for discharge of said sewage during the winter; the portion thereof when not covered by water is used by plaintiff for pasturing stock for a compensation, and pasturing stock of plaintiff used on said sewer farm; 207 acres are planted to alfalfa, which are flooded from time to time with sewage. The hay grown on said land is sold by plaintiff and used to feed stock belonging to plaintiff used on said farm. That about 30 acres are planted to grain, which will be sold by the plaintiff or used for feed of stock belonging to plaintiff used on said farm; that about 7 acres are planted to vineyard, which is not in bearing; the septic tanks occupy about 3 acres; about 7 acres are used for residence of foreman, outbuildings and corrals; and about 13 acres (not cultivated) are used from time to time as required. That all of said real property, including the portion thereof planted to alfalfa, grain, and vineyard, except the portion set apart for buildings, is used for disposal of sewage, and that the farming and grazing of a portion thereof are incidental to and in aid of the disposal of said sewage and are not conducted with a view to making a profit." It is then alleged "that the total receipts from said sewer farm, from its acquisition to and including the year 1920, barely offset the ex-

pense of the maintenance and operation of the septic tanks, sewage disposal and sewer farm, but were not sufficient to pay the expense of the maintenance of said sewer system within said city," and the receipts for four fiscal years are set forth as follows: For the year 1918, $9,022; 1919, $17,888; 1920, $10,794; 1921, $10,532.02; while for the fiscal year commencing July 1, 1919, the expense for the operation and maintenance of the outfall sewer was $7,035.07, of the septic tanks and sewer farm $16,267.81, and of the system within the city $26,040. And for the year 1920 the expense for the outfall sewer was $9,692.28; for the septic tanks and sewer farm, $13,554.23; and for the system within the city, $15,225. It is also alleged that there are no fees or charges made for the use of said sewer, other than the ordinary municipal taxes. Other allegations are contained in the complaint, but we have mentioned only those we deem pertinent for the purpose of this decision.

In the judgment we find the following recital: "* * * And the defaults of said defendants, and each of them, having been duly entered, and the plaintiff having applied for judgment in accordance with the prayer of the complaint, and the court having taken and heard evidence, and it appearing to the satisfaction of the court, and the court finds," and then are incorporated findings which closely follow the allegations of the complaint.

It is the contention of the appellants that the court erred in overruling their demurrer to the complaint, claiming that it is apparent therefrom that the lands of the city are not necessarily or actually used exclusively for governmental purposes, and that, where the property of a municipality is not so used, there is no exemption in law, express or implied, of such property from assessments of the character mentioned herein.

[1] It has been definitely held that the land of a municipality situated within an irrigation district is not expressly exempt from assessment by such district. San Diego v. Linda Vista Irrigation Dist., 108 Cal. 189, 41 P. 291, 35 L. R. A. 33.

[2] But though there is no express exemption, there may exist an implied exemption, dependent upon the use to which the property is put. It has been stated that "the principle * * * in regard to the exemption of public property is that while the exemption from liability to assessment for public improvement will be implied, such implication will only arise when the property is actually appropriated to public use" (35 L. R. A. 39, note), and this, in effect, is declared to be the rule in California. City Street Improvement Co. v. Regents, etc., 153 Cal. 776, 96 P. 801, 18 L. R. A. (N. S.) 451. In the case just cited, the court, after citing a number of cases decided in other jurisdictions, said:

"A reading of these cases will disclose that in many of the states, upon the theory that, in the absence of express prohibition, even the state should bear its share of benefits for special assessments, it is held that property, although devoted to public use, is liable to such assessment. The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not."

[3] To sustain the contention of the appellants, we must hold that the complaint shows that the lands of plaintiff were not actually devoted to a public use. That certain portions of the property are used by the respondent for the raising of alfalfa and grain and for vineyard purposes, and that an income is produced from its agricultural activities, are facts admitted in the complaint; but it does not follow that, because of these facts, the public use of the land is changed. If, notwithstanding this cultivation, use is still made of these areas for the disposal of the sewage, then they retain their character as property devoted to public use, and we cannot say that the growing of alfalfa or grain or the planting of a vineyard will necessarily preclude the city from discharging the fluid from the septic tanks over the portions used for such purposes, or will necessarily mean that these portions are withdrawn as a part of the city's sewer system. Further, it is alleged that "all of said real property, including the portion thereof, planted to alfalfa, grain and vineyard, except the portion set apart for buildings, is used for disposal of sewage," which allegation tends to negative the contention of the appellants.

We are satisfied that the complaint does not show that the property of the respondent is devoted to a private use, so as to render it liable to assessment, and the appellants' contention in that respect cannot be sustained.

[4] It may be further pointed out that while only a portion of the 812 acres owned by respondent within the irrigation district was used for the growth of the alfalfa, grain, and vineyard, yet the entire property, including that portion upon which are erected the septic tanks, is included in the assessment. Even though it should be conceded that the district could properly assess the portions used for agricultural and horticultural purposes, yet that would not render the remaining portion, which without question was in use as a part of the sewer system and which could be separately designated from the former portions, liable also to assessment.

[5] The appellants urge that there is no showing in the complaint that the city attempted to have its lands excluded from the district, or that, after the assessment was levied, it appeared before the board of directors of the district sitting as a board of equalization or objected to the assessment.

The property being exempt from assess-

ment, it was not necessary that the city, in order to avoid assessment, should have taken either of these steps.

We conclude that the court did not err in overruling the demurrer, and that the judgment should be affirmed.

The judgment is therefore affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 539

O'CONNELL v. ROGERS et al. (Civ. 5147.)

(District Court of Appeal, First District, Division 2, California. May 7, 1925.)

1. Attachment ⟸275 — Order requiring new undertaking and restoring attachment, made more than three years after attachment issued, without force or effect.

An order of superior court, pursuant to Code Civ. Proc. § 1057, requiring new undertaking for release of attachment, and ordering attachment restored after plaintiff ignored order, made more than three years after attachment was issued, and lien thereof had ceased, under section 542a, was ineffectual for any purpose.

2. Attachment ⟸337—Surety on attachment bond held not released by ineffectual order requiring new undertaking which was not complied with.

An order of court requiring new undertaking for release of attachment, which was ineffectual and not complied with, did not have effect of releasing surety on original undertaking.

3. Parties ⟸91—That others improperly joined no defense as to one against whom complaint states good cause of action.

Where complaint in action on attachment bond, given under Code Civ. Proc. §§ 554, 555, stated a good cause of action against one of sureties on such bond, it is of no concern of such surety that others were improperly joined to share her liability.

4. Appeal and error ⟸173(10)—Plea of statute of limitations, not raised below, not considered on appeal.

Contention that action in question barred by Code Civ. Proc. § 542a, cannot be considered on appeal where not raised in trial court, as plea of statute of limitations may be waived.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Daniel O'Connell against William J. Rogers and others. From a judgment against her, defendant Beatrice M. F. McKellar appeals. Affirmed.

Courtney L. Moore, of San Francisco, for appellant.

Daniel O'Connell, of San Francisco, in pro. per.

NOURSE, J. Plaintiff sued to recover on a statutory bond given under sections 554 and 555, Code of Civil Procedure, for the release of an attachment upon real property. The defendant, McKellar, alone appeared in answer to the summons, and from the judgment which was rendered against her she appeals under section 953a, Code of Civil Procedure.

The controversy arose from an action commenced by the same plaintiff against the Santanella Land Company, a corporation, for services rendered. When that action was commenced an attachment was issued and levied upon real property belonging to the corporation and situated in Merced county. To release its property from the attachment, the corporation filed an undertaking with the defendants Rogers and McKellar as sureties, and, after a hearing and examination thereon, the undertaking was approved and the attachment was, by order of the court, discharged. Thereafter the corporation disposed of all its property, and rendered itself immune from execution upon the judgment which was subsequently rendered against it. The undertaking was in the usual form provided for in section 555, Code of Civil Procedure, and recited that it was given in consideration of the release from attachment of the property of the corporation. Thereby the sureties expressly contracted that, if the plaintiff should recover judgment, the defendant would, on demand, redeliver the attached property to the proper party to be applied on the judgment, or that in default thereof, they would pay to the plaintiff the full value of the property, not exceeding the amount of the judgment. The value of the bond was $2,500; the judgment was for $398. Execution was returned unsatisfied, and the plaintiff made demand upon the corporation and its sureties for payment of the judgment. This demand having been refused, the present action was commenced against the principal and the sureties on the bond, and against Rogers and one Wiley, who were alleged to be the sole stockholders and owners of the corporation. The defendant Wiley defaulted, and the trial was had against the defendant, McKellar, alone. She appeals from the judgment which went against her in the sum of $409.92.

Two grounds are presented by the appellant in her attack upon the judgment: First, that the sureties on the bond in suit were released when the superior court ordered the attachment restored upon the failure of the corporation to give new and sufficient surety; and, second, that the special demurrer of appellant on the ground of misjoinder of parties defendant should have been sustained.

[1] On the first point the appellant directs our attention to section 1057, Code of Civil Procedure, which authorizes the superior

court to require a new undertaking with sufficient sureties when it appears that any surety on the bond given has become insufficient. The section also provides that, if such new undertaking shall not be given, "all rights obtained by the filing of such original undertaking shall immediately cease." Acting under the provisions of this section, the superior court, upon motion of the plaintiff in the original suit, ordered a new undertaking, and when this order was ignored by the defendant corporation the court ordered the attachment "restored with all the force and effect given to it by law," As the order was made more than three years after the attachment was issued and the lien thereof had ceased (section 542a, Code Civ. Proc.), there was no force or effect "given to it by law," and the order was therefore ineffectual for any purpose.

[2] But aside from this the order did not purport to release the sureties on the original bond. The motion of the plaintiff was to order a new undertaking because of the absence from the state of Rogers, one of the sureties on the original bond. If a new undertaking with new sureties had been offered and accepted by the plaintiff, then the question of the release of the sureties on the original undertaking might arise. But this was not done. The defendant in the original suit not only failed to file a new undertaking, but, having disposed of all its property, suffered the court to make an order which was ineffectual.

The case before us is therefore a simple one on a contract, wherein the appellant agreed that the property would be restored for the purpose of satisfying the judgment, or that in default thereof she would pay. The consideration was the release of the property from the attachment. This consideration was executed and paid. The breach of the contract is obvious and the judgment properly followed against the appellant.

[3] In framing his complaint the respondent joined as defendants the principal and the two sureties on the undertaking. He also joined Rogers, one of the sureties, and Wiley, as the sole stockholders and owners of the corporation principal upon the undertaking. The demurrer of the appellant is on the ground of misjoinder of these parties, "in that it cannot be determined" in what capacity some of them are sued. It may be conceded that some of the other defendants may have demurred on these grounds, but the complaint states a good cause of action against this appellant, and it is, of course, no concern of hers that others may be improperly joined to share her liability. Gardner v. Samuel, 116 Cal. 84, 90, 47 P. 935, 58 Am. St. Rep. 135.

[4] In her final brief on this appeal, the appellant for the first time raises the point that the proceedings are barred by section 542a, Code of Civil Procedure. It needs no citation of authority to the point that the plea of the statute of limitations may be waived, and that unless the plea is made in the trial court it cannot be considered on an appeal from the judgment.

Judgment affirmed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

---

72 Cal. App. 576

HABERMAN et ux. v. SAWALL et al.
(Civ. 5018.)

(District Court of Appeal, First District, Division 2, California. May 11, 1925.)

1. Vendor and purchaser ⟸85—Evidence held sufficient to sustain finding that contract had been canceled by mutual agreement.

In action to recover amount alleged to be due on contract providing for its termination upon failure to pay any installment, and that time was of the essence of the contract, evidence *held* sufficient to sustain finding that contract had been canceled by mutual agreement.

2. Appeal and error ⟸1010(1)—Findings of fact are conclusive on appeal.

Determination of facts and weight to be given testimony rests with the trial court, and findings supported by evidence are conclusive upon appeal.

3. Evidence ⟸466, 468—Parol evidence is admissible to show written contract has been canceled or that it has been fully performed.

Parol evidence is admissible to show that a written contract has been canceled by mutual consent or that it has been fully performed by the parties.

4. Vendor and purchaser ⟸85—Mutual oral agreement to cancel written contract is a sufficient consideration for its abandonment.

Mutual oral agreement between vendor and purchaser to cancel written contract is a sufficient consideration for its abandonment.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Jacob Haberman and wife against Emil Sawall and another. Judgment for defendants, and plaintiffs appeal. Affirmed.

Frank Kauke, of Fresno, for appellants.

Gallaher, Simpson & Hays, of Fresno, for respondents.

PRESTON, Justice pro tem. Plaintiffs commenced this action to recover from defendants the sum of $675, alleged to be due under a certain written agreement between plaintiffs and defendants. The case was tried by the court without a jury. Judgment

went for the defendants. From this judgment plaintiffs prosecute this appeal.

The facts of the case are these: On September 15, 1919, the plaintiff, Jacob Haberman, entered into a written contract with R. S. Elliott and Ethel M. Elliott, his wife, for the purchase of certain lands owned by them in Fresno county, Cal., for $14,000 payable as follows: $2,500 cash; $500 April 1, 1920; $500 October 1, 1921, and $1,000 annually thereafter, payable on October 1st of each year, until October 1, 1929, and the remaining $2,500 on October 1, 1930; all deferred payments to bear interest at the rate of 7 per cent. per annum, interest payable October 1, 1920, and annually thereafter; plaintiff having the option of paying any part, or all, before it became due.

The contract also provided for the right of forfeiture in case of default by the vendee; also, that on the full performance, a deed would be delivered, conveying the property free and clear of all liens and incumbrances, etc. All payments were made when due, and this contract fully performed by the vendee, Jacob Haberman, from its date until the 12th day of October, 1920, at which time the said Jacob Haberman and wife, plaintiffs in this action, entered into a written contract with the defendants Emil Sawall and F. P. Leisman, wherein they agreed to sell and assign to the defendants all their right, title, and interest in and to the Elliott contract, above mentioned, on the following terms, stipulations, and conditions, to wit: That the unpaid portion of the purchase price to the Elliotts was the sum of $11,000 principal and interest thereon from the 1st day of October, 1920. This sum should be paid by the defendants herein to Mr. Elliott at the times specified in the original Elliott contract. In addition to this, defendants were to pay to plaintiff Jacob Haberman $9,000, payable in annual installments as follows: $500 cash; $2,000 on or before the 12th day of November, 1920; $2,500 on or before the 10th of January, 1921; $1,000 on or before the 30th of July, 1921; $500 on or before the 1st of October, 1922; $500 on or before the 1st day of October of each year thereafter until the whole purchase price of $9,000 had been fully paid; all deferred payments, except the $2,000 due November 12, 1920, should bear interest at the rate of 7 per cent. per annum from date until paid, and the interest on all deferred payments except the $2,500 payment due January 10, 1921, should be made on the 1st of October, 1921, and annually thereafter; defendants to have possession of the property on November 12, 1920; or, in other words, the defendants were to pay the annual installments and interest remaining due on the Elliott contract as they became due, and perform the other covenants and conditions of that contract, which Jacob Haberman had obligated himself to do, and in addition thereto pay plaintiff Jacob Haberman $9,000 for his equity in the Elliott contract, payable in installments as above set forth. This latter contract also contained this clause:

"That should the said second parties (Sawall and Leisman) fail, neglect or refuse to make the payments hereinabove required to be made by them or otherwise fail, neglect or refuse to comply with any of the terms of this contract or of the aforesaid contract of sale on their part, then the said first parties (Haberman and wife) may, at their option, consider this contract canceled and terminated, and shall be released from all obligations in law or in equity to make said assignment and transfer of said contract of sale to the said second parties, and the said second parties shall forfeit all right thereto, and to the real and personal property therein described, and will quit and deliver up possession thereof to the said first parties, and it is agreed that time is of the essence of this contract."

The terms of both contracts were complied with by the defendants until the time when the installments became due on October 1, 1923. On this date the defendants, under their contract with plaintiffs, had agreed to pay $1,000 and interest to Elliott and wife, and an installment of $500 and interest to plaintiffs. The $1,000 and interest due Elliott and wife on this date were not paid; the $500 due the plaintiff, Jacob Haberman, was not paid, and amounted to $675, including interest. Mr. Elliott, after October 1, 1923, demanded payment of Haberman, and Haberman stated that he could not make the payment himself, and that he was informed that Mr. Sawall and Mr. Leisman could not meet their payments, and asked Mr. Elliott for time. Mr. Elliott insisted that Haberman take the land and make the payments. Then Mr. Elliott gave Haberman two days to make up his mind whether he would take the land or not. Haberman visited the property, and in a day or two returned, and told Mr. Elliott that he did not want the land, and wanted to know how he could get released from his contract, and Mr. Elliott informed him that he understood Sawall and Leisman were willing to surrender their contract, and that, if he, Haberman, would give him, Elliott, a quitclaim deed, that would release him from his contract. Haberman agreed to this. Haberman then had a conversation with Mr. Sawall and Mr. Leisman, and demanded payment of them, and they both informed him that they could not make the payments, and were unable to go on with the contract, etc. Haberman, after further conversation, agreed to release them from any further payments under the contract, and stated that he was going to "call the contract off," and that he was going to quitclaim the land back to Elliott. Thereupon Sawall and Leisman agreed that Haberman might convey the property back to Elliott, saying, "that was the only

thing to do." A day or two after this conversation Haberman and his wife and Mr. Elliott met at a real estate office in Fresno, and there Haberman and his wife signed and acknowledged a quitclaim deed for the property covered by the agreement to Mr. Elliott. After this deed was signed and acknowledged, there was a conversation between the real estate agent and Haberman in the German language, and after this conversation the real estate agent, a Mr. Yurk, stated to Mr. Elliott that Haberman wanted him, Elliott, to leave the deed in Yurk's hands until Leisman and Sawall brought in their contract. This was done. Elliott and Haberman and wife left the office of Mr. Yurk, and the same day Mr. Haberman met a friend, Mr. Scheidt, and told him what he had done with reference to the contracts, and Scheidt informed him he had made a mistake, and that he should recall the deed, and collect all of the money due him from Leisman and Sawall. Haberman and Scheidt then consulted an attorney, and this action was brought to recover $675, being the principal and interest due from defendants under the contract with the plaintiffs on October 1, 1923.

What became of the quitclaim deed is not revealed by the record. Mr. Elliott, being unable to recover possession of the deed, brought an action against plaintiffs and defendants to quiet title. No appearance was made by any of the plaintiffs or defendants to this suit to quiet title, and in December, 1923, Elliott procured judgment by default quieting his title, and thereafter demanded possession of the premises from a tenant of defendants, and, after some negotiations with the tenant regarding the removal of his crops, possession of the permises was delivered to Mr. Elliott without protest.

From these facts the trial court found that the contract between plaintiffs and defendants was then and there terminated and abandoned by mutual consent, and the defendants released from the payment of any moneys due thereunder, and released from any and all obligations under and by virtue of said contract, and gave judgment for the defendants.

[1, 2] From the testimony above related there is ample evidence in the record to support these findings of the trial court. There were a few inconsistencies in the testimony of both plaintiff, Jacob Haberman and the defendants, but the power to hear and determine the facts, and to weigh the testimony, rested with the trial court, and, as we have just shown, such findings, being supported by the evidence, are conclusive upon this court.

1. It is contended by appellants that a mutual rescission or abandonment of the contract between plaintiffs and defendants could not be effected by a verbal agreement, and that the court erred in admitting evidence of the conversations between Jacob Haberman and the defendants, Sawall and Leisman, as it was an attempt to vary the terms of a written contract by oral evidence.

[3] The purpose of the introduction of this oral testimony was not to vary the terms of the written contract, but to show that the contract between the plaintiffs and defendants had been canceled by mutual consent, and had no longer any operative effect. Such evidence is admissible for such purpose, as is oral testimony that the terms of a written agreement had been fully performed by the parties, or that the instrument evidencing such agreement has itself been canceled and destroyed by the concurrent act of both parties. Guidery v. Green, 95 Cal. 634, 30 P. 786; Arsenio v. Smith, 50 Cal. App. 173, 194 P. 756; Hooke v. Great Western Lumber Co., 54 Cal. App. 681, 202 P. 492; Tompkins v. Davidow, 27 Cal. App. 327, 149 P. 788.

In the case of Tompkins v. Davidow, above cited, which is somewhat similar to the case at bar, the court said:

"There can be no question that a contract can be mutually abandoned by the parties at any stage of their performance and each of the parties released from any further obligation on account thereof; that it may be done by parol, and the fact of its having been done established by evidence of the acts and declarations of the parties."

Again, in the case of Hooke v. Great Western Lumber Co., above cited, this court said:

"It is a general rule that a written contract as well as one not in writing may be discharged or modified by a subsequent oral agreement, and that the parol evidence rule does not exclude oral evidence thereof."

[4] 2. It is next contended by appellants that there was no consideration for the oral rescission or abandonment of the contract. It is true, as contended by appellants, that it is necessary that there be a consideration, but it has been held that the mutual oral agreement to cancel the contract is a sufficient consideration (Hooke v. Great Western Lumber Co., supra), and in this case Jacob Haberman's release from his obligation to transfer the contract between himself and Elliott to defendants was also a sufficient consideration for the abandonment of the contract.

It therefore follows that the court's ruling in the admission of evidence was correct, and that the judgment should be and it is hereby affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

72 Cal. App. 536

Ex parte GOHLKE. (Cr. 1263.)

(District Court of Appeal, First District, Division 1, California. May 7, 1925.)

1. Criminal law ⟸13—Statute, denouncing as felony driving of vehicle without owner's consent, held to make such act an offense, though no penalty provided.

Motor Vehicle Act, § 146, denouncing as a felony driving of a vehicle without consent of owner, makes such act an offense independent of Penal Code, § 18, though it fails to prescribe any penalty as a punishment therefor, in view that penalty is sufficiently covered by sections 17, 18a, and 671, which must be read in connection and considered as part of felony described in such act.

2. Criminal law ⟸13—Statute, denouncing as felony driving of vehicle without owner's consent, makes such act an offense, though maximum penalty may be severe.

Motor Vehicle Act, § 146, denouncing as a felony driving of a vehicle without owner's consent, makes such act an offense, though maximum penalty specified by section 671, which is applicable to such offense, might be severe, since imposition of maximum penalty is not imperative, and it cannot be assumed that in case of conviction a penalty wholly disproportionate to offense will be inflicted.

Application for writ of habeas corpus by W. H. Gohlke, to be directed to the Sheriff of Fresno County, to secure petitioner's release from custody for driving an automobile without the owner's consent. Writ discharged, and prisoner remanded to custody.

Charles A. Hill, of Fresno, for petitioner.

George R. Lovejoy, Dist. Atty., and William A. White, Deputy Dist. Atty., both of Fresno, U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

KNIGHT, J. Petitioner, by this proceeding in habeas corpus, seeks to be discharged from the custody of the sheriff of Fresno county, by whom he is detained under a commitment issued out of the police court of the city of Fresno, following the making of an order holding him to answer for trial before the superior court for "the offense of felony, to wit, driving automobile without owner's consent." The charge against petitioner is based upon section 146 of the Motor Vehicle Act of California (St. 1923, p. 564), which in part reads as follows:

"Any person who shall drive a vehicle not his own, without the consent of the owner * * * with intent to either permanently or temporarily deprive the owner thereof of his title to or possession of such vehicle, whether with or without intent to steal the same, shall be guilty of a felony."

The Motor Vehicle Act omits, however, to prescribe any penalty as a punishment for the commission of the felony therein declared, and upon that ground petitioner contends that the acts denounced by said section do not constitute a crime or public offense.

[1] It may be conceded, as petitioner claims, that a description, definition, and denouncement of the acts necessary to constitute a crime do not make the commission of such acts a crime unless a punishment be annexed, for a punishment is as necessary to constitute a crime as its exact definition (People v. McNulty, 93 Cal. 427, 26 P. 597, 29 P. 61), and furthermore it may be admitted that, under the rule stated in the case of In re Isch, 174 Cal. 180, 162 P. 1026, cited by petitioner, the penalty provided for in section 18 of the Penal Code, which provides that, "except in cases where a different punishment is prescribed by this Code, every offense declared to be a felony is punishable by imprisonment in the state prison, not exceeding five years," may not be invoked to supply the omission complained of, for the reason that the presence in that section of the words "prescribed by this Code" limits the operation thereof to those felonies declared by the Penal Code. Nevertheless, we are of the opinion that, independant of said section 18, the matter of penalty for the commission of the felony defined by said Motor Vehicle Act is sufficiently covered by other general provisions of the Penal Code, which must be read in connection with, and considered as a part of, the felony described in said act.

Section 17 of said Code declares that "a felony is a crime which is punishable with death or by imprisonment in the state prison. * * *" Manifestly, the felony under consideration is not punishable with death, and therefore must be, necessarily, punishable by imprisonment in the state prison; that being so, the minimum and maximum duration of such imprisonment is fixed by sections 18a and 671 of said Code. Section 18a reads:

"Except in cases where a different minimum punishment is prescribed by law, for every offense declared to be a felony and punishable by imprisonment in the state prison, the minimum punishment shall be imprisonment in the state prison for not less than six months."

And section 671 provides:

"Whenever any person is declared punishable for a crime by imprisonment in the state prison for a term not less than any specified number of years, and no limit to the duration of such imprisonment is declared, the court authorized to pronounce judgment upon such conviction may, in its discretion, sentence such offender to imprisonment during his natural life, or for any number of years not less than that prescribed."

[2] It will be observed that the language of both of these sections is much broader than the language of section 18. Section 18a, which was added to the Code after the Isch

Case was decided (Stats. 1919, p. 7), is not restricted, like said section 18, to cases of felony "prescribed by this (Penal) Code," but by its terms applies to all felonies except those wherein a different minimum "is prescribed by law"; and section 671 contains no words of limitation whatever. The fact that the maximum penalty specified by said section 671, if inflicted, might be severe, does not in itself serve as grounds for abolishing the crime sought to be punished, because the imposition of the maximum penalty is not imperative, and it cannot be assumed that in case of conviction a penalty wholly disproportionate to the offense will be inflicted. In re Hallawell, 8 Cal. App. 563, 97 P. 320.

The writ is discharged, and the prisoner is remanded to the custody of the sheriff of Fresno county.

We concur: TYLER, P. J.; CASHIN, J.

---

72 Cal. App. 561

PEOPLE v. HOWARD. (Cr. 1138.)

(District Court of Appeal, First District, Division 1, California. May 9, 1925.)

1. Criminal law ⊜445—Duly certified copy of judgment of conviction held admissible in evidence to show prior conviction as being "writing," within definition of public writings, and within class of judgments designated as "other official documents."

A certified copy of a judgment of conviction, delivered with a convict to, and filed by, the warden of the state prison as a commitment pursuant to Pen. Code, §§ 1213, 1216, *held* admissible in evidence in support of charge of prior conviction, in view of Pol. Code, § 1032, and Code Civ. Proc. §§ 1892, 1893, as being a "writing" within definition of public writings, defined by section 1888, and within class of writings designated as "other official documents," in section 1894, subd. 3.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Write—Writing.]

2. Criminal law ⊜304(17)—Trial court held entitled to take judicial notice of official position of state prison warden and genuineness of his seal.

Trial court *held* entitled to take judicial notice of official position of state prison warden and genuineness of his seal; he being an executive officer of the state under Pol. Code, § 343.

3. Criminal law ⊜322—Presumed prima facie that person assuming to act as secretary for prison board or warden was regularly appointed as such secretary.

It will be presumed prima facie that a person assuming to act as the secretary for prison board or the state prison warden, within Pen. Code, § 1576, was regularly appointed as such secretary.

4. Criminal law ⊜322—Presumed that warden regularly performed his duty to furnish on demand certified copy of commitment in his custody.

It will be presumed, in view of Code Civ. Proc. § 1963, subds. 14, 15, that the state prison warden regularly performed his duty to furnish on demand a certified copy of a commitment in his custody.

5. Criminal law ⊜445—Paper purporting to be copy of certified copy of judgment of conviction and commitment, and containing paper certifying such copy is correct copy of certified copy of judgment, held admissible in charge of prior conviction.

A paper purporting to be a copy of a certified copy of a judgment of conviction and commitment, and containing a certificate of the state prison warden, certifying that such copy of certified copy of judgment is a true and correct copy of the commitment in the case of a designated prisoner, and on file in warden's office, *held* admissible as evidence of the existence of and contents of the original copy, or of the duly certified copy thereof, alleged to have been on file in the office of the warden, in view of Pen. Code, §§ 1213, 1216, 1576, Pol. Code, §§ 343, 1032, Code Civ. Proc. §§ 1888, 1892, 1893, section 1894, subd. 3, and section 1963, subds. 14, 15, and Const. art. 10, § 3.

6. Criminal law ⊜1202(3) — Evidence held sufficient to sustain charge of prior conviction of felony.

Evidence *held* sufficient to sustain a charge of prior conviction of felony.

7. Burglary ⊜31—Admitting evidence of physical condition of transom, above door leading to room wherein offense was alleged to have been committed, held proper.

Admitting evidence of physical condition of transom, above door leading to room wherein offense was alleged to have been committed, *held* proper.

8. Criminal law ⊜1170(4)—Sustaining objections to questions, not improper cross-examination, held not prejudicial; questions having previously been answered substantially.

Sustaining of objections to questions, not constituting improper cross-examination, *held* not prejudicial; questions having previously been answered substantially.

Appeal from Superior Court, Alameda County; George Samuels, Judge.

James E. Howard, alias Charles Leonard, was convicted of an attempt to commit burglary, and he appeals. Affirmed.

Raine Ewell, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

CASHIN, J. Appellant was charged by information, filed in the superior court of Alameda county, with the crime of attempted burglary, and further therein charged with having, on January 14, 1920, prior to the at-

tempted burglary alleged, been convicted under the name of Charles Leonard in the superior court of San Diego county of a felony, to wit, burglary of the second degree; that on said conviction appellant served a term of imprisonment in the California state prison at San Quentin. The appellant entered his plea of "not guilty" to both of these charges, on both was convicted, and was sentenced to be imprisoned in the state prison at San Quentin. He moved for a new trial, which was denied, and from the order and judgment has appealed.

Appellant assigns certain rulings of the court as prejudicial error, and contends that the evidence adduced by the prosecution on the charge of prior conviction is insufficient to support the verdict.

The evidence in support of that charge was the testimony of A. B. Monahan, a guard employed at San Quentin prison, who identified appellant as a person whom the witness had known between the months of January, 1920, and November, 1922, as a convict then confined in that prison, and known to the witness as Blackie Leonard. Appellant took the stand on his own behalf, and on cross-examination refused to answer the questions of the district attorney as to whether he had ever been convicted of a felony, and whether he had not been so convicted in the superior court of San Diego county under the name of Charles Leonard. The prosecution offered in evidence a paper purporting to be a copy of a copy of a judgment and commitment to the state prison at San Quentin of and from the superior court of San Diego county, with a paper attached thereto purporting to be a copy of the certificate of the clerk of that court, authenticating it as a true copy of such judgment; the purported judgment being one of conviction of Charles Leonard in said court on January 14, 1920, of the crime of burglary in the second degree. Attached to the paper offered was a certificate upon which was impressed the seal of the state prison at San Quentin, such certificate purporting to be that of J. A. Johnston, the warden, by K. T. Pietrzak, secretary, and certifying the papers attached, being the copy of the certified copy of the judgment hereinabove referred to, to be "a true and correct copy of the commitment in the case of prisoner No. 31995, Charles Leonard, now on file in this office." Appellant objected to this evidence as being incompetent, on the grounds that it was hearsay and secondary evidence.

[1] We are of the opinion that a certified copy of the judgment of conviction, delivered with the convict to, and filed by, the warden of the state prison as a commitment pursuant to sections 1213 and 1216 of the Penal Code, may be held by reasonable construction of the language of the Code to be a writing within the definition of public writings as such are defined by section 1888, Code of Civil Procedure, and within the class of such writings designated as "other official documents," in subdivision 3 of section 1894 of said Code; and, such being in the custody of the warden of a state prison, a public officer, for the purposes provided by the Penal Code, and being one which a citizen has a right to inspect (Pol. Code, § 1032), a duly certified copy thereof is admissible in evidence (Code Civ. Proc., §§ 1892, 1893).

[2-4] Such being the character of the writing so delivered and filed, the point made by appellant is whether a paper purporting to be a copy thereof was admissible as evidence of the existence and contents of the original record or of the duly certified copy thereof, alleged to have been on file in the office of the warden, without other proof than that of the certificate shown above.

The wardens of the state prisons are executive officers of the state of California (Pol. Code, § 343), and provision is made by law for a seal of office to be used by the warden as such. The only other officers of the state prisons whose offices as such were created by law are the clerks and five directors; the latter having the power to determine the necessary officers and employees of the prisons other than wardens and clerks, and to specify their duties severally (Pen. Code, § 1576), and the warden having the power to appoint the officers and employees of the prison so determined by the directors (Const., art. 10, § 3).

[5, 6] There is no direct evidence in the record of the appointment of K. T. Pietrzak, who signed the certificate mentioned as secretary, or of his authority as such. There is, however, attached thereto the seal of the warden, the certificate purported to be that of J. A. Johnston as warden, and of whose official position and the genuineness of whose seal the trial court might and did take judicial notice. The appointment of a secretary for the board or warden was provided for by statute (Pen. Code, § 1576), and the said Pietrzak, as shown by the certificate, assumed to act as such. It will be presumed prima facie that he was regularly appointed as such secretary; and, it being the duty of the warden to furnish on demand a certified copy of the commitment in his custody, it will be presumed that such duty was regularly performed. Code Civ. Proc., § 1963, subds. 14 and 15. We are of the opinion that the certificate with the copy of the certified copy of the judgment was properly admitted in evidence, and that this, with the testimony of the witness Monahan, was sufficient prima facie to prove the identity of the appellant with Charles Leonard, and that he had been convicted of a felony in the superior court of San Diego county as charged.

[7, 8] The appellant further assigns as error the ruling of the court admitting, over objection, evidence of the physical condition of the transom above the door leading to the room wherein the offense was alleged to have

been committed, and sustaining objections to certain questions by appellant on cross-examination with reference to the same conditions. The former rulings were proper. The latter, while not improper cross-examination, had been answered substantially in replies to previous questions.

The other matters assigned as error were the refusal of the court to direct a verdict for appellant, to allow appellant's challenges of certain jurors for cause, an instruction of the court in which was quoted the language of section 663, Penal Code, and certain general objections to the jury system as administered in Alameda county, none of which have substantial merit.

After an examination of the entire cause, including the evidence, we are of the opinion that the evidence supports the verdict, and that no error was committed by the court prejudicial to the substantial rights of appellant.

The judgment is affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

72 Cal. App. 531

SULLIVAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 4984.)

(District Court of Appeal, Second District, Division 2, California. May 6, 1925.)

1. Divorce ⟸249(1)—Property rights not properly to be covered by interlocutory decree of divorce.

Property rights are not properly to be covered in interlocutory decree of divorce.

2. Divorce ⟸254—Interlocutory decree of divorce adjudging property rights becomes conclusive through lapse of time, when no appeal taken therefrom or attempt to set it aside made.

An attempt by judge to adjudge property rights in an interlocutory decree of divorce does not represent departure from jurisdiction of court, but is mere matter of error, and when petitioner, ordered by such decree to convey property to wife and build her a house, did not appeal therefrom, or make attempt, under Code Civ. Proc. § 473, to set it aside, such decree, through lapse of time, became final.

3. Divorce ⟸254—Petitioner, not having appealed or attempted to set aside interlocutory divorce decree within proper time, cannot attack order therein, on ground that it requires rendition of personal service.

Where petitioner did not, within proper time, appeal from interlocutory divorce decree ordering him to build wife a house, or move to set decree aside under Code Civ. Proc. § 473, he cannot later attack validity of such order on the ground that courts will not specifically enforce the rendition of personal service.

4. Divorce ⟸269(1)—Disobedience to one of orders in interlocutory divorce decree sufficient basis for contempt proceedings.

Where petitioner disobeyed order in interlocutory divorce decree, ordering him to convey land to wife, such disobedience was sufficient to support contempt proceedings, without determining whether an order contained in such decree, ordering petitioner to build a house, was void as uncertain and indefinite.

5. Divorce ⟸254—Petitioner, failing to appeal from interlocutory divorce decree, or to move to set it aside, cannot attack orders therein for lack of allegations in pleadings in action to support them.

Petitioner cannot attack orders in an interlocutory divorce decree on ground that they were not supported by allegations in pleadings in the divorce action, where he did not appeal from decree or move to set it aside.

6. Divorce ⟸170—Final decree of divorce may be denied party on the ground that he is in contempt of requirement in interlocutory decree.

A final decree of divorce may be denied party on the ground that he is in contempt of some requirement of interlocutory decree of divorce.

Application by R. E. Sullivan for writ of mandate to be directed to the Superior Court of Los Angeles County and Hon. J. W. Summerfield, Judge thereof, to compel the entry of final decree of divorce. Writ denied.

Hilton & Critchley, of Los Angeles, for petitioner.

Sebald L. Cheroske, of Los Angeles, for respondents.

WORKS, J. Petitioner presented his petition, asking that respondents be ordered to enter a final decree in an action for divorce between petitioner and his wife, which is pending in respondent court, and our alternative writ of mandate went forth. Respondents make return by demurrer to the petition.

The petition alleges that on September 27, 1922, petitioner and his wife entered into a written agreement for the settlement of their property rights; that the agreement provided, among other things, that petitioner "shall cause to be conveyed unto" the wife certain particularly described real property in Los Angeles county, and "shall further cause to be erected and constructed upon said real property a dwelling house of five rooms;" that theretofore, on July 20, 1922, petitioner commenced, in respondent court, an action against his wife for divorce on the ground of desertion; that on April 5, 1923, respondent court rendered its interlocutory decree of divorce in that action, which decree adjudged in part "that the plaintiff shall cause to be conveyed unto the defendant" the real property already mentioned, and that "said plaintiff shall further cause

to be erected and constructed upon said real property a dwelling house of five rooms;" that "thereafter, and on the 17th day of April, 1924, more than one year having elapsed since the entry of the interlocutory decree, and no appeal having been taken from said judgment, and no motion for a new trial having been made, and the action not having been dismissed, this petitioner made application for a final decree; that thereupon * * * the defendant in the said action for divorce filed therein her petition based upon her affidavit * * * asking that a final decree be denied this petitioner, in that he was in contempt of court, having failed to comply with the terms of the aforementioned interlocutory decree, in that he had failed * * * to convey unto said defendant the aforementioned property, and had further failed to erect thereon a house in accordance with the terms of said interlocutory decree;" that thereafter, on May 22, 1924, before respondent judge, evidence was adduced in support of the last-mentioned petition, and "the court, after considering all testimony, found that this petitioner * * * had not complied with the order of the court, * * * in that he had not deeded said land" to his wife, "and that he had further not erected thereon a house as per the said interlocutory decree;" that at said hearing petitioner showed, by "uncontradicted testimony, that on account of financial reasons he was unable to comply with the order of the court in the building of the said house, but in lieu thereof had furnished" his wife "with an apartment, and paid therefor out of his own funds"; that "he had offered to convey said lot to" his wife, but that she "refused to join with him in the said conveyance according to the law, * * * and petitioner stands now ready and willing to deed said land" at any time when his wife "will join in the said conveyance to herself"; that it "was further shown at said hearing that this petitioner had put forth every effort to secure a loan to build said house, but that he was unable to secure such loan, and, not having the money himself, was unable to comply with the said order of court;" that thereafter, and on July 29, 1924, respondent judge caused to be entered an order holding petitioner in contempt of court for his failure to deed the land and to build the house, as required by the interlocutory decree; and that thereafter respondent judge refused to make and enter a final decree of divorce because of the order holding petitioner in contempt of court. The prayer of the petition is that respondents be required to set aside the order adjudging petitioner guilty of contempt of court and to enter a final decree of divorce.

[1, 2] Petitioner contends that the requirements that he build the house and convey the land had no proper place in the interlocutory decree, and were not therefore a basis for the order adjudging him to be in contempt. It has been decided several times, on appeals from interlocutory decrees of divorce, that such matters as those mentioned are not properly to be covered by such decrees. See Radich v. Radich, 64 Cal. App. 605, 222 P. 182, and cases cited in the opinion there rendered. Where, however, there is no appeal from the interlocutory decree, the rule is quite different. The attempt by interlocutory decree to make disposition of the property rights of the parties to the action does not represent a departure from the jurisdiction of the court. It is but a mere matter of error. If the interlocutory decree is not appealed from, or no attempt is made under section 473 of the Code of Civil Procedure to set it aside on the ground that it was rendered through the surprise, inadvertence, or excusable neglect of the defendant, it becomes, through lapse of time, as fully a finality as if the matters mentioned were included in a final decree. In the absence of an appeal, or of a motion for relief under section 473, the parties are concluded by it. Abbott v. Superior Court (Cal. App.) 232 P. 154. Here the time within which an appeal might have been taken and the time within which relief might have been sought under section 473 had both expired. The interlocutory decree became then, in the respects mentioned, as good as a final decree, granting that error was committed in its rendition.

[3] Petitioner contends for the invalidity of the interlocutory decree on another ground and insists that, because of its alleged invalidity on that ground, he could not legally be charged with contempt of court in refusing to obey it. The ground insisted upon is this: The provision of the interlocutory decree requiring the building of a house is void, for the reason that the courts will not specifically enforce the performance of a contract by which it is agreed that personal services shall be rendered. This point comes within the ruling of Abbott v. Superior Court, supra. If the agreement to build be regarded as an agreement to perform personal services, the attempt of respondent court to decree a specific performance of it can be regarded as nothing more than error, if, indeed, it is to be regarded even as error, which we do not decide, and petitioner has had his opportunity to correct the error by appeal. Not having availed himself of the opportunity, the requirement of the decree in the regard mentioned has become conclusive against him.

[4] Petitioner makes the further point that the interlocutory decree could not form a proper basis for the contempt charge against him, for the reason that the order to build the house was indefinite and uncertain. He cites authority, in support of his contention, to the effect that an uncertain order cannot

furnish ground for a charge of contempt in disobeying it. We need not, however, decide whether the order in the respect mentioned was indefinite and uncertain. There still remains the order to convey. As petitioner was held in contempt as for a disobedience in the matter of that order, it is unimportant whether he was in contempt of the order to build.

[5] It is insisted that the order to build and the order to convey were alike void, upon the ground that there were not allegations of the pleadings in the divorce action to support them. This question is concluded under the rule stated in Abbott v. Superior Court, supra.

[6] It is contended that, an interlocutory decree of divorce having been rendered, the party in whose favor it had been made cannot be denied a final decree upon the ground that he is in contempt of some requirement of the interlocutory decree. Directly the contrary has been decided. See Weeks v. Superior Court, 187 Cal. 620, 203 P. 93.

Demurrer sustained. The alternative writ of mandate is vacated, and a peremptory writ is denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

72 Cal. App. 409

RENO v. AMERICAN ICE MACH. CO.
(Civ. 5068.)

(District Court of Appeal, First District, Division 2, California. April 24, 1925. Hearing Denied by Supreme Court June 22, 1925.)

1. Licenses ⊂⊃39—Executory contract for sale of stock held void, where no application made to commissioner of corporations for permit to sell stock.

Executory contract for sale of stock to employee *held* void, in view of Corporate Securities Act, §§ 3, 12, where no application to issue stock attempted to be sold, and containing copy of contract for sale thereof, was ever made to commissioner of corporations prior to commencement of action.

2. Contracts ⊂⊃136—Purchaser of stock, under executory contract for sale, held not estopped to question validity of contract where it violated statute.

Purchaser, under executory contract for sale of stock, *held* not estopped, by conduct and ratification, to question validity of contract, where contract was void in view of Corporate Securities Act, §§ 3, 12, because no application to issue stock attempted to be sold, containing copy of contract, was ever made to commissioner of corporations.

3. Contracts ⊂⊃134—One may not ratify contract contrary to express statute.

One may not ratify contract contrary to express statute.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by A. J. Reno against the American Ice Machine Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Roy A. Bronson and E. D. Bronson, Jr., both of San Francisco, for appellant.

Sterling Carr, of San Francisco, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against it, in an action brought to recover $891, alleged to be due to the plaintiff under facts revealed by the following findings, containing statements which were stipulated to be true:

On October 23, 1920, plaintiff and defendant entered into a contract by the terms of which plaintiff was employed as agent for the defendant in the sale, design, construction, and erection of its apparatus, and in the direction and management of its business. The employment was to terminate at the pleasure of the board of directors of the defendant. Plaintiff was to be paid a salary of $49.50 a week. He subscribed to 33 shares of stock of defendant company at $100 a share, payable by a weekly credit on his salary account of $16.50. The agreement further provides that, in the event of a termination of the agreement by either party, plaintiff should not offer for sale the stock so acquired by him to any third party without first offering the same to the stockholders of the company. The plaintiff entered the employ of defendant under the terms of said contract, and continued in such employment until February 24, 1923, and duly and regularly performed all the terms of the contract by him to be performed. At the time the contract between the parties was entered into the defendant did not have a permit from the commissioner of corporations of this state to sell or dispose of its capital stock as required by the Corporate Securities Act. The defendant withheld from the salary of plaintiff $16.50 weekly during the period of employment, which sums aggregated $891 at the date the employment was terminated. Under date of June 29, 1921, defendant received a permit from the commissioner of corporations to sell certain of its shares of capital stock. Under date of October 14, 1921, the defendant received an amended permit from said commissioner, and in neither of these permits was the contract between plaintiff and defendant referred to, passed upon, or agreed to by the said commissioner. Said permits were revoked by said commissioner of corporations on June 21, 1922. Upon May 10, 1923, after the commencement of this action, the defendant filed an application with said commissioner

for permission to issue its capital stock, and a new permit was issued upon said application. On May 1, 1922, during the period of plaintiff's employment, the stockholders of the defendant company held a meeting, at which plaintiff was present, and at which plaintiff made a motion that said stockholders apply to the commissioner of corporations for a permit to sell and issue its capital stock. On June 22, 1922, the directors of said defendant held a meeting at which plaintiff was also present.

No shares of stock of the defendant company were ever offered, issued, or tendered to plaintiff prior to the commencement of this action, and the plaintiff has never taken or received any of the capital stock of said defendant, but, subsequent to the date of the filing of the action, defendant tendered to plaintiff nine shares of stock, which plaintiff refused to accept. Before bringing this action, plaintiff demanded the return to him of the amount of his salary retained by the company.

As appellant correctly states, the only question presented by the appeal is the validity of the subscription agreement between the parties. If such agreement was not valid in its inception, and did not become so later by reason of any action of the plaintiff, it is conceded that the judgment must be affirmed.

There is a contention by appellant, urged in one portion of its brief, that the original contract for stock, which contract was made in the absence of a permit to the corporation to issue said stock, was not void. The Corporate Securities Act, § 3 (Stats. 1917, p. 673), provides that no corporation shall take subscriptions for any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do. Such application shall contain, among other things, a copy of any contract it proposes to make concerning the same.

[1] No application to issue the stock attempted to be sold to plaintiff, and containing a copy of the contract for the sale thereof, was ever made to the commissioner of corporations prior to the commencement of this action, and it was never possible for the defendant company to have lawfully issued its stock to plaintiff. That being true, we think it must follow that the contract for the sale of the same was void. Section 12 of the Corporate Securities Act provides that any security issued without a permit shall be void. But appellant contends that this provision does not apply to a contract for the sale of stock. Can it be contended seriously that, while an executed contract forbidden by statute is void, the same contract, while executory, is valid? If the issuance of the stock to plaintiff during the term of his employment by the defendant would have been void, certainly the contract for the issuance of the same was equally void.

[2, 3] The next question raised by appellant is involved in the contention that although the original contract was void when made, it became possible for the defendant to perform the same at one period when it had certain unrevoked permits from the commissioner, and that during that period the contract was ratified by the plaintiff by attending meetings of the stockholders and directors and thus assuming to act as such, and also by plaintiff's continued payments upon the purchase price of the stock. An answer to this contention is the finding of the trial court that under neither permit to issue stock, which defendant had been granted prior to the commencement of this action, was defendant permitted to make the contract involved here. If this finding be a misconstruction of the permits which were granted, nevertheless there remains the steadfast rule of law that one may not ratify a void contract—a contract contrary to an express statute. This is one of the distinctions between void and voidable contracts. The doctrines of estoppel by conduct and ratification have no application to a contract which is void because it violates an express mandate of the law or the dictates of public policy. Such a contract has no legal existence for any purpose, and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. Colby v. Title Ins., etc., Co., 160 Cal. 632, 644, 117 P. 913, 35 L. R. A. (N. S.) 813, Ann. Cas. 1913A, 515; Lukens v. Nye, 156 Cal. 498, 505, et seq., 105 P. 593, 20 Ann. Cas. 158. The case of Moore v. Moffatt, 188 Cal. 1, 204 P. 220, relied upon by appellant as contrary to the doctrine we have just announced, does not so impress us. That was not an action between the parties to avoid contract, but an action by a trustee in bankruptcy of a corporation to recover the unpaid subscription price of stock for the benefit of creditors. That situation presents an exception to the rule above announced, which rule is suspended in the interests of innocent third persons who have relied upon the contract. 6 R. C. L., p. 820, § 215.

The judgment is affirmed.

We concur: NOURSE, J.; PRESTON, Justice pro tem.

72 Cal. App. 526

PEOPLE v. CORDERO. (Cr. 836.)

(District Court of Appeal, Third District, California. May 6, 1925.)

1. Witnesses ⟸387—Sustaining objection to question, on cross-examination of state witness as to which of conflicting statements was true, held proper.

In prosecution under Pen. Code, § 288, objection of counsel for prosecution to question, on cross-examination of state witness as to truth of his former statements, made to counsel for defendant, which were different from statements in his testimony, was properly sustained; it being for jury to determine which of conflicting statements were true.

2. Criminal law ⟸730(8)—Remarks of counsel for prosecution, as to whether state witness was being tampered with, held not prejudicial error warranting reversal.

In prosecution under Pen. Code, § 288, where defense was based on claim that boys alleged to have been tampered with by defendant had framed the case, remarks of counsel for prosecution, while defense counsel was cross-examining one of the boys as a witness, to let him alone, and that "we will see if you are tampering with witness" *held* not prejudicial error warranting reversal, in view of charge to consider testimony only.

3. Criminal law ⟸666½—Right of counsel for defendant to interview witness is sacred.

Right of counsel for defendant to interview witnesses prior to trial is as sacred as right of district attorneys to ascertain all facts concerning cause to be tried, and exercise thereof constitutes no basis for charge of improper or unprofessional conduct.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Charles Cordero was convicted of violating Pen. Code, § 288, and he appeals. Affirmed.

A. B. Reynolds, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was prosecuted for the offense denounced and made punishable by the provisions of section 288 of the Penal Code. Following the defendant's conviction, a motion for a new trial being denied, the defendant appeals. In prosecuting this appeal, no question is tendered to the court as to the sufficiency of the evidence, if believed by the jury, to support the verdict. We have read all the testimony set forth in the transcript, and are satisfied therefrom that no question could be raised as to its sufficiency, but the nature of the testimony is such as to preclude its being set forth in this opinion.

The points relied upon for reversal relate simply to remarks made by the district attorney during the course of the examination of witnesses and in his closing address to the jury. Appellant also sets forth in his brief that certain remarks of the court were prejudicial, but, as an examination of the transcript discloses no objections to the remarks made at the time, and no request made by counsel that the court instruct the jury to disregard such remarks, it is not necessary for us to set forth the remarks of the court, or to make any further comment thereon.

The testimony relied upon by the prosecution being an action based, as we have said, on section 288 of the Penal Code, was necessarily, in large part, that of the testimony of small boys. It appears that the attorney for the defendant interviewed one of the boys involved in the offense alleged to have been committed by the defendant, and obtained from him some statements as to why he was testifying against the defendant, and that the boy, under the examination conducted by the attorney for the defendant at the interview referred to, made statements different, or at least alleged to be different, from the testimony he had given on the witness stand. It also appears that the defense in this case was based upon the claim that the boys alleged to have been tampered with by the defendant had framed the case against the defendant out of spite, owing to some differences relating to money matters. It was during the cross-examination of the witnesses, that had been interviewed by the attorney for the defendant prior to the trial, that the remarks of the district attorney, hereinafter set forth, were made, which appear in the transcript as follows:

"Q. And didn't you tell me on that occasion that the story wasn't true, that you boys got together and framed it by reason of the fact that you were sore at Charlie Cordero? A. Yeh.

"Q. That is what you told me yesterday? A. Yeh.

"Q. Now, is that the truth, Mario? Did you tell me and your father the truth? Was what you told us yesterday true, Mario? Do you understand that?

"Mr. Henderson: Well, let him alone. See if he understands it. We will see if you are tampering with witnesses or what.

"Mr. Reynolds. May it please the court, I assign that remark upon Mr. Henderson's part as prejudicial error to this defendant.

"Mr Henderson: We will find out whether it is prejudicial error.

"Mr. Reynolds: All right, and I assign this remark—

"Mr. Henderson (interposing): By the time we get through with this witness, Mr. Reynolds, we will find out."

At this time, it appears from the transcript, that a brother of the witness was alleged to be shaking his hand at the witness, whereupon Mr. Henderson said:

"Let us get hold of him. We will find out about this thing, whether he is framing these witnesses or not.

"Mr Reynolds: Again, I assign that remark of the district attorney as prejudicial error, and I ask the court to admonish the jury to pay no attention to that remark."

At a later period in the trial, during the course of an argument participated in by the district attorney and counsel for the defendant, the district attorney used these words, "I call it intimidating the witnesses for the prosecution," referring to interviews had by counsel for the defendant with witnesses who appeared for the prosecution.

[1] As to the evidence itself, it is clear that the objections thereto, made by counsel for the prosecution, were correctly sustained. It was for the jury and not for the witness to determine which of the conflicting statements, if the statements were conflicting, were true. The different statements alleged to have been made by the witness were allowed to be admitted by the court, and the circumstances under which the statements were made, and the jury also had the witnesses before it, and could determine whether the witness was confused in his statements, was endeavoring to tell the truth, or whether he was endeavoring to assist in framing a case against the defendant.

[2] It does not appear that the defendant submitted any proposed instructions to the jury to disregard the remarks of the district attorney, nor does it appear that any further attention was paid thereto. The remarks, in and of themselves, while uncalled for, and remarks that should not have been made, taken in connection with the testimony adduced under the claim of the defendant that a case had been framed against him, do not, we think, constitute prejudicial error, warranting a reversal of the case. The jury was carefully instructed that they should consider nothing in arriving at their verdict except the evidence, which had been admitted by the court and allowed to remain, that they were not to allow passion or prejudice to govern them in their deliberations, but that they should find their verdict upon the testimony, and the testimony alone. These are not the exact words of the instructions, but correctly state their substance upon these points.

[3] In the course of his address to the jury, the district attorney referred to the fact that counsel for the defendant made no attempt to impeach the testimony of one of the witnesses named Joe Senga, and that the defense's attack was principally directed against the witness named Mario. We find nothing of merit in this assignment of error, and our attention has not been called to anything contained therein which would warrant this court in interfering with the verdict of the jury. The right of counsel to interview witnesses prior to a trial of a case is just as sacred, and just as full and complete, as is the right of district attorneys to ascertain all the facts concerning the cause to be tried. The exercise of this right by counsel for the defendant, in and of itself, constitutes no basis for a charge of improper or unprofessional conduct, but we cannot conclude that jurors, sworn to find a true verdict, will disregard their oaths and also disobey the instructions of the court to base their verdict upon the testimony alone, will allow themselves to be influenced by one or two casual remarks, which may be made by counsel under the influence of passion, or when it has been charged that the case he is presenting against a defendant is a framed or put-up scheme to convict the defendant.

We find nothing in the case justifying a reversal. It is therefore ordered that the judgment and order of the trial court be, and the same are hereby, affirmed.

We concur: FINCH, P. J.; McDANIEL, Justice pro tem.

---

72 Cal. App. 649

FISHER et al. v. SOUTHERN PAC. CO.
(Civ. 4725.)

(District Court of Appeal, First District, Division 1, California. May 13, 1925. Hearing Denied by Supreme Court July 7, 1925.)

Highways ⟸213(2, 4)—Negligence in causing smoke and contributory negligence of driver held questions for jury.

Whether railroad company burning thicket along the side of the highway, causing smoke obscuring automobile driver's vision, was negligent, and whether driver, who, though conscious of the danger, proceeded until a collision occurred, was contributorily negligent, in view of his apprehension of danger from the smoke and fire, and from a possible collision with a following car, *held* questions for the jury.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Edith Fisher and husband against the Southern Pacific Company, a corporation. Judgment of nonsuit, and plaintiffs appeal. Reversed.

Goldman, Nye & Surr, of San Francisco, for appellants.

Ford, Johnson & Bourquin, of San Francisco, for respondent.

CASHIN, J. Appeal by Edith Fisher and Ralph W. Fisher, her husband, from an order of nonsuit and judgment entered thereon in the superior court of the city and county of San Francisco in favor of respondent,

Southern Pacific Company, a corporation, and against appellants.

The action was brought by appellants to recover damages on account of personal injuries received by appellant Edith Fisher, alleged to have been caused by the negligence of respondent. Respondent denied the alleged negligence, and pleaded the negligence of appellant Ralph W. Fisher as a proximate contributing cause of the damage alleged.

The evidence, in substance, was as follows: On January 3, 1921, at about 3:40 o'clock p. m., appellants were traveling in an automobile driven by Ralph W. Fisher in a southerly direction, on a paved highway, at a point near Maxwell, in Colusa county. The right of way and tracks of respondent run parallel with the highway north and south at the point mentioned; the westerly line thereof being the easterly line of the right of way of the highway. On the date mentioned, respondent was engaged in burning dry weeds and tules which had grown upon its right of way between the tracks and the east line of the right of way for the highway, and in so doing burned grass growing along the east line of the paved portions of the highway, causing smoke to arise and drift over and across the pavement, obscuring, at times, the vision of those traveling thereon. The highway was undergoing repairs, and there had been placed a sign some distance north of the point mentioned stating the fact and that its condition was "dangerous but passable," which sign was seen and read by Fisher. The paved portion of the highway at the places mentioned herein was 16 feet wide. As appellants approached the section of the railroad right of way being burned, smoke was drifting therefrom to the west across the pavement, obscuring vision to some extent, and when they arrived at a point about 100 feet north of the place of the accident hereinafter described a cloud of smoke from a thicket fired by respondent suddenly enveloped them, making it impossible for them to see in the direction in which they were going farther than the front of the hood of the automobile. To this point Fisher had been driving at a speed of about 15 miles an hour. He knew that another automobile was following, but did not know at that moment its distance in the rear. A space of about 4 feet in width, being the earth portion of the right of way, ran along the west line of the pavement, permitting a car to stand off the pavement to approximately that extent. Parallel with and adjoining said strip was a ditch used to drain water from the road surface. At a point 100 feet south of where the smoke cloud enveloped appellants, and on their right-hand side, there had been left standing unattended and facing appellants on the highway by the California highway commission a motor truck, which was unseen by them. Appellants testified that the smoke was suffocating and made vision ahead impossible, and that flames were visible and the heat therefrom intense. Ralph W. Fisher was conscious of the danger of proceeding, but apprehensive of the smoke and fire, and also of a possible collision with the car approaching from the rear if he stopped on the pavement or ran his car upon the dirt strip to the extent possible by reason of its width; he proceeded at a speed less than 15 miles an hour —how much less the evidence does not show —with the result that appellants' automobile struck the truck mentioned and caused bodily injury to Edith Fisher. Appellants' car was damaged to such an extent that the inference might be drawn of a speed greater than the testimony directly shows.

The car approaching from the rear was in fact about 500 yards away at the time appellants were enveloped by the smoke and became conscious of the danger of proceeding. At a point between 75 and 100 feet north of the place of collision, appellant Ralph W. Fisher could see the flames mentioned through the smoke, and which were distant 14 feet from the edge of the pavement, but could not see objects ahead of the automobile.

The motion for nonsuit was granted on the ground of lack of evidence showing negligence on the part of respondent, and on the further ground that, assuming such negligence, the only reasonable conclusion from the evidence was that Ralph W. Fisher also was negligent, and that such negligence was imputable to Edith Fisher, and was a proximate contributing cause of the injuries and damage alleged.

In view of the facts known to respondent, and those which should have been apparent to it before and at the time the thicket was fired—the position of the standing truck which, as a fair inference from the evidence, could be seen by respondent's employees, the direction of the wind, the obvious fact that clouds of smoke would be created and would drift across the highway, the presence of travelers moving south thereon, the probability that their vision would be obscured and a view of the track cut off, and the fact that no warning of the presence of the truck was given or attempted before or after these atmospheric conditions were produced—we are of the opinion that a jury might reasonably and fairly find respondent guilty of negligence which was a proximate cause of the injuries and damage alleged.

It is contended by respondent that from the conduct of appellants but one reasonable conclusion could fairly be arrived at by the jury, to wit, that the act of appellant Ralph W. Fisher in proceeding through the smoke at a rate of speed not permitting the stopping of the car quickly enough to prevent a collision, or, if a collision occurred, that it would be of so slight a character as not to

entail injury to the occupants of the automobile, was, in view of his consciousness of the danger of proceeding, negligent and a proximate contributing cause of the injuries and damage suffered.

We are prepared to affirm that such conduct, standing alone, would constitute negligence as a matter of law; but we are also of the opinion that, from the situation presented to appellant Ralph W. Fisher, namely, his apprehension of danger from the rear, the obstruction of vision by the smoke, the heat and sight of the flames, calculated to induce excitement and confusion of mind, the jury might fairly and reasonably have concluded that, while actual peril did not exist, the driver had reasonable ground based on appearances for believing that such peril did exist, and that his course of action in proceeding in the manner and at the rate of speed that might be inferred from the evidence was such as an ordinarily prudent man might reasonably have adopted under like circumstances. McRae v. Erickson, 1 Cal. App. 326, 329, 82 P. 209; Gibson v. Kennedy Extension Mining Co., 172 Cal. 294, 301, 156 P. 56. It is our opinion that the case should have been submitted to the jury and the motion for a nonsuit denied.

For the foregoing reasons it is ordered that the judgment be reversed.

We concur: TYLER, P. J.; KNIGHT, J.

---

72 Cal. App. 559

PEOPLE v. SOKOLIS. (Cr. 1217.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1925.)

Witnesses ⊂=301—Cross-examination held not to include matters outside of scope of direct examination so as to compel accused to be witness against himself.

In prosecution for receiving stolen automobiles, where accused gave an account of some transactions in which he purchased one or both of the automobiles alleged to have been stolen, and described somewhat generally his method of transacting business, and denied he ever bought a car that he knew was stolen, cross-examination of accused as to the particular transactions concerning which he had testified and about other matters, responsive only to the direct testimony, *held* not to include matters outside of scope of direct examination so as to compel accused in effect to testify against himself.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

E. L. Sokolis was convicted of receiving stolen property, and he appeals. Affirmed.

Mart Coles, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CONREY, P. J. Defendant was convicted of the crime of receiving stolen property. He appeals from the judgment and from an order denying his motion for a new trial.

No briefs were filed. On oral argument, counsel for appellant, without specifically pointing out any error of the trial court, stated as the ground of his appeal that on cross-examination of the defendant the court permitted that cross-examination to include matters outside of the scope of the direct examination, and that defendant was thereby unlawfully compelled to be a witness against himself.

The rule of law relating to such cross-examination, as well as the manner in which that rule should be applied, was clearly explained by the Supreme Court in People v. Creeks, 170 Cal. 368, 379, 149 P. 821. We have examined those portions of the defendant's testimony to which we understand that the oral argument referred. On direct examination, the defendant gave an account of some transactions in which he purchased one or both of the automobiles which were alleged to have been stolen, and also described somewhat generally his method of transacting business in relation to the purchase and sale of automobiles. In reply to a question of his counsel, asking whether he did "so take that car or any other car," the witness replied, "No, sir; I never taken any car if I knew it was stolen, because I never do any kind of business like that." After he had given some other testimony of a similar character, he was questioned by the district attorney about the particular transactions concerning which he had testified. Also, he was questioned about other matters which could be responsive only to the direct testimony of the witness in which he denied in general terms that he ever purchased any stolen automobiles knowing that they were stolen property. The court overruled the objections, not only for the reason that the questions had a bearing upon "the question of intent" of the defendant, but also for the additional stated reason that the direct examination had covered the topic, and that thereby the gates had been let down for the purpose of impeaching the witness and attacking his credibility.

We think that the cross-examination was reasonably limited to the subject-matter of the direct examination, and that there was no error in overruling the objections of the defendant. To have excluded these questions from the cross-examination would have left unchallenged his general statements, made in his own favor, in giving his direct testimony. The prosecution was entitled to meet

that situation by appropriate questions, to show by the defendant's own admission that he had made contrary statements, or that his conduct had been inconsistent with the statements given in his direct testimony.

The judgment and order are affirmed.

We concur: CURTIS, J.; HAHN, Justice pro tem.

---

72 Cal. App. 678

FISKE v. LOWRY. (Civ. 5142.)

(District Court of Appeal, First District, Division 2, California. May 15, 1925. Rehearing Denied June 8, 1925.)

Appeal and error ⟹1011(1)—Findings of trial court conclusive where the evidence is conflicting.

Findings of trial court on questions of fact are conclusive where the evidence is conflicting.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by F. L. Fiske against P. C. Lowry. From a judgment for plaintiff, defendant appeals. Affirmed.

Sidney P. Robertson, of San Francisco, for appellant.

Arthur L. Shannon, of San Francisco, for respondent.

PRESTON, Justice pro tem. This is an appeal by defendant from a judgment against him in the sum of $1,545.60 for plumbing supplies alleged to have been sold and delivered to defendant by the plaintiff.

The complaint is in two counts. Count 1 alleges:

"That within two years immediately last past defendant became indebted to plaintiff in the sum of $1,545.60, on account of goods, wares, and merchandise sold and delivered by plaintiff to defendant at the latter's instance and request; that neither the whole or any part of said sum has been paid."

Count 2 alleges:

"That on the 20th day of February, 1924, an account was stated between plaintiff and defendant in the sum of $1,545.60; that defendant agreed to pay plaintiff said sum but neither the whole or any part thereof has been paid."

Defendant, by his amended answer, denies specifically both counts of the complaint, and in addition alleges, as a separate defense, that the merchandise, consisting of certain plumbing supplies, were not purchased by him, but, on the contrary, were placed in his warehouse on the understanding and agreement that defendant should sell same as agent for plaintiff, and receive a commission on all sales made, and that in pursuance of this agreement defendant did sell certain of said plumbing supplies to his regular customers, but that the goods were defective, and many were returned and rebates made to customers on others. Defendant admits that there is certain money due plaintiff from him on these sales, but contends that he could not pay any money to plaintiff at the time of filing his answer, owing to the fact that other dissatisfied customers might return their goods and demand a return of their money, etc.

Defendant has also filed a counterclaim in which he alleges that he was the agent of plaintiff to sell certain plumbing fixtures, and that he did make certain sales, and earned commissions in the sum of $359.37, and that he expended $35 as freight on the goods, and other incidental expenses, amounting in the aggregate to $411.87, and prays judgment in his favor for $411.87.

Upon the issues thus joined the case was tried by the court without a jury, and the court found that all of the allegations of count 1 of plaintiff's complaint were true, and further found as follows:

Finding 2. "That on February 20, 1924, defendant became indebted to plaintiff in the sum of $1,545.60 on account of goods, wares, and merchandise, consisting of plumbing supplies, sold and delivered by plaintiff to defendant at the latter's instance and request; that said sum of $1,545.60 became due and payable from defendant to plaintiff on February 20, 1924; that neither the whole nor any part of said sum, nor any interest thereon, has ever been paid."

Finding 3. "That it is not true that plaintiff ever employed or appointed defendant as plaintiff's agent to sell said plumbing supplies or that defendant ever acted, or was ever authorized to act, as such agent; that plaintiff never promised or agreed to pay defendant anything for any services by defendant in connection with the sale of said plumbing supplies, nor to reimburse defendant for any expenditures made by defendant in connection with said plumbing supplies; that no commission or other compensation is due from plaintiff to defendant for selling said plumbing supplies; that nothing is due from plaintiff to defendant on account of any expenditures made by defendant in connection with said plumbing supplies."

Judgment for plaintiff for $1,545.60 followed these findings.

The only contention made by appellant which is supported by argument or citation of authority is (1) that the evidence was and is insufficient to justify the decision of the court.

It is the contention of plaintiff, and testified to by him at the trial, that he sold and delivered certain plumbing supplies to defendant at a fixed and understood price, to wit, $21 per set net to him, which was agreed to be paid to plaintiff by defendant as and when the defendant resold the goods to his

customers. Plaintiff only seeks to recover at the rate of $21 per set for the plumbing supplies that defendant admits he sold. Defendant, on the other hand, contends that he did not purchase the goods from plaintiff, but merely acted as plaintiff's agent in the resale of them, and claims he is entitled to deduct certain expenses incurred by him in the resale of the goods, and also a commission on the sales made by him.

It is admitted by appellant that the evidence is conflicting. Appellant also admits that he accepted the goods in question from plaintiff and resold them to his own customers at his own price, upon his own terms, and after adding certain of his own equipment thereto. In other words, the facts testified to by plaintiff are substantially the same as found by the court in its findings, and the testimony of defendant in substantially the same as set forth in his amended answer and counterclaim. There were other witnesses who testified on both sides, and there were some inconsistencies and discrepancies in the testimony of both plaintiff and defendant, but the testimony, on the whole, was conflicting upon the disputed issues in the case. The court, however, as indicated by the findings, accepted the testimony of plaintiff and his witnesses as being a correct statement of the transaction, and resolved the conflict in the evidence in favor of the plaintiff, and, as there is abundant evidence in the record to support the findings of the trial court on the disputed issues, it is conclusive on this appeal.

The appellant also makes a number of assignments of error on the part of the trial court, but none of them are supported by argument or citation of authority. However, we have examined the record very carefully, and we find no merit whatever in any of the contentions of appellant. It is simply a case where the evidence is conflicting, and the trial court resolved the conflicts in favor of plaintiff.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

72 Cal. App. 545

RODETSKY v. NERNEY. (Civ. 5115.)

(District Court of Appeal, First District, Division 1, California. May 8, 1925. Hearing Denied by Supreme Court July 6, 1925.)

1. Breach of marriage promise ⟸22 — Evidence of character of defendant held inadmissible.

Where, in action for breach of promise to marry, with seduction alleged in aggravation of damages, character of defendant was not put in issue by complaint, evidence thereof was not admissible.

2. Appeal and error ⟸989—Courts of Appeal cannot weigh testimony or determine credibility of witnesses.

It is not within province of Courts of Appeal, nor can they from the record weigh testimony or determine credibility of witnesses from all facts that appear to jury, but they are required to do so to extent possible therefrom.

3. Appeal and error ⟸1026—Before appellate court may reverse judgment, error complained of must have resulted in miscarriage of justice.

Before a court of review may reverse trial court's judgment, it must be of opinion that error complained of has resulted in miscarriage of justice, and such result must fairly and reasonably appear from whole record, or appellate court's conclusion must be an affirmative one.

4. Appeal and error ⟸1170(7)—Error in admission of evidence as to character held not to result in miscarriage of justice.

In suit for breach of promise of marriage, in view of doubtful testimony of plaintiff and her witnesses, and uncontroverted testimony of defendant, error in admission of evidence of defendant's character *held* not prejudicial to degree which would lead court of review to opinion that it resulted in miscarriage of justice, within Const. art. 6, § 4½.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Cecelia Rodetsky against T. A. Nerney. Judgment for defendant, and plaintiff appeals. Affirmed.

Wm. F. Herron, of San Francisco, for appellant.

Ralph Starke, of San Francisco, and Carl E. Lindsay, of Fresno, for respondent.

CASHIN, J. Appeal by Cecelia Rodetsky from a judgment of the superior court of the state of California, in and for the city and county of San Francisco, made and entered in favor of T. A. Nerney, respondent herein. The action was for damages for breach of promise to marry, with seduction alleged in aggravation of the damages. The case was tried before a jury. The verdict was for respondent. A motion by appellant for a new trial was denied, and she appeals from the judgment.

The appellant complains of certain rulings of the trial court in permitting respondent, over objections duly made, to introduce evidence tending to show that respondent's reputation—his character not having been attacked—for chastity and morality was good. This is the only point made by appellant as ground for reversal.

Decisions directly in point are few, and these from jurisdictions other than California. That the general rule is against the admissibility of such evidence unless the issue involves the character of the party is well

settled. Vance v. Richardson, 110 Cal. 414, 42 P. 909; Title Insurance Co. v. Ingersoll, 153 Cal. 1, 94 P. 94; Greenl. on Evidence, § 54; Wigmore on Evidence, § 64. As stated by Mr. Wigmore in the section of his work cited, it is possible to maintain that the reasons of policy for the exclusion of such evidence should be yielded to in ordinary civil cases only; and that where a moral intent is marked and prominent in the nature of the issue the defendant's good moral character should be received as in criminal cases. And to the same effect is the decision in Hein v. Holdridge, 78 Minn. 468, 81 N. W. 522, quoted by Mr. Wigmore and cited by the respondent in this case. The opinion in the case last cited states persuasive reasons for the rule contended for by respondent here; and it might seem that such evidence, under the provisions of section 2053, Code of Civil Procedure, would be admissible on the ground that the issue involves the character of respondent, had not the court, in the case of Van Horn v. Van Horn, 5 Cal. App. 719, 91 P. 260, discussed and applied the rule to facts so closely analogous in their nature to the instant case and decided in principle against the views of counsel for respondent. That action was one for divorce, charging defendant with adultery. Judgment was entered for plaintiff, and defendant appealed. Among the assigned errors urged as a ground for reversal was the refusal of the trial court to permit defendant to introduce evidence of her good moral character. On appeal the court held that by the allegation of adultery appellant's character was not put in issue, and that evidence concerning it under section 2053, Code of Civil Procedure, was properly excluded. A rehearing therein was denied both by the District Court of Appeal and the Supreme Court.

We are unable to perceive a distinction in principle between a charge of adultery in a civil case, which was held not to involve the character of a party, and a charge of seduction, which is contended here to have that effect. Both involve similar acts, and are reflected in reputation at least in an equal degree; but if the charge of adultery in a civil action does not involve character in the sense the word is used in section 2053, it cannot reasonably be said that the charge of seduction in such an action has that effect.

[1] It is our conclusion that the character of respondent was not put in issue by the allegations of the complaint, and that evidence thereof was not admissible in the case at bar.

[2] It is contended by respondent that, assuming the admitted evidence to have been improper, it but supported the presumption that respondent's conduct was in accordance with the rules of morality (Glos v. McBride, 47 Cal. App. 688, 690, 191 P. 67; White v. White, 82 Cal. 427, 433, 23 P. 276, 7 L. R. A. 799), and was, therefore, not prejudicial to a degree which, in view of the provisions of section 4½ of article 6 of the Constitution, would warrant a reversal.

[3] It is not within our province, nor can we from the record weigh the testimony or determine the credibility of witnesses from all the facts that appear to the jury, many of which, due to their nature, cannot be recorded; but we are required to do so to the extent possible therefrom. Hirshfield v. Dana, 193 Cal. 142, 223 P. 451; People v. O'Bryan, 165 Cal. 55, 130 P. 1042. Before an appellate court may reverse the judgment of a trial court it must be of the opinion that the error complained of has resulted in a miscarriage of justice. Such may not be assumed, but the result must fairly and reasonably appear from the whole record. For us to say that we cannot determine therefrom that the error complained of did not have that result is not sufficient. Our conclusion in the premises must be an affirmative one. People v. Chapman, 55 Cal. App. 192, 201, 203 P. 126; People v. Mazzurco, 49 Cal. App. 275, 280, 193 P. 164; Const. art. 6, § 4½; People v. O'Bryan, supra; People v. Roe, 189 Cal. 548, 561, 209 P. 560.

[4] An examination of the evidence shows that appellant and respondent were respectively of the ages of 35 and 62 years. Appellant, a widow, was engaged in the business of dressmaking, and is the mother of two boys, one of whom, aged 15 years, was a witness in the case. Respondent is a traveling salesman. The parties became acquainted in the month of October, 1921, in the course of certain negotiations for the leasing by appellant of a house owned by respondent. The proposed arrangement was not consummated, but thereafter, following a casual meeting on the street, respondent called on several occasions at the home of appellant, and they from time to time visited various public places together. According to the testimony of appellant, the marriage proposal was made at her home by respondent on a certain day in the forenoon during the absence at school of both her children; that she hesitated to accept, stating to respondent that she had known him "just for a couple of days"; that on this occasion the first act of intercourse took place. Appellant's testimony as to the date of this meeting was contradictory. It might be inferred therefrom as being a few days or several weeks after their first meeting. Nor is it clear from her testimony whether the alleged promise of marriage was made before or after the first act of intercourse. She further testified that, due to the act mentioned and further acts of the same nature, she became pregnant. There was no corroboration of her testimony in these respects other than the testimony of her son, Theodore Rodetsky, that respondent visited appellant from time to time, and on one occasion at the hour of noon. This witness testified that respondent visited appellant during the evening of the last-mentioned day, and

that at that time the witness from an adjoining room while looking through the keyhole of the door saw the parties seated on a sofa and heard respondent ask appellant to marry him, and that appellant then and there agreed. Appellant further testified that the first act of intercourse, whatever the date, was during the daytime and in the absence of her children, and that the proposal accepted by her was also made in the daytime and during such absence. That such proposal should have been renewed and again accepted at any time thereafter seems improbable, and, in the minds of the jury, might tend to throw doubt on the truth of the testimony of the son, and might, together with the method used to gain information as to the facts testified to, lead to the conclusion that his testimony was not entitled to full weight and credit.

Respondent denied the alleged offer of marriage and the acts of intercourse; admitted his acquaintance with appellant and various visits to her home and with her to places of amusement, and further testified that on his last visit to her house during the month of November, 1921, in response to a call from her by telephone, appellant requested of respondent—whether as a loan or a gift the record does not show—the sum of $500, stating to respondent, "You are a big man and got a lot of money," and, "You come to see me, and I could make you much trouble"; that thereupon respondent departed and their relations ceased. The testimony of respondent as to the conversation on the last day mentioned was not denied by appellant.

From the nature of the testimony of appellant and her son, and from the uncontroverted testimony of the respondent last set forth, it is our opinion that a jury might fairly and reasonably have concluded that the allegations of the complaint were untrue; and it is our conclusion that, conceding that the admission of the evidence of character was error, such error was not, in view of the evidence as a whole, prejudicial to a degree which would justify, nor does it lead us to the opinion that it resulted in a miscarriage of justice.

It is therefore ordered that the judgment be affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

72 Cal. App. 570

PEOPLE v. CHESNEY. (Cr. 1215.)

(District Court of Appeal, Second District, Division 2, California. May 9, 1925.)

1. Forgery ⟸44(½)—Evidence held to sustain conviction.

Evidence *held* to sustain conviction of forgery.

2. Criminal law ⟸1159(3)—That testimony of handwriting experts conflicting in forgery prosecution does not require reversal, but makes jury question.

Fact that handwriting experts, in prosecution for forgery, did not agree, is not ground for reversal, but makes it a question for jury, whose finding will not be disturbed.

3. Criminal law ⟸1186(4)—Appellate court not required to sit as jury, subject to all presumptions that govern jury in first instance.

Const. art. 6, § 4½, does not require an appellate court to sit as jury and be subject to all presumptions that govern jury in first instance.

4. Criminal law ⟸1159(2, 4)—Questions of fact, credibility of witnesses, and weight of their testimony for jury, whose finding not reversed because testimony inconsistent.

Questions of fact, credibility of witnesses, weight to be given their testimony, and guilt or innocence of person on trial, are exclusively for jury, and, when so determined, a reversal is not authorized because testimony inconsistent or susceptible of two reasonable inferences.

5. Criminal law ⟸770(2)—Court must instruct as to law pertaining to each class of facts on which evidence adduced.

The trial court is required to instruct as to law pertaining to each class of facts as to which evidence has been adduced.

6. Criminal law ⟸829(4)—Refusal of instruction covered by court's given instruction held not error, though requested instructions stated correct principle of law.

In prosecution for forgery, defendant advancing theory that check was issued either by purported maker, or by purported payee, *held* that, where court instructed jury that, under theory advanced by defendant, a verdict of acquittal must be returned, it was not error to refuse to give further instructions on same matter, though containing correct statement of law.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Robert B. Chesney was convicted of forgery, and appeals. Affirmed.

H. K. Sargent, Wm. M. Morse, Jr., and Harold Ide Cruzan, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. It was charged, by information filed by the district attorney of Los Angeles county, that appellant forged the name of one Robert Urban to a check for the sum of $700, and that he made the same payable to J. S. Young, indorsed the latter name thereon, and uttered, published, and passed said check with intent to defraud the said Robert Urban and the Security Trust & Savings Bank. A jury found appellant

guilty as charged, and he appeals from an order denying his motion for new trial, and from the judgment, alleging insufficiency of evidence, and errors in giving and in refusing to give certain instructions.

[1] It appears that the appellant and said Urban had previously been friends, but that they had not recently met for some time, until shortly before the offense was alleged to have been committed. In March, 1924, Urban testified he received his bank statement and canceled checks, and upon examination of them discovered the check here in controversy, which he immediately returned to the bank with a protest. He further testified that, he did not know Young, had had no dealings with him, and did not sign or issue said check or know of its existence until it came to his attention in the manner stated. When appellant was questioned about the matter, he claimed to have received the check from J. S. Young, with instructions to reopen the latter's account, and produced at the trial a purported power of attorney from Young, reading:

"To whom it may concern: I, J. S. Young, do hereby give power of attorney to R. B. McChesney to sign for me any papers pertaining to business during my absence. J. S. Young."

He admitted having opened an account in the name of Young with the check in question, and having checked out moneys on several occasions from said account, but contended that he had authority to do so, and that Young had given him the power of attorney at the Stowell Hotel in Los Angeles. Appellant told the police, when arrested, that the J. S. Young from whom he had received the check resided at 1238 West Fifty-First street, Los Angeles, and was a railroad and construction engineer and contractor. Bank officers testified that appellant, when opening the account, stated to them that he was the J. S. Young therein named, that he was born in Iowa, was an engineer, at the time was in the army at Manila, or in the Philippine islands, and gave 1238 West Fifty-First street as his address.

Maude L. Young, a witness for the people, testified that she was the wife of J. S. Young, and that in February, 1924, when said account was opened, she was residing with her husband at said address, 1238 West Fifty-First street; that she had previously met appellant, and knew his wife, but that appellant was theretofore known to her as Robert McChesney; that her husband was born at Asheville, N. C., and was engaged in railroad construction work, but was not an engineer, and had never been in the army. She further testified that she was very familiar with his handwriting, and that neither the signature on the check nor on the power of attorney offered by appellant was that of her husband.

Testimony given by appellant upon a former trial of the same case was introduced, from which it appeared that he then swore that he had told the bank teller that Young was born in Ireland, that he did not sign the identification card at the bank, but that he saw Young sign it, and that he did not know Young's mother, or her maiden name. Employees of the bank testified in the record before us that appellant signed the card, and drew the money from the account, and that he then stated that O'Connell was the maiden name of Young's mother. Handwriting experts compared exemplars, and testified positively that none of the writing at the bank or on the so-called power of attorney had been done by Young, but that all, including that admittedly of appellant, was beyond peradventure of a doubt the writing of one and the same person. The jury had all of these facts before them.

The brief for appellant consists largely of a repetition of the evidence presented by the transcript. Much of the argument contained in the few remaining pages is devoted to the presentation of questions of fact, to which but slight reference is here necessary.

It is first said that the signed statement of appellant, introduced at the trial, was a declaration of innocence, whereas a confession is restricted to admissions of guilt. Counsel for appellant stipulated to its introduction, and objection to its competency is not made at this time, but it is argued that, "in the whole record, there is no evidence connecting the defendant with the crime charged save and except his own statements, and these statements in every connection contain the assertion of innocence." Granting, for the sake of the argument, that appellant at all times asserted his innocence, it is obvious from the record before us that his connection with the transaction was amply established in various ways, and that his frequent assertions did not agree with each other, nor with the facts as detailed by other witnesses. This alone, not only created a conflict of evidence, but a serious question as to the innocence of the defendant. People v. Keyes, 178 Cal. 794, 175 P. 6. We have carefully reviewed the evidence in this case, and, from the brief statement herein, which by no means embraces all of the facts tending to establish the guilt of the appellant, it readily appears therefrom that the evidence, if believed by the jury, would justify a conviction; and the many conflicting statements made by appellant in his various "assertions of innocence" render it only the more imperative that an appellate court should not disturb the finding.

[2] It it next asserted that the testimony of certain handwriting experts was unworthy of belief, but the fact that different members of that profession testified on each side in the

case at bar, and did not agree, is not a ground for reversal, but rather brings such question within the rule above stated.

[3, 4] Appellant tells us that it is the duty of this court to determine the facts as well as the law, and it is suggested that section 4½ of article 6 of the Constitution requires an appellate court to "sit as a jury and be subject to all the presumptions that govern the jury in the first instance." We cannot agree with this interpretation of that constitutional provision. Questions of fact, including the credibility of witnesses, the weight to be given to their testimony, and the guilt or innocence of a person on trial before a jury, are exclusively for the jury to decide, and, when so determined, a reversal is not authorized because of inconsistencies or disparities in the testimony, or because the testimony is susceptible of two reasonable inferences—one looking to the guilt of the defendant, and the other to his innocence; and the mere fact that there is a conflict in the evidence does not give rise to a reasonable doubt of the defendant's guilt. People v. Billings, 34 Cal. App. 549, 168 P. 396; People v. Slaughter, 33 Cal. App. 365, 382, 165 P. 44; People v. Keyes, 178 Cal. 794, 175 P. 6; People v. Loomis, 170 Cal. 347, 149 P. 581.

As we have shown, appellant's contention upon the trial was that he indorsed the check for $700, made the deposit, and checked out funds therefrom, under authority of a power of attorney which he claimed to have been executed by J. S. Young. He now assigns as error the refusal of the trial court to give a requested instruction to the jury that they should not consider evidence tending to show that the defendant may have committed other offenses than that for which he was on trial, and that, notwithstanding what they might believe with reference to similar offenses by other persons, the defendant was the only person on trial, was charged with but one specific offense, and, unless proven guilty thereof beyond a reasonable doubt, must be acquitted. The grounds assigned for this point are that the defendant was entitled to have the jury charged upon his theory of the case. It is said that two theories were advanced for the defense: First, that the check was issued by Urban; and, second that it was issued by Young.

[5, 6] The rule invoked by appellant is the law to this extent: That the trial court is required to instruct as to the law pertaining to each class of facts as to which evidence has been adduced. People v. Buelna, 81 Cal. 135, 22 P. 396; People v. Newcomer, 118 Cal. 263, 50 P. 405. Upon the theory of the defense that Urban signed the check, there is nothing in the instruction requested which could possibly apply thereto. Besides, the court gave another instruction to the effect that, if the jury should find that the signature "Robert Urban," on the check described in the information, was the genuine signature of Robert Urban, they should acquit the defendant.

The other theory which appellant claims was presented is that the check may have been signed by Young. An examination of the entire record fails to disclose any evidence that Young affixed the signature of Robert Urban to the check. The only evidence from which such an inference could possibly be drawn is that Urban's testimony and that of others negatives the idea that Urban signed the check, and the defendant denied having signed it, and stated that it was handed to him by Young. It may be that under these circumstances the jury might, if they believed this testimony, have concluded that, inasmuch as the check had apparently been in Young's possession, there was a probability that he affixed the signature in question. Under this theory the defendant would be innocent, because his participation in the transaction in which Urban was defrauded was without criminal intent and through the inducement of Young. If this defense were accepted, it would follow that the power of attorney purporting to have been executed by Young was genuine. At the request of the defendant, the court gave the following instruction:

"You are further instructed that, if you find from the evidence that the defendant in this case, charged with this offense, was innocently drawn into the alleged transaction under such circumstances that he honestly believed that he had the right to do the things which he did then do, then that would show an absence of intent to commit the crime charged, and, if you find that there is any reasonable doubt as to whether there was an intent on the part of the defendant to defraud by the commission of a forgery, then you must acquit the defendant."

This instruction applies to the only hypothesis upon which the defendant could be held innocent, except the theory that the check bore the genuine signature of Urban. Having thus informed the jury that under either theory advanced by the defendant a verdict of acquittal must be returned, it was not error to refuse to give the further instruction, of which refusal complaint is made, even though it contained a correct statement of the law.

The further assignments of appellant relate to elementary questions of law, presented by instructions universally given, and which have been passed upon repeatedly. The citation of authority supporting the action of the trial court in these respects is unnecessary.

No error appearing, the judgment and order appealed from are affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

72 Cal. App. 414

PEOPLE v. SEAWRIGHT et al. (Cr. 1184.)

(District Court of Appeal, Second District, Division 2, California. April 24, 1925. Rehearing Denied May 23, 1925. Hearing Denied by Supreme Court June 22, 1925. Opinion Modified July 10, 1925.)

1. Robbery ⊂⊃24(1)—Evidence held insufficient to sustain conviction.

In prosecution for robbery, evidence *held* insufficient to sustain conviction.

2. Robbery ⊂⊃26—Conflict of evidence as to question of defendant's identity held for jury.

In robbery prosecution, conflict of evidence as to question of defendant's identity *held* for jury.

3. Criminal law ⊂⊃1159(3)—Jury's conclusion on conflicting evidence will not be disturbed on appeal.

Jury's conclusion on conflicting evidence will not be disturbed on appeal.

4. Robbery ⊂⊃26—Whether defendant held up victim with pistol, while his companion accosted other victim, held for jury.

In robbery prosecution, whether defendant held up victim with pistol or revolver, while his companion accosted other victim, *held* for jury.

5. Robbery ⊂⊃11—Statute defining robbery in first degree construed.

Pen. Code, § 211a, defining robbery in first degree as that which is perpetrated with a dangerous or deadly weapon, in view of section 245, does not require proof to constitute offense that there was an actual assault upon the person with a deadly weapon, but that accused was armed with a dangerous or deadly weapon.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Robbery.]

6. Robbery ⊂⊃24(1)—Evidence held to justify inference that guns used in robbery were loaded, and that defendants intended to discharge them if their commands were not obeyed.

In robbery prosecution, evidence *held* sufficient to justify inference that guns used were loaded, and that defendants intended to discharge them, for purpose of committing bodily injury, if their commands were not obeyed.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Ben Marvin Seawright and Carl John Eberle were convicted of robbery, and they appeal. Reversed as to first named defendant, and affirmed as to second named defendant.

Lyle Pendegast, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CRAIG, J. Appellants and one Kent were charged with the crime of robbery, a felony. Three separate verdicts were returned by a jury, convicting each defendant of robbery in the first degree. Seawright and Eberle appeal from orders denying their motions for new trial, and from the judgments based upon said verdicts.

The three defendants were tried jointly, and each one testified upon the trial. A written confession of the defendant Kent was introduced in evidence, but the jury were instructed to regard it only as against him, and that nothing therein contained should be considered as evidence against these appellants. The latter appeal upon the ground of alleged insufficiency of evidence to sustain a conviction of robbery in the first degree, as defined by section 211a of the Penal Code. Robbery, as denounced by the statute, is defined and classified as follows:

"Sec. 211. Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

"Sec. 211a. All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree. All other kinds of robbery are of the second degree."

It is contended by appellants that the evidence was not sufficient to warrant the jury in finding that they committed the offense charged, that, if committed by them, they used the firearms which were introduced in evidence, or that, if appellants were believed by the jury to have committed the robbery with firearms, the guns were loaded at the time of the holdup.

The principal facts presented to the jury were as follows: On July 4, 1924, at about 11:30 p. m., one Myron G. Stevens and a Miss Beyerle were seated in a coupé parked near the curb at the Pasadena Hospital, in Los Angeles county, where the latter was employed. Two men, later identified as defendants Eberle and Kent, approached the car, pointed guns at the occupants, and ordered them to get out, which they did. Eberle started to search Miss Beyerle, but when assured by her that she had nothing he desisted. Kent searched Stevens' pockets and took from him a watch, wallet and money, a bankbook, some keys, and certain papers. Witness Enders testified that as he drove through Fair View avenue he saw a Ford standing with lights out, just south of the front door of the hospital, and that it was occupied by one man, who was wearing a straw hat; that two other straw hats had been placed up in the back of the machine so that they were visible through the small window, from the rear. The witness made several tours around the block and on one of

these occasions saw two men in the shadows of some trees near said hospital, one of whom wore a cap. He notified the Pasadena police department of the occurrence, and upon his return to the scene the Ford was moving away in a southerly direction. At about 12:15 or 12:30 a. m. a Ford car was stopped at North Broadway bridge in a direct route southerly from Pasadena, by Officers Dunn and Hackett, and the occupants thereof, who proved to be the defendants Eberle, Kent, and Seawright, were there arrested and the automobile was searched. At the time of such arrest all three men were wearing straw hats, and in their machine were found two caps, an automatic pistol and a revolver, both of which were loaded, and the property which had about an hour previously been taken from Stevens.

After the arrest, the defendant Kent signed a statement involving all three, but, this having occurred in the absence of the defendants Eberle and Seawright, it was excluded as to them. Seawright was asked where one of the guns came from, but did not reply. The caps found in the machine were tried on the defendants, and were found to be of the same sizes as the straw hats. When arrested, defendant Kent was driving the Ford, Eberle sat on the other side, and Seawright sat between them. Upon the trial, Kent and Eberle were positively identified by Stevens and his companion as the men who committed the robbery, and it was shown that they wore caps at the time.

The appellants denied participation in the robbery, and testified that they had never been in Pasadena; that they had immediately preceding their arrest left Lincoln Park, where they had spent several hours.

[1] The most that a thorough review of the record warrants with respect to appellant Seawright is, we think, that he was apprehended under circumstances which created a strong suspicion of his complicity in the offense. Enders did not see more than that some person occupied the Ford near the Pasadena Hospital, and of course did not pretend to identify him at the time of the trial. The officers arrested him when riding with the other two men, in an automobile which contained the stolen property. He wore a straw hat, as did the occupant of the car in Pasadena, but this fact alone would bear but slight significance. It is not shown that he knew anything about the stolen articles. He testified that he and his codefendants drove from Los Angeles around through Glendale, Hollywood, and Burbank, and thence to Lincoln Park, where they arrived at about 10 o'clock p. m., and remained there for a period of about two hours. It is apparent from the evidence before us that the other two defendants were in Pasadena at the time of the robbery, and that the jury disregarded this story of Seawright, but he denied having any knowledge of the loot being found in the car, or that the two caps were taken therefrom. The only evidence tending to connect Seawright with the robbery, therefore, is the testimony of the two officers that they found him in the company of Eberle and Kent, and the fact that he related an improbable story while on the stand. We do not think this was sufficient evidence to support the finding of the jury, and as to Seawright the judgment must therefore be reversed.

[2, 3] Appellant Eberle likewise denied any knowledge of the transaction, and testified that he had not been in Pasadena, but he was positively identified by Miss Beyerle, and there can be but small doubt that he changed hats before the arrest, which may well have led the jury to believe that he had not been at the park, as he claimed, and that he entertained a consciousness of guilt. As was said in a recent case:

> "The defendant's story is plausible, but the jury had the advantage of the presence of the defendant and evidently came to the conclusion that the recital of what took place lacked the essential element of truth." People v. De Verre (Cal. App.) 230 P. 197.

A conflict of evidence as to the identity of one on trial accused of having committed an offense presents a question wholly within the province of the jury, and their conclusion will not be disturbed upon appeal. People v. Connelly (Cal. Sup.) 234 P. 374.

[4] The same ruling must also necessarily apply to the finding of the jury, as implied by its verdict, that appellant Eberle held up Miss Beyerle with a pistol or revolver, while his companion accosted Stevens, since the young woman testified that he used a "gun," but that she did not know its character or whether or not it was loaded.

We shall now proceed to consider the contention of appellants that, since there was no direct evidence that the firearms were loaded at the time of the robbery, the judgment should be reversed upon the ground that it was not shown that the offense was committed with a dangerous or deadly weapon.

[5, 6] Appellants cite People v. Sylva, 143 Cal. 62, 76 P. 814, which involved a charge of assault with a deadly weapon. The Supreme Court said that "the verdict shows that the jury did not believe that the gun was loaded." No such situation exists here. Section 245 of the Penal Code defines assault with a deadly weapon to be an actual assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury; but robbery of the first degree, as we have indicated, consists of the felonious taking of personal property from another by means of force or fear, by a person who is armed with a dangerous or deadly weapon. There is no claim that the victims in the case at bar were not put in fear when robbed, nor is there any evidence that the weapons were not loaded at that time. Section 211a of the

Penal Code does not require proof that there was an actual assault upon the person with a deadly weapon, but that the accused was armed with a dangerous or deadly weapon. An unloaded revolver has repeatedly been held to be a dangerous weapon, according to the manner in which it may be used, when in the hands of one intent upon committing crime, if capable of producing great bodily injury, and considering the proximity of the person in control to the intended victim. State v. Godfrey, 17 Or. 300, 20 P. 625, 11 Am. St. Rep. 830; State v. Hammond, 14 S. D. 545, 86 N. W. 627. In State v. Lynch, 88 Me. 195, 33 A. 978, it was said that "deadly" and "dangerous" are not equivalents; that a dangerous weapon may possibly not be deadly, but that a deadly weapon, one which is capable of causing death, must be dangerous; and in all of these cases the question of the dangerous or deadly character of the weapon was said to be one for the jury to decide.

But the jury might reasonably have believed that the guns were loaded. Appellants were arrested within an hour after the hold-up, and the officers testified that both guns were then loaded. Since the jury apparently believed that appellants committed the robbery near the Pasadena Hospital, not alone merely armed with guns, but actually by the use thereof, it was within their province also to conclude that the defendants would not perpetrate the crime with unloaded weapons, and reload them during the hour before starting upon a peaceful drive. We think all of the circumstances, including the conduct of the robbers at the time, would have amply justified the jury in finding that the guns were loaded when Stevens was compelled to give up his property.

People v. Montgomery, 15 Cal. App. 315, 114 P. 792, involved a charge of assault with a deadly weapon. Montgomery leveled a rifle at one Freeholdt, who ran behind a post and called for help; the accused was thereafter led away and finally went home. The rifle was found to be loaded when officers arrived, but there was no evidence tending to show that it was loaded at the time of the assault, and Montgomery testified that it was not then loaded, yet the jury found him guilty as charged, and its decision was upheld on appeal.

We think that in the instant case there was sufficient evidence of appellants having so conducted themselves as to justify the jury in drawing the inference that the guns were loaded and that appellants intended to discharge them, if their commands to "put them up" were not obeyed, for the purpose of committing bodily injury.

The judgment and order as to appellant Eberle are affirmed, and those of appellant Seawright are reversed.

I concur: WORKS, J.

FINLAYSON, P. J. I concur. The serious question in the case is whether either of the robbers was armed, at the time of the robbery, with a dangerous or deadly weapon. There is no direct evidence that either of the pistols which the robbers pointed at the complaining witness and his companion was loaded; i. e., no one testified that he saw some person load either weapon or that he saw cartridges in either pistol. Wherefore appellants earnestly insist that there is no evidence to support a verdict of robbery in the first degree as defined in section 211a of the Penal Code.

An empty revolver merely pointed at a person, and not used to strike him with, is neither a dangerous nor a deadly weapon, however much the person at whom it is pointed may be put in fear. A loaded revolver pointed at a person within shooting distance is a dangerous weapon as a matter of law. Though there is some conflict in the cases, the rule which in my opinion is supported by reason and by the weight of authority is this: The prosecution makes out a prima facie case from which the jury may infer that the gun or pistol was loaded, and that consequently it was a dangerous or deadly weapon, when it is proved that the weapon was pointed at the person assailed, within shooting distance, and that the act was accompanied with a threat, evidenced by words or conduct indicating an intention to fire, the person at whom the weapon was pointed not knowing but that it is loaded. Note to Territory v. Gomez, 42 L. R. A. (N. S.) 975. In Lipscomb v. State, 130 Wis. 238, 109 N. W. 986, a robbery case, the court says:

"A loaded revolver pointed at a person within shooting distance is a dangerous weapon as matter of law. This does not mean that it was necessary in the present case for the state to introduce proof that some person loaded the revolver or saw the cartridges in it. Under the weight of authority, when the state proves that a gun or revolver was pointed at a person within shooting distance with a threat or other words indicating intention to fire, the person assailed not knowing but that it is loaded, the state has made prima facie proof that the gun or revolver is loaded and consequently a dangerous weapon. * * * The case of Nevada v. Napper, 6 Nev. 113, holding to the contrary, seems to stand practically alone and is disapproved."

In my opinion this rule states the only practical view to be taken in the enforcement of statutes dealing with assaults or robberies, where the weapon used to intimidate the victim is a gun or a pistol.

The evidence in this case, when considered in the light of the above-mentioned rule, is amply sufficient to warrant the inference that the pistols were loaded, and that therefore the robbery was committed with dangerous and deadly weapons.

72 Cal. App. 509

PEOPLE v. CONSON. (Cr. 1249.)

(District Court of Appeal, First District, Division 1, California. May 6, 1925.)

1. Criminal law ⟸195(1)—To sustain plea of former jeopardy, second prosecution must be for same offense.

To sustain a plea of former jeopardy on basis of former acquittal or conviction. second prosecution must be for the same offense. both in law and fact. as that for which first prosecution was instituted.

2. Criminal law ⟸296—Question of former jeopardy is for court where there is no dispute as to facts.

Where there is no dispute as to facts, whether accused has been formerly in jeopardy for same offense is question for court and not of fact for jury.

3. Criminal law ⟸166—Proceeding before prison board, resulting in forfeiture of prison credits, held not former jeopardy for crime of escaping from prison.

Hearing before prison board to determine whether accused should forfeit his credits, on account of escape from state prison, *held* not former jeopardy, barring prosecution under Pen. Code. §§ 105, 106.

4. Prisons ⟸15—Prison board has no authority to punish under authority to regulate credits.

Proceeding before prison board, to forfeit credits of escaping prisoner, is administrative in character, and board does not exercise judicial functions; authority granted by Penal Code to ameliorate punishment of prisoners giving no authority to impose penalties other than forfeiture of credits.

5. Pardon ⟸8—Prisoner held not to have been granted parole.

Where printed form used by prison board in fixing terms for which prisoners shall be confined had been filled out, but printed form immediately following, which may be filled out in event that board grants parole, had not been filled out, claim, that prisoner had been granted parol, *held* without merit.

Appeal from Superior Court, Marin County; Frank H. Dunne, Judge.

John Conson was convicted of escaping from state prison, and he appeals. Affirmed.

N. Charles Brusatori, of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Dep. Atty. Gen., for the People.

TYLER, P. J. Defendant, upon information, was charged by the district attorney of Marin county with the crime of felony, to wit, escaping from state prison.

He is a prisoner confined at San Quentin, Cal., having entered that institution from Los Angeles county on or about the 15th day of June, 1922, to serve sentences upon two convictions of felony. Thereafter, on July 14, 1924, he was assigned to prison road camp A, located near the town of Requa, in Del Norte county. On the 22d day of July following he was found missing from the camp, and was some nine days thereafter apprehended and returned to San Quentin.

Subsequently, on the 23d day of August, 1924, at a hearing before the board of prison directors he was found guilty of a charge of escaping from prison, and all the credits to which he was entitled under the Penal Code, which he had already earned and which he would thereafter earn, were declared forfeited.

On November 14, 1924, an information was filed in the superior court of Marin county charging defendant with a violation of sections 105 and 106 of the Penal Code relating to escapes from state prison, and it was upon this information that the conviction here appealed from was had.

[1] To this information defendant entered a general plea of not guilty. He also entered the plea of once in jeopardy, claiming that he had already been convicted of the offense charged by the judgment of the state board of prison directors rendered on the 23d day of August, 1924. Defendant was found guilty, and this is an appeal from the judgment of conviction. The main question involved in the appeal is whether or not appellant was once in jeopardy for the offense charged.

[2] The question arises by reason of the rejection by the trial court of certain evidence going to prove the action of the board of prison directors in forfeiting the credits of appellant, and on the instructions of the court as to what constituted former jeopardy, and the refusal to give certain instructions on this subject as requested by appellant. It is a well-settled principle that a plea of once in jeopardy, former acquittal or former conviction, is not good, unless the second prosecution is for the same offense, both in law and fact, as that for which the first prosecution was instituted. People v. Kerrick, 144 Cal. 46, 77 P. 711; 7 Cal. Jur. p. 955. In cases of this character, where there is no dispute as to the facts, and the only question is whether the defendant has been in jeopardy, the question becomes one of law for the court, and not one of fact for the jury. People v. Wilkison, 30 Cal. App. 473, 158 P. 1067.

[3, 4] The ruling of the court upon the subject was correct. Punishment by the prison authorities for a violation of its rules, or for the enforcement of necessary discipline, does not place a defendant in jeopardy within the constitutional sense, and it constitutes no defense whatever to a charge of the character for which defendant was tried. State v. Cahill, 196 Iowa, 486, 194 N. W. 191–194;

People v. Huntley, 112 Mich. 570–577, 71 N. W. 178.

A proceeding, such as was here instituted by the prison board for the purpose of determining whether defendant should forfeit his credits, is one administrative in character, and the board, in the performance of this act, does not exercise judicial functions, nor is it a judicial body. In re Lee, 177 Cal. 690, 171 P. 958.

Its proceedings in the matter therefore did not constitute once in jeopardy of the offense charged in the information. Defendant in the instant case was accused by information with the violation of certain provisions of the Penal Code which amount to a felony. In order to be entitled to the plea he invoked, it was incumbent upon him to show that he had previously been placed on trial before a court of competent jurisdiction upon indictment or information for the same offense, namely, escaping from the state prison.

[5] The hearing before the prison board was a mere inquiry by that body under the provisions of the Penal Code for flagrant disregard of the prison rules. The board has no jurisdiction to try any one for a felony, and it is manifest that it made no attempt to do so. The sections of the Penal Code, authorizing the prison board to ameliorate the punishment of prisoners, gives it no authority to impose a penalty other than a forfeiture of credits, and are designed solely for the benefit of prisoners, who by their conduct prove that they are entitled to a reduction of their sentences by reason of their good behavior, and the right given to the board to forfeit the credits is one intended merely for the good government of the prison and to maintain discipline, and its action in forfeiting the credits of one who has attempted to escape does not place such delinquent in jeopardy within the constitutional sense. People v. Huntley, supra.

Equally without merit is the further contention that the state board of prison directors had granted appellant a parole and that his confinement in the road camp was therefore illegal.

In this connection, it appears from the record, that the board in the course of its duty in fixing the term for which prisoners shall be confined uses a printed form. This form was properly filled out, fixing the term for which appellant was to serve. Immediately following is a printed form which may be filled out in the event that the board grants a parole. This portion of the form was not filled out, and it is perfectly apparent that when his term of confinement was fixed no action was taken by the board with reference to a parole.

The judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 801

PEOPLE of the State of California, Plaintiff and Respondent, v. William C. MOORE, Defendant and Appellant. (Cr. 1250.)

(District Court of Appeal, First District, Division 1, California. May 6, 1925.)

Appeal from Superior Court, Marin County; Frank H. Dunne, Judge.

George H. Harlan, of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Dep. Atty. Gen., for the People.

TYLER, P. J. Appellant was charged by information of the district attorney of the county of Marin with the crime of felony, to wit, escaping from state prison. He was tried and convicted, and this is an appeal from the judgment.

The same points are here urged for a reversal as were discussed in People v. Conson (Crim. No. 1249), 237 P. 799, this day decided. Upon the authority of that case, the judgment herein is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 800

PEOPLE of the State of California, Plaintiff and Respondent, v. F. A. PORTER, Defendant and Appellant. (Cr. 1251.)

(District Court of Appeal, First District, Division 1, California. May 6, 1925.)

Appeal from Superior Court, Marin County; Frank H. Dunne, Judge.

Thos. P. Boyd, of San Rafael, for appellant.

U. S. Webb, Atty. Gen., and Charles A. Wetmore, Jr., Dep. Atty. Gen., for the People.

TYLER, P. J. Appellant was accused, upon information by the district attorney of Marin county, with the crime of felony, to wit, escaping from state prison while undergoing a sentence of 10 years' imprisonment in the state prison at San Quentin under and by virtue of a judgment of the superior court of the county of Lassen. He was tried and found guilty, and this is an appeal from the judgment of conviction.

The same points are urged as grounds for reversal that were considered in the case of People v. Conson (Crim. No. 1249) 237 P. 799, this day decided. Upon the authority of that case, the judgment appealed from is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

72 Cal. App. 479

PEOPLE v. EPHRAIM. (Cr. 1262.)

(District Court of Appeal, First District, Division 1, California. April 30, 1925.)

1. Criminal law ⇐1148—Refusal of application for bail pending appeal from conviction of embezzlement, not disturbed, unless discretion abused.

After conviction for embezzlement, refusal of application for bail pending appeal will not be interfered with, except for abuse of trial court's discretion granted by Pen. Code, § 1272, in cases involving imprisonment for felony, notwithstanding certificate of probable cause had been issued.

2. Bail ⇐44—Refused by appellate court, after conviction, pending appeal, except in extraordinary cases.

Appellate court ought not to admit to bail after conviction of felony and pending appeal, except where circumstances of extraordinary character have intervened since conviction.

Appeal from Superior Court, Alameda County; Fred V. Wood, Judge.

W. K. Ephraim was convicted of embezzlement, and he appeals. On application for admission to bail. Application denied.

Thomas T. Califro and John D. Harloe, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., Wm. F. Cleary, Deputy Atty. Gen., Earl Warren, Dist. Atty., Charles Wade Snook, Asst. Dist. Atty., and Edwin A. Heafey, Deputy Dist. Atty., all of Oakland, for the People.

TYLER, P. J. Application for an order admitting defendant to bail pending appeal. Petitioner was informed against by the district attorney of Alameda county with the crime of felony, to wit, embezzlement. He was tried and found guilty.

[1] Thereafter, on March 7, 1925, an appeal was duly taken from such conviction, and on March 9, following, the superior court made and filed its certificate of probable cause. Thereafter application was made to the superior court for an order of bail pending the appeal. The petition alleges that the court denied the application upon the sole ground that it was not the practice of said court to allow bail in cases where the matter was one of discretion with the court.

Assuming that the motion was properly presented to the lower court, the denial thereof was in effect an exercise of this discretion. Section 1272 of the Penal Code declares when a defendant, after conviction and pending appeal, may be admitted to bail. That section provides that bail may be allowed: (1) As a matter of right, when the appeal is from a judgment imposing a fine only; (2) as a matter of right, when the appeal is from a judgment imposing imprisonment in cases of misdemeanor; (3) as a matter of discretion in all other cases.

[2] The defendant having been convicted of a felony, the application was one within the sound discretion of the court, and there is nothing in the record before us to show that the discretion vested in the court was in any manner abused, or arbitrarily exercised. The mere issuance of a certificate of probable cause is not alone sufficient grounds for admission to bail, pending the appeal, as such certificate has become such a matter of common occurrence that the appellate court would not be warranted in considering it either as evidence of illegal conviction or of the existence of reversible errors. People v. Cornell, 28 Cal. App. 654, 153 P. 726. It is a settled rule in this state that the appellate court ought not to admit to bail after a conviction of a felony and pending appeal, except where circumstances of an extraordinary character have intervened since the conviction. Ex parte Turner, 112 Cal. 627, 45 P. 571. No such circumstances here appear.

Moreover, applications of this character are, as above indicated, addressed to the sound discretion of the trial court, and its determination should not be disturbed or ignored except in an instance of manifest abuse, and no such abuse here appears. Ex parte Preciado, 30 Cal. App. 323, 158 P. 1063.

The application is denied.

We concur: KNIGHT, J.; CASHIN, J.

---

73 Cal. App. 104

Ex parte Ephraim. (Cr. 1276.)

(District Court of Appeal, First District, Division 1, California. June 2, 1925.)

Application for Writ of Habeas Corpus prayed to be directed to the Sheriff of Alameda County to secure release of petitioner on bail. Writ denied.

T. T. Califro and Julian H. Biddle, both of San Francisco, for petitioner.

TYLER, P. J. The applicant herein heretofore on April 23, 1925, filed in this court an appeal from an order denying him bail after conviction of a felony. People v. Ephraim, 237 P. 801.

It appeared therein that the superior court had made and filed a certificate of probable cause, but denied the application for bail pending appeal upon the sole ground, so it was alleged, that it was not the practice of the court to allow bail in cases where the matter was one of discretion with it. In the opinion rendered by this court it was held that the denial of the motion was in effect an exercise of this discretion. It was there pointed out that section 1272 of the Penal Code declares when a defendant, after conviction and pending an appeal, may be admitted to bail, and that the appellate

court ought not to interfere after a conviction of a felony and pending appeal, except where circumstances of an extraordinary character have intervened since the conviction.

The present application presents no such circumstances, and it is therefore denied.

We concur: KNIGHT, J.; CASHIN, J.

---

72 Cal. App. 632

PEOPLE v. SYLVIS. (Cr. 1208.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1925. Rehearing Denied June 5, 1925.)

1. Rape ⟸51(1)—Conviction held supported by evidence.

Evidence *held* sufficient to support conviction of rape.

2. Rape ⟸54(1)—Conviction may be had on prosecutrix's uncorroborated testimony.

One may be convicted of rape on prosecutrix's uncorroborated testimony, if believed by jury.

3. Robbery ⟸24(1)—Conviction held not sustained by evidence.

Evidence *held* insufficient to sustain conviction of robbery under Pen. Code, § 211, as not showing taking of property from person or immediate presence of prosecuting witness.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Elmer Sylvis was convicted of rape and robbery, and appeals. Conviction of rape affirmed, and that of robbery reversed.

Charles R. Morfoot, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

HAHN, Justice pro tem. The defendant in this case was charged, by information No. 23725, with the crime of assault with intent to commit rape in count 1, and, in count 2, with the crime of robbery. He was also charged, in information No 23751 with the crime of rape. Both informations, having been issued by the district attorney of Los Angeles county, were consolidated, and the defendant tried upon all of the charges at the same time.

The jury found the defendant guilty of rape, as charged in information No. 23751, and also guilty of robbery as charged in count 2 of information No. 23725, and not guilty as to the charge of assault with intent to commit rape, as set forth in count 1 of information No. 23725.

Defendant prosecutes this appeal from the judgment of the court and from the order denying his motion for a new trial on the two counts upon which he was found guilty.

[1] It is urged, on defendant's behalf, that the evidence was not sufficient to support the verdict finding the defendant guilty of the crime of rape, as charged in information No. 23751.

From the testimony of the prosecutrix, Lulu Fuller, it appears that she, a woman of about 40 years of age, on her way to attend a moving picture theater, was waiting for a street car on Whittier boulevard at about 7:30 o'clock on the evening of October 2, 1924. The defendant, driving a Chevrolet touring car, stopped and invited her to ride; he indicating that he was driving in the direction of the theater where she desired to go. The prosecutrix accepted the invitation, and, after riding several blocks with the defendant, he turned his automobile in a direction different from that which would have taken her to the point she desired. She at once protested to the defendant that she did not desire to ride further and, opening the door of the car, attempted to alight. The defendant restrained her by taking hold of her and putting his arms about her and one of his hands over her mouth to prevent her from calling for help. She testified that she was very much frightened, and that she fought the defendant as vigorously as her strength permitted her to do, until she was entirely overcome. The defendant then drove his car out near a cemetery, where he stopped the car, and by physical force dragged and carried her from the front to the rear seat of the car, and there accomplished the act of sexual intercourse. Thereupon the defendant drove back to the main highway and let the prosecutrix out of the car. The prosecutrix was in a nervous and dazed condition, but finally wended her way to a moving picture theater, and a few minutes after entering, noticing a friend of hers, one Mrs. Brinegar, she went over to the friend and related to her the incident of the attack by the defendant.

Mrs. Brinegar, testifying on behalf of the people, stated that about 8:30 o'clock on the evening of October 2d, while sitting in a moving picture theater on Whittier boulevard, she saw Mrs. Fuller, the prosecutrix, enter; that a few minutes later Mrs. Fuller came to the witness, and, taking a seat alongside of her, related the circumstances of the attack; that the prosecutrix at that time was trembling and crying, and her clothes were dusty on one side; that the witness suggested that she take Mrs. Fuller to her home, but Mrs. Fuller protested that she wished to go to her own home, which she subsequently did.

It appears from the evidence that the prosecutrix, upon arriving home that evening, did not relate the incident of the attack to her husband, giving as a reason for her silence the fact that her husband was not well, and

that for some time it had been necessary for the members of the family to withhold from him any circumstances that would tend to cause him worry. It does appear that the prosecutrix, upon the first opportunity, related the circumstances of the attack to her daughter.

The prosecutrix further testified that on the morning of October 13th, following the date of the attack, while on her way to visit a friend, she saw the defendant with a companion in the same Chevrolet touring car, and that again in the afternoon of the same day, while she (the prosecutrix) was accompanied by her daughter and a Mrs. Hayden, the defendant and his companion were observed in the Chevrolet touring car. On this occasion she was able to secure the license number of the car, which she immediately reported to the officers, and upon which information the officers made the arrest of the defendant and his companion, one Joseph F. Welch.

Joseph F. Welch, as a witness on behalf of the people, testified that on the morning of October 13th, while riding in the Chevrolet car, the defendant pointed out the prosecutrix, who was then walking along the sidewalk, and said: "I took her on the other night; I made a date with her the night I had her out." Welch further testified that on the afternoon of the same day, while riding in the same machine, the defendant pointed out Mrs. Fuller, who was in an automobile with two other women, and said: "There is that broad that I showed you this morning. * * * I said to Elmer: 'It looks like she was taking your number down.' He says: 'Yes'; I don't know—he said something about 'That is hell,' he says, or something, 'I am going to get out of here.'"

While it is true that the defendant denied the charges in toto, and went so far as to assert that he had never seen the prosecutrix, Mrs. Fuller, until she appeared in the county jail where he was incarcerated to identify him, there is no question but that there is abundant evidence in the case to support the verdict of the jury.

[2] Counsel for the defendant urges that, because there was no corroborating testimony as to the actual assault, there was insufficient evidence to support the verdict. The rule is well settled that one may be convicted of rape upon the uncorroborated testimony of the prosecutrix, if the jury believes her story. People v. Mayes, 66 Cal. 597, 6 P. 691, 56 Am. Rep. 126; People v. Logan, 123 Cal. 414, 56 P. 56; People v. Benc, 130 Cal. 159, 62 P. 404; People v. Preston, 19 Cal. App. 675, 127 P. 660; People v. Bernon, 29 Cal. App. 424, 155 P. 1021; People v. Akey, 163 Cal. 54, 124 P. 718.

We have taken the pains to read with care the entire transcript of the testimony. The impression of the testimony of the prosecutrix carries a note of sincerity, and we feel that her recital of the attack could reasonably have had no other result than to convince the jury of its truthfulness.

[3] Coming now to the charge of robbery in information No. 23725: The following detailed statement of the evidence includes what is material in the consideration of this point: The complaining witness, one Mrs. Lillian Bourlis, a young married woman under the age of 18 years, on the morning of October 14, 1924, while walking along Pasadena avenue in Belvidere Gardens, on her way to work, was accosted by the defendant and his companion, Joseph F. Welch, who were riding in a Chevrolet touring car, and invited to ride with them. Being advised that they were going in the direction of her place of employment, she accepted the invitation, and sat in the front seat between the defendant and his companion. After proceeding a few blocks, the defendant, who was driving the car, turned into a side road, which was unpaved and little frequented, and which led to a sparsely settled locality along the railroad track. The complaining witness asked the reason for taking this direction, which was not the direction in which she desired to go, and the defendant replied that it was a short cut to the point of their destination. When the car arrived at a point where there were some trees along this unfrequented road, the defendant stopped the car and put his arm around the complaining witness and attempted to engage in familiarities with her. She promptly resented this conduct and resisted the defendant's efforts, even to the extent of scratching his face and striking him. It seems that the defendant then desisted and drove his car a short distance further along this unfrequented road and, again stopping the car, renewed his attempts to caress and fondle the complaining witness. Again the complaining witness vigorously resisted the defendant's attempts, and in the mêlée Welch opened the front door of the car and got out. As soon as the complaining witness could free herself from the defendant, she, too, jumped out. In getting out of the car, she either stumbled or fell, so that she lost her balance and was assisted to her feet by Welch. About the time that she alighted from the car she noticed a man, by name Chadwick, working nearby, and she called to him for help. Her cries for help alarmed the defendant and his companion, who immediately got into the car and left the complaining witness. The man Chadwick came to her assistance, and to him she related the attacks of the defendant.

The complaining witness stated that when she got into the automobile she had her hat, coat, and a handbag, in which she carried a purse containing about $10 in change. After she got out of the automobile, and the defendant and his companion had left, she, aided by Chadwick, looked about for her hat, coat, and bag. She found her hat at one point on the ground and her coat on the

ground some distance from the hat; but the purse she was unable to find, although she searched carefully, and a second time went back to the point where she left the car, looking for her purse. There is no testimony in the record that explains how the hat and coat reached the points on the ground where they were found; nor does the complaining witness have any recollection of seeing either the defendant or his companion take her purse or bag; nor does she remember where she last saw her purse and bag, except that she had them with her when she got into the automobile.

The only other testimony in the record pointing to the defendant having anything to do with the purse, comes from Welch, the co-defendant of Sylvis, and who was with Sylvis in the car. On this point, Welch testified:

That he and Sylvis had gotten into the car and started away, leaving the complaining witness. That defendant Sylvis all of a sudden looked back and says, "Gee, there is her pocketbook there; get out and see what is in it." So I goes out and says, 'God, that girl won't have car fare, what are you going to do, leave her out there?' He says, 'Hell, do you think I am a damn fool to go back there?' So I opens up the pocketbook, and it was heavy, like it had a lot of loose change. It was a beaded bag. So I shoved my hand in it, and I thought I never would get through counting it; there was about a handful of dimes and nickels in there. If I am not mistaken it was pretty near all dimes. So I says, 'What do you want to do with this?' He says, 'Hell, it just comes in handy,' he says, 'I am pretty short on some money that my dad has,' he says, 'You say there is $10 there?' He thought I was kidding him; so I takes the whole thing and shoved it in my pocket; so when we got to going along I said, 'Gee, this is not a bad pocketbook; I think I will keep it myself.' He says, 'Hell, no; you don't want to be caught with that; throw it out some place there, out in the bushes.' So the first clump of bushes we come to I tossed it out."

Welch further testified that subsequently he turned over the money to Sylvis, but received back from Sylvis $1 of the amount.

It appears from the testimony that the complaining witness, at the time she missed her pocketbook, was under the impression that in some manner it had been dropped or dragged out of the car with her hat and coat. She at no point indicated that she even entertained the thought that the defendant had taken her pocketbook. The only evidence that the defendant had anything to do with the pocketbook, comes from Welch; and but one construction can be placed upon his testimony, and that is that the pocketbook was found on the ground after they had left the complaining witness. In fact, at another point in the testimony, Welch states that it was after they had gone two or three blocks from where the complaining witness was that they found the pocketbook. It does appear that the complaining witness, in response to a question from the district attorney, who asked her if it was not a fact that she failed to stop to get her purse because she was frightened, replied in the affirmative; but a full reading of her testimony clearly indicates that she made a very careful search for her purse, and that she was not deterred in any way from this search by a feeling of fear.

Section 211 of the Penal Code, defining robbery, reads as follows:

"Robbery is the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear."

A most careful consideration of the testimony on this point discloses the fact that the essential elements of robbery—that is, the taking of the property from the person or his immediate presence—are wholly lacking. Both the defendant and his companion, Welch, were clearly guilty of petty larceny, but not of robbery.

The judgment and order in case No. 23751 are affirmed; and the judgment and order in case No. 23725 are reversed.

We concur: CONREY, P. J.; CURTIS, J.

---

72 Cal. App. 639

WEBSTER et al. v. PARRA. (Civ. 4307.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1925.)

1. **Appeal and error ⇐1011(1)—Judgment, based on findings of fact, supported by evidence, will be affirmed.**

If findings of fact, based on conflicting evidence, are supported by such evidence, judgment will be affirmed.

2. **Brokers ⇐86(1)—Evidence held sufficient to support finding that brokers rendered services to defendant at her special instance and request.**

Evidence *held* sufficient to support finding that plaintiff brokers rendered services to defendant at her special instance and request.

3. **Contracts ⇐15—Mutual consent is necessary to existence of agreement.**

Mutual consent is necessary to existence of agreement.

4. **Brokers ⇐86(1)—Evidence held to show that owner of hotel business understood that plaintiffs, who made appointment with her to bring prospective customer, were brokers.**

Evidence considered, in connection with Civ. Code, § 1589, *held* to show that defendant owner of hotel business understood that plaintiffs, who made appointment with her to bring a prospective customer, were brokers.

5. Brokers ⊂⊃43(2)—Written memorandum of employment to sell personal property not required.

Provision in statute, requiring written memorandum of employment to sell real property, does not apply to sale of personal property.

6. Brokers ⊂⊃69—Law implies payment of reasonable compensation to broker employed to procure purchaser, in absence of agreement as to amount of compensation.

Law implies payment of reasonable compensation to broker employed to procure purchaser, in absence of agreement as to amount of compensation.

7. Brokers ⊂⊃53 — Broker, who is efficient agent or procuring cause, is entitled to commission, though not first one to inform purchaser of owner's desire to sell.

A broker, who is the efficient agent or procuring cause for the sale, is entitled to commission, though not the first one to bring to the attention of the purchaser, the fact that the property sold was for sale, and the price thereof.

8. Brokers ⊂⊃52—Broker procuring sale not required thereafter to render services as condition to right to commission.

Broker, who has brought the minds of the parties together, resulting in a contract of purchase and sale, is not thereafter required to render any particular services as a condition to a right to compensation.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by Charles B. Webster and another, a copartnership doing business under the firm name and style of Webster & Jordan, against Clara Parra. Judgment for plaintiffs, and defendant appeals. Affirmed.

Kaye & Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for appellant.

Walter Osborn, of Bakersfield, for respondents.

HAHN, Justice pro tem. This action was brought to recover $550 for services alleged to have been rendered by the plaintiffs as brokers in the sale of the furniture, fixtures, and good will of a certain hotel. The complaint contains two counts, the first alleging an express contract of employment, and agreement on the part of defendant to pay a fixed sum of $550 for the services. The second count alleges the rendering of the services by the plaintiffs at defendant's request, and that the reasonable value of the services rendered is the sum of $550.

The case, tried by the court without a jury, resulted in findings of fact and judgment thereon in favor of the plaintiffs on the second count.

[1] The appellant bases her appeal on the ground of the insufficiency of the evidence to support the findings and the judgment of the court. In support of this contention, two particular points are urged: First, that "there was no agreement for the employment of plaintiffs as brokers, or to pay them any commissions"; second, that "the plaintiffs did not find the purchaser or render defendant any assistance in making the sale, and there was therefore no consideration for any implied or express promise to pay a commission." The evidence bearing upon these two propositions is in conflict and, under the well-established rule, if there is any evidence sufficient to support the findings, the judgment will be affirmed.

Charles B. Webster, one of the plaintiffs, testified that during the month of March, 1921, he was engaged with one J. H. Jordan as a partner in the real estate and brokerage business in the city of Bakersfield. At that time, the defendant, with whom he had an extended acquaintance, was conducting the Euclid Hotel and was desirous of selling her lease on the hotel, together with the furniture and fixtures therein contained; that on March 16, 1921, one F. W. Nighbert came to his office, representing himself as the adviser of one Mrs. Loeva A. Voll, who was desirous of purchasing a hotel or rooming house, and entered into a discussion with him (Webster) about the Euclid Hotel. Wesbter stated further that, previous to this visit of Mr. Nighbert, he had had some arrangement (what it was does not appear) with the defendant about the hotel. While Nighbert was in his office on the morning of March 16th, Webster called the defendant over the telephone and asked her price for the hotel, which she gave him; that thereupon Webster informed her that he desired to bring some one up to look at the hotel, and the appointment was made for 2 o'clock that afternoon. At the appointed hour, Webster and Nighbert called at the hotel and had a conversation with the defendant concerning its sale and purchase. They went through the hotel, examined the furniture, and generally inquired as to matters having a bearing upon the question of its sale; that upon the completion of the investigation that afternoon, Nighbert stated that he was willing to make a deposit of $500 on account of the purchase of the hotel for Mrs. Voll, the price agreed upon being $11,000. He then drew a receipt for the deposit, which was signed by the defendant. But before the deposit was made, the defendant asked Mr. Nighbert if he was in any sense an agent in the transaction, and stated to him that she wanted it understood that she did not wish to pay two or three commissions; that Mr. Webster was her agent. Whereupon Mr. Nighbert assured the defendant that he was not acting in the capacity of an agent, but merely assisting Mrs. Voll in financing the purchase of the place, and that he had no claim for a commission. Where-

upon Nighbert gave his check for $500 and received the receipt from the defendant, setting forth the purchase price and the purpose of the deposit; that subsequently, after the deal was closed, Webster called the defendant over the telephone and asked about payment of the commission; that the defendant replied that she would be down to his office in a day or two and settle with him. A few days later, the defendant not having settled with Webster, he met her at the Euclid Hotel and again spoke to her about payment of the commission; that the defendant again stated that she would be down to see him in a day or two. A third time, upon Webster meeting the defendant, he raised the question of the payment to him of his commission, and she replied, as she had previously, that she would see him in a day or two. Finally, apparently with some impatience, Webster called the defendant over the telephone and asked her if she did not intend to pay the commission; whereupon she stated that she thought $550, which was 5 per cent. of the purchase price, was too much; that she thought $500 was sufficient. In reply, Webster stated that he would not have a controversy over $50, and that he would be willing to accept $500 in settlement of his claim for commission. However, the defendant never sent her check; nor did she make any payment to plaintiff on account of his claim.

Mr. F. W. Nighbert, a witness on behalf of the plaintiffs, testified that he, as a friend and adviser of Loeva A. Voll, called at the office of Webster & Jordan on the morning of March 16th and discussed with Mr. Webster the matter of the purchase by Mrs. Voll of the Euclid Hotel; that he (Nighbert), prior to the morning of March 16th, had been informed that the hotel in question might be purchased, and in order to acquire further information he had called on the defendant at the Euclid Hotel and made some inquiries of her; that on that occasion the defendant had stated that her price was $12,000, and, after looking over the hotel he (Nighbert) stated that he left and did nothing further about buying the hotel at that time. At the time he was in the office of the plaintiffs on the morning of March 16th, Webster called the defendant and talked with her over the telephone about a sale of the hotel, and stated that he would like to bring some one, at an appointed time, to look over the hotel with a view to its purchase. The hour was fixed at 2 o'clock that afternoon, and he, together with Webster, went to the hotel. After some continued conversation with the defendant and a more detailed examination into the hotel and the furnishings, he (Nighbert) stated that he was willing to make a deposit on behalf of Mrs. Voll for the purchase of the hotel and furnishings at $11,000, which was the price agreed upon. In accordance with this proposal, he gave a check to the defendant and received a receipt therefor; that subsequently, on behalf of Mrs. Voll, he paid the balance of the purchase price and the transaction was completed.

Loeva A. Voll, a witness on behalf of the plaintiffs, testified that Mr. Nighbert had made some inquiry for her concerning the purchase of the hotel several days previous to March 16th, when the deposit was made; that he advised her prior to that date that he had seen the defendant, and that she would not talk of any price less than $12,000. Later and prior to March 16th, she had seen Mr. Jordan, one of the plaintiffs, who told her that he thought the hotel could be purchased for $11,000; that on the morning of either March 15th or March 16th—it is not clear from the transcript—plaintiffs, Webster & Jordan, called upon Mrs. Voll at her home, and there discussed the matter of her purchase of the hotel; that subsequent to the making of the deposit in her behalf by Mr. Nighbert she, with plaintiffs, Webster & Jordan, went to the Euclid Hotel and made an inventory of all the furniture and furnishings; that on this occasion she met and talked with the defendant at the hotel; that subsequent to the completion of the transaction she testified that she talked with the defendant with regard to the payment of a commission to the plaintiffs, and that in that conversation she (the defendant) stated that she owed plaintiffs the money for the commission. The witness, Mrs. Voll, stated that she definitely asked the defendant, if she was paying the plaintiffs a commission, and that she stated that she "supposed she was"; and when she (the witness) stated that Mr. Webster had evidently been up to the hotel looking for her (the defendant), the defendant replied:

"I suppose he will hound me to death until he gets the money."

The defendant was the sole witness on her own behalf, and denies that she made any agreement with the plaintiffs or either of them requesting them or employing them to act as brokers for her in the sale of the hotel. She testified that Mr. Nighbert called on her one morning and made some inquiry concerning the hotel. She states that she told Mr. Nighbert the hotel was for sale for $11,000. She seemed to think that Mrs. Voll accompanied Mr. Nighbert on the occasion of this visit. The defendant, giving her conversation with Mr. Nighbert on the morning of March 16th, testified:

"I didn't figure I wanted to sell, had decided not to sell. I think he said for whom he was inquiring. The morning of the 16th he was there. But I am sure Mrs. Voll was there, but she is just as sure she was not; I don't know. I told him I would sell for $11,000, but I had already told Mr. Webster to bring his party at 2 o'clock, so that after 2 o'clock

I would see them, if Webster's party didn't take it. Just before that, he (presumably Webster) told me, he called me, said he would bring a party at 2 o'clock. That is all he said, asked if it was for sale, said he would bring a party at 2 o'clock. I told him the price was $11,000. Nothing was said about commission. Nothing was said about his being an agent. I didn't know he was an agent."

The defendant, testifying further, stated that when Webster came to keep his appointment and brought Mr. Nighbert with him, she stated that Mr. Nighbert had been to see her before, and that she expected Webster to bring some one else. Thereupon Mr. Webster and Mr. Nighbert asked if they could look through the hotel, and the defendant accompanied them, taking them and showing them various rooms and the furniture. The defendant admitted having one conversation over the telephone with plaintiff Webster concerning a commission; but denied the other three conversations testified to by Webster. On the occasion that she talked with him over the telephone, she stated that she refused to pay him a commission, alleging that she did not think she owed him anything, and that he had not earned a commission. She also denied the conversation testified to by Mrs. Voll in which she (the defendant) was alleged to have made the statement that she owed Webster a commission.

[2] Considering appellant's first proposition, the query arises: Is there sufficient evidence to support the court's finding that the "plaintiffs rendered services to the defendant at defendant's special instance and request"? There is evidence that, first, plaintiffs were licensed brokers; second, that they talked with the defendant concerning the matter of the sale of her hotel, and secured her price therefor, and informed her that they had a prospective purchaser for the same, and made an appointment with her, at which time they brought to her hotel a prospective purchaser, who subsequently did purchase upon terms satisfactory to the defendant; third, that she stated to the purchaser and to her adviser that plaintiff Webster was her agent, and that she expected to pay him a commission; and, fourth, that subsequent to the consummation of the deal she made statements that she would pay the plaintiffs a commission for their services in the transaction. Manifestly there is sufficient evidence to support the finding of the court that the plaintiffs rendered services to the defendant at her special instance and request.

[3] A mutual consent is necessary to the existence of an agreement. When the plaintiff Webster talked with the defendant over the telephone concerning the sale of her hotel, and gave the price for which she was willing to sell, and made an engagement with him to go over the property with the prospective purchaser, the only reasonable deduction to be made is that the defendant was desirous of having the plaintiff secure for her a purchaser for her property, and her conduct was in effect a proposal that he find a customer for her. In turn, Webster accepted her proposal to find a customer for the hotel at the price of $11,000, and pursuant to an appointment made therefor, he brought the prospective customer to the defendant, and the sale was immediately consummated, and the defendant received the benefits of the purchase by the customer brought by the plaintiff.

[4] While appellant admits the circumstances of the conversation with the plaintiff on the morning of March 16th relative to the sale and her price and the appointment for the afternoon, she contends that she did not know that plaintiffs were brokers. A careful examination of the defendant's testimony could not possibly justify a construction or inference that the defendant believed, in her conversation or negotiations with the plaintiffs, that she was dealing with them as customers. It appears clearly from her testimony that she understood the inquiry made by the plaintiffs and their efforts were in behalf of a prospective customer, and that she understood the appointment with her for the afternoon was for the purpose of meeting a prospective customer. At no point in her testimony does it appear that she considered that Mr. Webster was making inquiries with a view to purchasing the hotel himself.

[5] Furthermore, it appears from the testimony that before the deposit was accepted by the defendant on behalf of Mrs. Voll, she made inquiry to ascertain whether or not Mr. Nighbert, who was making the deposit for Mrs. Voll, considered himself an agent in the transaction and by reason thereof would make a claim for a commission. When Mr. Nighbert replied that he was not acting as an agent, but simply as a friend of the purchaser, the defendant replied that Mr. Webster was her agent, and that she did not wish to find herself in a position where she would be obligated to pay more than one commission.

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Civ. Code, § 1589.

It is a well-known custom in the matter of listing properties for sale with brokers that owners simply inform the brokers that they wish to sell and the price for which they will sell. It is true, in the matter of a sale of real property a written memorandum of employment is necessary under our statute, but this provision does not apply to a sale of personal property. Where the listing is made, whatever may be the method, and subsequently the broker brings to the owner one

who purchases on terms satisfactory to the owner, the only reasonable inference to be drawn from such facts is that there was an employment by the owner of the broker to procure a purchaser for his property.

[6] And, of course, where such an employment appears, even though there be no agreement as to the amount of the compensation, the law implies that a reasonable compensation will be paid. This principle is so fundamental and well established that no authorities need be cited in support of it. It is not urged by the appellant that the amount of the judgment is an unreasonable amount of compensation for the services

We have examined the authorities cited by the appellant in her brief in support of her contention, but none of these authorities hold contrary to the views here expressed; in fact, most of them deal with the question of a written agreement or memoranda involved in the sale of real estate.

[7] Appellant further contends that the plaintiffs did not find a purchaser, nor did they render the defendant any assistance in making the sale. It does appear from the evidence that Mr. Nighbert, having had information from other sources that the hotel in question was for sale, called at the hotel on the Monday previous to March 16th and at that time interviewed the defendant relative to a sale of the hotel. It appears also from the testimony of Mr. Nighbert that the price the defendant quoted to him was $12,000, and that after a short interview he left and did nothing further about it. It seems that subsequently he, as well as Mrs. Voll, learned from Mr. Jordan, one of the plaintiffs, that the property could be purchased for $11,000, and on the morning of March 16th Mr. Nighbert went to the office of the plaintiffs for the purpose of taking up with them the matter of securing the property for $11,000, or, perchance, for a less sum. The well-established rule is that a broker, before he is entitled to compensation for his services, must show that he produced a purchaser who was ready and willing to make the purchase on terms satisfactory to the owner, and that he was the efficient agent or procuring cause of the sale. Zeimer v. Antisell, 75 Cal. 512, 17 P. 642. Under this well-established rule, it is unnecessary for the broker to prove that he was the first one to bring to the attention of the purchaser the fact that the property in question was for sale and the price thereof. What is required is that he shall be the efficient agent or procuring cause for the sale. In other words, it must appear that his efforts had to do with the meeting of the minds of the seller and buyer. The evidence of this case clearly brings the plaintiffs within that rule; for it appears that plaintiffs went to the home of Mrs. Voll, and also had interviews with Mr. Nighbert, her adviser, for the purpose of inducing Mrs. Voll to purchase and Mr. Nighbert to advise her to purchase; that they made the appointment for the purchaser and accompanied him to the hotel and continued with him until Mr. Nighbert agreed to buy and made a deposit.

[8] Appellant urges in support of her contention that the plaintiffs did not render her any service in closing the deal after the deposit was made; that the deal was finally consummated, as far as payment of the balance of the purchase price is concerned, without the presence of the plaintiffs; this being accomplished at a bank. We do not understand that the law requires the broker to render any particular service after he has brought the minds of the parties together, and the contract has been entered into for the purchase and sale.

From the foregoing, it appearing that there is sufficient evidence to support the findings and judgment of the court, the judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

72 Cal. App. 550

CAWSTON OSTRICH FARM v. SALOMON et al. (Civ. 4160.)

(District Court of Appeal, Second District, Division 1, California. May 8, 1925. Hearing Denied by Supreme Court July 6, 1925.)

1. Subrogation ⟹31(3)—Lessee by payment of its assignee's obligation held entitled to sum deposited with lessor.

Where, on assignment of lease by lessee, it guaranteed payment of rent reserved when due, and faithful performance of lease by its assignee, and, where existing judgment against lessee represented total amount of liability, secured to lessor by sum deposited with him, and payment of judgment by lessee would be payment by it as guarantor or surety on behalf of its assignee, in view of Civ. Code, §§ 2831, 2849, lessee by making such payment was entitled to be subrogated to and have benefit of deposit which lessor may have obtained from assignee.

2. Judgment ⟹735—Right of subrogation not res judicata.

Where, in action by lessor against lessee to recover sums alleged to be due under lease, lessee's right of subrogation to sum deposited with lessor was not involved, and existence of right was not submitted, nor were circumstances such that failure to demand its enforcement in that action created an estoppel against lessee, judgment in former action was not res judicata as to lessee's right to subrogation.

Appeal from Superior Court, Los Angeles County; Chas. S. Crail, Judge.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Action by the Cawston Ostrich Farm, a corporation, against Walter J. Salomon, sometimes known as Walter J. Salman, and another. Judgment for plaintiff, and defendants appeal. Affirmed.

B. P. Woodard, of Glendale, and Grant Jackson, of Los Angeles, for appellants.

Donald Barker, of Los Angeles, for respondent.

CONREY, P. J. This action is described by the plaintiff as a suit in equity to enforce a right of subrogation in favor of the plaintiff as equitable owner of a $1,500 fund.

On the 31st day of May, 1912, Salomon executed to the plaintiff, Cawston Ostrich Farm, a California corporation, a five-year lease of a storeroom in the city of New York. At that time the plaintiff deposited with the defendant $1,500 in accordance with a paragraph of the lease which read as follows:

"Twentieth. And the said tenant hereby deposits with the said landlord the sum of fifteen hundred dollars as part security for the faithful performance of all the conditions and covenants of the said lease, which security is to remain in the possession of the said landlord until the expiration of the within lease, and then returned to the said tenant if all the considerations and covenants of the within lease have been complied with, but this deposit shall not be considered in any sense as liquidated damages."

Under date January 6, 1914, a written agreement was entered into between Salomon, party of the first part, Cawston Ostrich Farm, party of the second part, and Cawston Ostrich Farm Corporation, a New York corporation, party of the third part. In that agreement the party of the second part assigned the lease to the party of the third part, and Salomon consented thereto. This agreement referred to said $1,500 fund as follows:

"V. The party of the second part hereby transfers and assigns to the party of the third part the sum of fifteen hundred dollars, now deposited with the party of the first part as security under the terms and conditions of clause number twenty of the said lease and hereby authorizes and directs the party of the first part to pay same to the party of the third part whenever the same may be due under the terms of this lease."

In said agreement of January 6, 1914, it was also provided:

"The party of the second part hereby guarantees to the party of the first part the prompt payment of the rent reserved in said lease when due by the party of the third part, as well as the prompt and full and faithful performance of all the terms and conditions contained in said lease by the party of the third part."

In September, 1914, Cawston Ostrich Farm Corporation, with the written consent of Salomon, assigned said lease to one Frances Cohen, and also assigned to her said sum of $1,500 deposited with Salomon as security under the terms and conditions of said clause No. 20 of the lease, and at the same time authorized and directed Salomon to pay the same to Cohen "whenever the same may be due under the terms of the said lease." Cawston Ostrich Farm had no knowledge of said assignment to Cohen, and did not consent thereto. Cohen entered into possession of the leased premises, and remained in possession for about two months, when she was dispossessed under a judicial proceeding for nonpayment of the rent for October, 1914. Thereupon Salomon went into possession and made certain alterations in the store premises. Thereafter Salomon leased the premises (from and after November, 1914), and received certain sums as rental therefor.

In April, 1915, Salomon brought an action (No.B.–24138) against Cawston Ostrich Farm in the superior court of Los Angeles county, to recover various sums alleged to be due from said Cawston Ostrich Farm to Salomon, by reason of nonpayment of certain taxes and nonpayment of the rent of October, 1914, and by reason of the fact that the rents received by him from November, 1914, to March, 1915, were less than the amount due to him under the lease contract. This action resulted in a judgment entered January 8, 1917, in favor of Salomon and against Cawston Ostrich Farm in the sum of $2,197.68 and costs.

On October 21, 1920, the plaintiff made tender to Salomon of the sum of $849.55 on account of said judgment, and demanded that he apply said sum of $1,500 and interest thereon at the rate of 4 per cent. per annum from the date of the deposit, toward the satisfaction of the judgment. The court, in the case at bar, found in favor of Salomon on the issue relating to his alleged obligation to pay interest on said deposit, and determined the amount which plaintiff shall pay, which sum, together with said sum of $1,500, will satisfy the said judgment.

According to the findings in the present action (and there are no assignments of error as to the findings), the judgment recovered by Salomon against Cawston Ostrich Farm (plaintiff and respondent in the present action) represented all of the indebtedness or liability due or payable from this plaintiff to Salomon under said lease, or otherwise, either at the date of the judgment or thereafter. Said fund of $1,500 has remained in possession of Salomon at all times from and after the time of its deposit when the lease was executed. The plaintiff herein alleged, and the court found, that said sum is so held by Salomon, "subject only to the right of said Salomon to apply said moneys and the accrued interest thereon toward the indebtedness of said Frances A. H. Cohen to said Salomon for rental and taxes arising out of the assumption by her of the obligations of the lessee under said lease from and after the date of

the assignment thereof to her as aforesaid and subject to the right of this plaintiff to be subrogated in the place of said Frances A. H. Cohen and to her rights with reference to said fund of $1,500 and interest, then and there held by said Salomon as security for the obligations of the lessee under said lease as aforesaid."

The defendant Salomon alleged, and the court found herein, that it is the law of the state of New York that, while the execution of a final warrant of dispossess, such as that obtained by Salomon in New York against the tenant Cohen, terminated the relation of landlord and tenant between Salomon and Cohen, it did not terminate the obligation imposed by that paragraph of the lease wherein the lessee agreed to pay the damages sustained by Salomon, to wit, the difference between the rent reserved in the said lease and the amount of rent received by the defendant Walter J. Salomon on a reletting of the said premises, and that such obligation and covenant survived the severance of the said relation of landlord and tenant between the defendant Walter J. Salomon and the said Frances A. H. Cohen, as aforesaid. But the court further found as follows:

"The defendant Walter J. Salomon did not, in reletting the said premises in pursuance of paragraph 28 of the said lease attached as Exhibit A to the complaint herein, or by reason of any breach of obligations of the lessee under said lease, sustain any damages except those included in the judgment in the former action of Walter J. Salomon, plaintiff, v. Cawston Ostrich Farm, defendant, numbered B–24138, records and files superior court, Los Angeles county."

In action No. B–24138 said damages were determined as follows: The court found that in said action of Salomon against Cohen, which was a summary proceeding in the municipal court of the city of New York, judgment was entered against Cohen for the sum of $1,455, being the rent for the month commencing October 1, 1914, and costs; and that said judgment was wholly unpaid except the sum of $304.78, which Salomon received on account from the trustee in bankruptcy of Cohen. The court in said action B–24138 determined that by the institution of the said summary proceedings, and the recovery of judgment therein, and the subsequent acts of the plaintiff (referring to the changes made by Salomon in the leased premises and his reletting of the premises to other tenants), the lease to which this action relates was terminated. Thereupon the court gave judgment in favor of Salomon and against Cawston Ostrich Farm in said sum of $2,197.68, which was a sum equal to the unpaid balance of the New York judgment, plus a certain amount covering taxes paid by Salomon (to repayment of which he was entitled by an agreement in the lease), together with certain stated interest and costs. In its conclusions of law the court stated "that he is not entitled to recover any other sum or sums."

From the judgment in said action B–24138, Salomon appealed. On that appeal the judgment was affirmed. 43 Cal. App. 465, 185 P. 314. The contention of Salomon on that appeal was that the judgment should have been for a larger sum, and should have included the difference between the rental specified in the lease and that received, between November 1, 1914, and April 1, 1915, on the reletting of the premises.

At the trial of the present action it was stipulated:

"That by reason of alleged severance of the relation of landlord and tenant between the defendant Walter J. Salomon and the said Frances A. H. Cohen, as averred in the answer herein, and by reason of alleged reletting of the said premises thereafter, the defendant Walter J. Salomon claims damages amounting to $14,012.28, for which amount the defendant Walter J. Salomon on or about the 18th day of October, 1920, brought an action against the said Cawston Ostrich Farm Corporation, the assignor of the said Frances A. H. Cohen and the assignee of the plaintiff herein, in the supreme court of the state of New York, which action is now pending and undetermined."

It was further stipulated that said deposit of $1,500 is held by Salomon under claim of right to hold it to await the result of his said action against Cawston Ostrich Farm Corporation in New York. The first question to be determined on this appeal relates to this asserted right. In giving consideration to this question it is first necessary to define the nature of the obligation on which the judgment of Salomon against Cawston Ostrich Farm is founded. Originally, when the lease was executed, this obligation was that of a principal promisor. But immediately upon execution of the assignment to the Cawston Ostrich Farm Corporation, by the agreement contained therein, to which Salomon was also a party, the obligation of Cawston Ostrich Farm became that of "a surety or guarantor." This is so by the very terms of that contract which we have quoted; and this construction of the contract has been finally affirmed as between the parties to this action by the findings and judgment in said action B–24138. For in that action the court found that the allegations of paragraph X of the answer to the amended complaint were true. In that paragraph it was alleged that the agreement containing said guaranty had been executed, and that "thereafter defendant occupied the position only of a surety or guarantor according to the provisions of said written agreement, and that the liability of the defendant was thereafter limited as in and by the terms and provisions of said written agreement set forth."

Based upon the new relation thus established between Salomon and Cawston Ostrich Farm, it was held in said action B–24138,

Salomon v. Cawston Ostrich Farm, that Salomon was not entitled to recover against said defendant the difference between the rental specified in the lease and that received between November 1, 1914, and April 1, 1915, from the new tenants to whom he leased the premises after Mrs. Cohen had been ejected. This was the very point involved in the appeal (Salomon v. Cawston Ostrich Farm, 43 Cal. App. 465, 185 P. 314), wherein it was decided that appellant Salomon was not entitled to recover said alleged amount of lost rentals. This decision was based upon the finding of the court below summarized by the Court of Appeal as follows:

"After taking possession, he made no effort to rent the premises as a whole, but removed the entire front, and by the removal of the two pilasters increased the glass area four or five feet in width. He also divided the store in two by a longitudinal partition two inches thick and put two doors in the front instead of one, thus changing the demised store into two new stores, each somewhat less than eight and a half feet wide. None of the changes were made because of needed repairs or for the preservation of the premises. * * * Upon conflicting evidence, the trial court found that certain affirmative allegations of the answer were true. Among these were that by the alterations the premises were so changed that they were not adapted to the use of one tenant; that the premises were more valuable for rental purposes and more readily rentable as one store than as two, and that, if the alterations had not been made, the plaintiff could have obtained in the reletting an amount of rental equivalent to the rental payable under the lease. There was sufficient evidence to sustain these findings. Upon them the trial court concluded that by the summary proceedings and the subsequent acts of the plaintiff the lease was terminated, and that the plaintiff was entitled to recover the net amount of rents, with surcharges unpaid for the month of October, 1914, in which the plaintiff resumed possession. The implication necessarily follows that the plaintiff was not entitled to the difference between the rents collected and those reserved in the lease after the lease was terminated. The only real question presented on this appeal is whether or not, despite the evidence and the findings, the conclusion of law upon this subject was correct."

It was held that in New York, as well as in California, the obligations of the guarantor are strictly construed; and that, because the described changes in the premises were made by Salomon without the knowledge or consent of the guarantor, the latter was released.

Appellant Salomon contends herein that the decision of the California courts in his said former action is not res adjudicata as to his claims against either the Cawston Ostrich Farm Corporation, a New York corporation, or Frances A. H. Cohen of New York city. It must be conceded that the California judgment could not be used by said New York parties as a bar to Salomon's claims against them in the New York court. The two actions are not between the same parties. But it is equally true that Cawston Ostrich Farm would not be bound by a judgment establishing Salomon's demands against those parties in the New York court. As between Salomon and Cawston Ostrich Farm the issues concerning said liability must be directly determined in an action between the parties now before this court. This is precisely the thing that has been done in said action of Salomon against Cawston Ostrich Farm.

Appellant next makes the following contention: That, because the Cawston Ostrich Farm specifically directed Salomon to pay said deposit to the New York corporation when all of the terms and conditions of paragraph 20th of the lease had been fully complied with, and because the New York corporation made a like specific direction and authorization to Salomon to pay said deposit to Cohen, and because Cawston Ostrich Farm assigned to Cawston Ostrich Farm Corporation, together with said lease, the said deposit of $1,500, said Cawston Ostrich Farm has no further interest in said deposit, and the said deposit now belongs to said Cohen as sole owner thereof, but subject to the terms and conditions of said paragraph 20th of the lease.

[1] It is not disputed that the assignment was made, and directions given, exactly as appellant states them. Nevertheless, we are of the opinion that these facts do not affect in any way the rights of respondent Cawston Ostrich Farm asserted in this action. So far as the rights of the Cawston Ostrich Farm as guarantor are concerned, it is now settled that the existing judgment against it represents the total amount of liability secured to Salomon by the sum deposited with him. Payment of this judgment by the Cawston Ostrich Farm will in reality be a payment by the guarantor or surety on behalf of its principal. On the facts of this case Cawston Ostrich Farm is a surety for the principal obligor, and it is of no consequence that the word "guarantees" was used in making the promise. Upon making such payment, the surety "is entitled to be subrogated to and to have the benefit of all securities which may at any time have been put into the creditor's hands by the principal debtor, or which the creditor may have obtained from the principal debtor." Pomeroy's Equity Jurisprudence (4th Ed.) § 1419.

"A surety is entitled to the benefit of every security for the performance of the principal obligation held by the creditor, or by a cosurety at the time of entering into the contract of suretyship, or acquired by him afterwards, whether the surety was aware of the security or not." Civ. Code, § 2849.

"A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the per-

formance by the latter of some act in favor of a third person, or hypothecates property as security therefor." Civ. Code, § 2831.

[2] Finally appellant contends that the judgment in Salomon v. Cawston Ostrich Farm is res adjudicata as to the right of the plaintiff to apply said sum of $1,500 towards the satisfaction of that judgment; in other words, that, because that right was not affirmed in that action, therefore it cannot be asserted in this action. But, on the contrary, we think that respondent's right of subrogation was not involved in the decision of the former action. As is pointed out by respondent, the indebtedness for which Cawston Ostrich Farm was held liable in that action was an unliquidated amount, and until the rendition of that judgment the defendant therein could not know the amount, payment of which would entitle it to assert its right of subrogation. The existence of that right was not submitted for decision in said former action, nor were the circumstances such that failure to demand its enforcement at that time created an estoppel against the plaintiff in the present action.

The judgment is affirmed.

I concur: CURTIS, J.

---

72 Cal. App. 626

PEOPLE v. GONZALES. (Cr. 1171.)

(District Court of Appeal, Second District, Division 1, California. May 12, 1925. Rehearing Denied June 5, 1925. Hearing Denied by Supreme Court July 7, 1925.)

1. Criminal law ⟹1159(2)—Verdict, supported by sufficient testimony, if accepted as true, not disturbed on appeal.

Jury's conclusion from testimony sufficient to justify verdict, if accepted as true, cannot be disturbed on appeal.

2. Criminal law ⟹409—Defendant's rights held not violated by admission of testimony as to admissions by him.

Where witness, testifying to admissions by defendant, stated that no threat, force, or violence was used, nor any hope of immunity or promise of reward held out, but that statement was free and voluntary, and defendant's counsel examined witness fully on voir dire, defendant's rights were not violated.

3. Criminal law ⟹409—No foundation necessary for admission of statements not amounting to confession.

No foundation need be laid for admission in evidence of statements by defendant not amounting to a confession.

4. Indictment and information ⟹196(7)—Objection that information charged more than one offense waived by failure to demur.

Under Pen. Code, §§ 1004, 1012, defendant, interposing no demurrer to information as charging more than one offense, waives objection.

5. Weapons ⟹4—Criminal intent need not be shown to warrant conviction of convicted felon for possessing firearm.

When act is made indictable in general terms, as by St. 1923, p. 695, making possession of firearm by one convicted of felony a crime, criminal intent need not be shown, unless purpose to require it can be discovered from language or effects of law.

6. Weapons ⟹17(5)—Whether convicted felon knowingly possessed firearm fact question for jury.

Whether convicted felon knowingly possessed firearm, in violation of St. 1923, p. 695, is question of fact for jury.

7. Weapons ⟹4—Concealment on person not necessary to conviction of felon for possessing firearm.

To warrant conviction of convicted felon for carrying firearm in violation of St. 1923, p. 695, weapon need not have been concealed on his person; mere possession or control and custody thereof being sufficient.

8. Criminal law ⟹1137(3)—Defendant cannot complain of omission of matter eliminated from instruction at his request.

In prosecution of convicted felon for possessing firearm, in violation of St. 1923, p. 695, defendant could not complain of failure to instruct that, if possession was unknown to him, he would not be guilty, in view of instruction, given at his request, expressly excepting count containing firearm charge from rule as to necessity of guilty knowledge.

9. Criminal law ⟹1137(3)—Defendant cannot complain of giving of part of instruction offered in his own behalf.

Defendant cannot complain of giving of part of instruction offered in his own behalf.

10. Criminal law ⟹829(1)—Refusal of instruction, covered by instructions given, not error.

Refusal of instruction, fully covered by instructions given, is not error.

11. Criminal law ⟹1137(2)—Party cannot complain of error he helped bring about.

Party cannot complain of error he was instrumental in bringing about.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Louis Gonzales was convicted of second degree burglary and violation of the firearms act, and he appeals. Affirmed.

John S. Cooper and Caesar A. Roberts, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

HOUSER, J. On each of two counts of an information defendant was convicted of the crime of burglary of the second degree, and

on the fourth count of the same information defendant was found guilty of a violation of the so-called firearms act (Stats. 1923, p. 695; Deering's Gen. Laws [1923 Ed.] Act 1970). He appeals from the judgment and from the order denying his motion for a new trial.

[1] The first point made by appellant for reversal of the judgment is that the evidence was insufficient to support the verdict. The argument, however, deals with the credibility which appellant claims should have attached to the testimony of the several witnesses. Appellant's counsel does not suggest that such testimony, if accepted as true by the jury, was not sufficient to justify the verdict. In such circumstances, the authorities are uniformly to the effect that the conclusion reached by the jury cannot be disturbed on appeal.

[2, 3] On the trial of the action, evidence of certain admissions by defendant was presented to the jury, and it is contended by appellant that the proper foundation therefor was not laid prior to the introduction thereof. The record, however, shows that the witness, testifying to such admissions by defendant, stated that no threat or force or violence had been used against defendant, nor was any hope of immunity or promise of reward held out to him to induce him to make any statement, but, on the contrary, that such statement by defendant was free and voluntary on his part, and that thereupon counsel for defendant examined the witness fully on voir dire as to each of such conclusions. Thereafter, without objection by defendant, his several admissions were introduced in evidence. In such circumstances, it is clear that none of defendant's rights in the premises was violated. In addition thereto, the law is well settled that no necessity exists for laying such foundation for the admission in evidence of statements made by defendant not amounting to a confession. People v. Ford, 25 Cal. App. 388, 418, 143 P. 1075.

[4] Appellant charges error in that two or more offenses not connected in their commission were contained within the information against defendant. By section 1004, Penal Code, a defendant is given the right to demur to the information on the ground (3) "that more than one offense is charged, except," etc. In view of the fact that no demurrer was interposed by defendant, it is clear that he waived the objection. Section 1012, Penal Code; People v. Connor, 17 Cal. 354; People v. Shotwell, 27 Cal. 394; People v. Garnett, 29 Cal. 622; People v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389.

[5] Appellant also suggests as a reason why the judgment should be reversed and the motion for a new trial granted to defendant, that the statute heretofore referred to as the "firearms act" is unconstitutional in that it makes criminal the mere possession of a firearm by certain designated persons without requiring that such possession be accompanied by criminal knowledge and intent. No reference is made by counsel representing appellant to any article or section of the Constitution of which he claims the act in question is violative, nor, so far as can be determined from the argument and the authorities submitted on the point, is the constitutionality of the statute involved. With reference to the necessity of showing criminal intent on the part of the person charged with the offense of unlawfully having a firearm in his possession, the authorities appear to be in accord to the effect that:

"When an act, in general terms, is made indictable, a criminal intent need not be shown, unless from the language or effects of the law a purpose to require the existence of such intent can be discovered."

See People v. O'Brien, 96 Cal. 171, 31 P. 45, where the subject is treated at length and the adjudicated cases bearing thereon are reviewed, including State v. McBrayer, 98 N. C. 623, 2 S. E. 755, which is quoted as follows:

"It is a mistaken notion that positive, willful intent to violate the criminal law is an essential ingredient in every criminal offense, and that, where there is an absence of such intent, there is no offense. This is especially so as to statutory offenses. When the statute plainly forbids an act to be done, and it is done by some person, the law implies conclusively the guilty intent, although the offender was honestly mistaken as to the meaning of the law he violates. When the language is plain and positive, and the offense is not made to depend upon the positive, willful intent and purpose, nothing is left to interpretation."

See, also, People v. Hartman, 130 Cal. 487, 62 P. 823; Matter of Application of Ahart, 172 Cal. 764, 159 P. 160; People v. Tomalty, 14 Cal. App. 230, 111 P. 513; People v. Phillips, 27 Cal. App. 412, 150 P. 75; People v. Iden, 24 Cal. App. 627, 142 P. 117.

In the case of People v. Worfrom, 15 Cal. App. 732, 115 P. 1088, it is said:

"When the intent is not made an affirmative element of the crime, the law imputes that the act knowingly done was with criminal intent, and it need not be alleged nor proven."

[6] A perusal of the statute which is the subject of appellant's attack shows that the mere possession of a firearm by any person described in the act is sufficient to constitute a criminal offense. The language of the statute is that:

"* * * No person who has been convicted of a felony against the person or property of another or," etc., "shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person."

By the statute, intent on the part of a defendant accused of the commission of the offense is not made an essential to the completion of the criminal act; and whether or not the act was committed knowingly would

necessarily be a question of fact for determination by the jury.

[7, 8] In this connection, defendant also assigns as error the giving of the following instruction, at the request of the people:

"You are further instructed that, under the offense charged in said count 4, it is not necessary that the weapon should have been carried concealed upon the person of the defendant; the mere having in his possession, or under his control and custody, of such weapon being sufficient."

While the instruction correctly states a principle of law applicable to the case, it is possible that it might have contained an additional statement to the effect that, if the possession of the firearm by the defendant was unknown to him, he would not be guilty of a violation of the statute. But by an examination of the instruction given to the jury at the request of defendant, we find that the very matter, in substance, which he now suggests should have been given to the jury was eliminated from the instruction at his own request. The instruction to which we refer is as follows:

"You are instructed that in every crime or public offense there must exist a union or joint operation of act and intent, and the criminal intent is the essential element. A person may aid in the commission of an offense by doing innocently some act essential to its accomplishment, and you are instructed that merely aiding or assisting in the commission of the offense charged in this information, without guilty knowledge or criminal intent on the part of the defendant, is not criminal and would not justify you in finding him guilty. This instruction implies only to the first three counts of the information."

The "firearm" charge against defendant was contained in the fourth count of the information, and was therefore, at defendant's suggestion, expressly excepted from the operation of the rule as announced in the instruction just quoted. In the circumstances, defendant has no just cause for complaint.

[9, 10] As a final complaint by appellant, he asserts that the trial court erred in giving a certain instruction to the jury. It is as follows:

"The court instructs the jury that the credibility of the witnesses is a question exclusively for the jury; and the law is that, where a number of witnesses testify directly opposite to each other, the jury are not bound to regard the weight of the evidence as evenly balanced."

[11] The instruction was a part of one offered by defendant in his own behalf. The remainder of the instruction which was refused by the court was fully covered by other instructions which the court gave to the jury. If the instruction states an incorrect principle of law applicable to a criminal case, it constitutes an error of which defendant is in no position to complain. The rule affecting such a situation is correctly announced in the case of People v. Goulding, 60 Cal. App. 542, 213 P. 277, where it is said:

"It is a sound principle, as well as a most salutary one, that a party cannot be heard to complain of an error which he himself has been instrumental in bringing about. Missouri Pac. R. Co. v. Fox, 60 Neb. 531, 83 N. W. 744."

We find no error in the record prejudicial to defendant's substantial rights.

The judgment and the order denying defendant's motion for a new trial are affirmed.

We concur:

CONREY, P. J.; CURTIS, J.

---

72 Cal. App. 513

ANSO v. ANSO. (Civ. 2895.)

(District Court of Appeal, Third District, California. May 6, 1925.)

1. Evidence ⊂=594—Uncontradicted testimony not disregarded.

Generally uncontradicted testimony of witness to a particular fact may not be disregarded, but should be accepted as proof.

2. Evidence ⊂=594—Uncontradicted testimony not disregarded unless improbable.

Rule that uncontradicted testimony cannot be arbitrarily rejected is subject to fact that it is not inherently improbable.

3. Evidence ⊂=594—Testimony held not inherently improbable.

In husband's action for divorce for wife's alleged cruelty, nothing in record indicated that his testimony and that of his witnesses was inherently improbable, or that surrounding circumstances were such as to render testimony incredible or unworthy of belief.

4. Divorce ⊂=27(18) — Husband's testimony when taken with other facts, held sufficient to constitute cruelty.

Wife received endearing letter from another man stating, "You ask me, dear, to write and tell you that I love you," and "with all my love and lots of kisses that I wish were real." When confronted with letter she said, "What of it?" *Held*, this taken with other testimony, was sufficient to constitute cruelty within Civ. Code, § 94.

Appeal from Superior Court, Fresno County; S. L. Strother, Judge.

Action of divorce by Leo Felice Anso against Lillian Holda Anso. Judgment for defendant, and plaintiff appeals. Reversed.

H. L. Meyers, of Fresno, for appellant.

PLUMMER, J. Action by plaintiff for divorce. The decree of divorce was denied, and the plaintiff appeals. It appears from the transcript that the cause of action set

forth in the plaintiff's complaint is that of cruelty. The complaint, after setting forth the necessary jurisdictional facts, alleges that the defendant on numerous occasions told the plaintiff that she was sorry she had married him; that she wanted to get a divorce; that there would be no more married life for her; that she wanted to be free so that she could do and have whatever she wanted; that the defendant also refused to do any household work whatever, refused to cook any meals for the plaintiff, and stated that she would not wait on any man; that the defendant also received love letters from other men. Personal service was had of the summons and complaint in the action. The defendant made no appearance.

The plaintiff testified, in substance, as follows:

"Shortly after we arrived here [Fresno], about a month, my wife refused to do any of the household work, refused to cook any meals or do any of the duties of a housewife, and as a result of this I was compelled to eat my meals in town. She assumed a very indifferent and independent attitude, and continually told me she was sorry she had married me, that she didn't like housework, and that she wouldn't wait on any man, and that she wanted to be free, so that she could do and have whatever she wished. Her actions in this way led me to believe she was unfaithful to me, so I kept a closer watch for signs of infidelity, and on December 11th I discovered two love letters, received from other men, in her vanity box. I confronted her with the letters and she asked, 'What of it?' "

The witness testified further that, as a result of the trouble, he became and was at the time of the trial still very nervous. A sister of the plaintiff, a witness called in corroboration, testified as follows:

"The defendant was dissatisfied with married life; she was sorry she married him; she wanted to be free; she wanted him to get a divorce; she did not want to be married any longer; she refused to cook his meals or to do anything, and while I was there I had to do the cooking, in order to have anything to eat in the house. She just said she was dissatisfied with married life. She said these things in the presence of the plaintiff and myself several times."

The plaintiff and the defendant separated on the 5th of December. On the 11th of December the plaintiff discovered the letters referred to, one of which was introduced in evidence, and reads as follows:

"Los Angeles, Cal., December 10, 1923.

"Dear little girl, I have only just got in from Needles and went to the post office and got your letter and am going to answer it right away. I sure am all tired out and am going home to have a good sleep as I have to go back to Needles tomorrow. You ask me dear to write and tell you that I love you, I only wish that I could show you really how much I do care for you, I thought of you all the time that I was in Needles and I was wishing you were there instead of in Fresno although I can't say that I like that town at all. I am indeed very sorry that you are so lonesome dear and I wish that I might be there with you, it is too bad that things have to be the way that they are with you but then it is all in a lifetime so try to cheer up and be a good little girl, and you know that I am thinking of you all the time little girl if no one else is. * * * I hope that you will be able to send me a picture the next time that you write me and although I know how things are with you try to write as soon as possible as I will go to the post office when I return and hope that there will be a letter there for me.

"With all my love and lots of kisses that I wish were real, Dal.

"Dated: San Bernardino, December 10, 1923."

No findings were filed in the case, and it does not appear why and upon what grounds the decree of divorce was not granted. There does not appear anything in the record tending to discredit the testimony of any of the witnesses. The defendant failed to answer the charges, allowed default to be entered against her, and it therefore must be assumed that, so far as she was concerned, the allegations contained in the complaint were true.

[1] The question then is presented to this court as to the effect of the uncontradicted evidence. In 10 California Jurisprudence, 1143, § 362, this subject is stated as follows:

"It is a general rule that the uncontradicted testimony of a witness to a particular fact may not be disregarded, but should be accepted as proof of the fact."

This rule is approved in the concurring opinion to Stewart v. Silva, 192 Cal. 405, 221 P. 192; Gage v. Billing, 12 Cal. App. 688, 108 P. 664.

[2, 3] The rule, however, that uncontradicted testimony cannot be arbitrarily rejected by the court, is subject to the fact that it is not inherently improbable. If there is anything in the testimony which makes it inherently improbable or affecting its accuracy contained in the witness' own statement, or appearing from a consideration of all the surrounding circumstances, then and in that case it is proper to disregard such testimony. 10 Cal. Jur. p. 1145, § 363. We do not find anything in the record indicating that the testimony which we have set forth is inherently improbable, or that the surrounding circumstances of the case, as disclosed by the record, were such as to render any of the testimony incredible or unworthy of belief.

[4] With these considerations in view, do the facts disclosed by the record constitute extreme cruelty, as that term is defined in section 94 of the Civil Code? The fact that the defendant refused to attend to the usual household duties common to people living and occupying their station in life, and such as a right-thinking woman would ordinarily perform, cannot be said, as a matter of law, to

constitute cruelty, even though it does tend to impose considerable hardship and additional burdens upon the husband, who is unfortunate enough to be married to a woman having so little regard for the usual wifely duties. Such facts, however, and such failure on the part of the wife to conform to the husband's station in life and to assist him in meeting and solving the usual daily problems of managing a properly conducted household, which present themselves to married people from day to day, may very properly be considered, however, for the purpose of determining the mental attitude of the wife, and whether she did or did not entertain such an attitude toward her husband as might reasonably show that she did not intend to fulfill her marriage obligations, and whether she was seeking elsewhere for either diversion, pleasure, or happiness. In other words such facts may be considered in determining whether all the circumstances disclosed constitute extreme cruelty. There is no allegation of physical pain or suffering inflicted upon the plaintff by the defendant, and the question is simply one of whether the conduct of the wife was reasonably calculated to, and did, cause grievous mental suffering. The testimony shows that the defendant stated to the plaintiff a great many times that she was sorry that she married him; that she wanted to be free, so that she could do what she wanted and go where she pleased; that she was dissatisfied with married life; and, in substance, that she was through with the plaintiff. This testimony alone might or might not show sufficient grounds for a charge of cruelty, depending in large part upon the sensitiveness of the one to whom such remarks were addressed, but there appears something further in this case which we think is in and of itself sufficient to show conduct utterly subversive of the marital relation. No right-thinking man, and we may say no man worthy of the name, would or could be other than agitated, and mentally disturbed by the knowledge of the fact that his wife was receiving endearing letters from other men. The concluding part of the letter is, in and of itself, sufficient to produce great mental agitation and suffering—"With all my love and lots of kisses that I wish were real." It is true that the defendant did not write these words, but when confronted with the letter she simply asked, "What of it?" The letter shows upon its face that it is a reply to one from the wife, in which she must have made statements eliciting the words which we have quoted from the letter signed by the man who calls himself "Dal." Correspondence of the kind to which we have referred is certainly subversive of the purposes of the marital relation as ordinarily understood. We think this testimony, when taken with other facts, to which we have adverted, sufficient to constitute cruelty, as defined by the Civil Code of the state.

The judgment of the trial court is hereby reversed.

We concur: FINCH, P. J.; HART, J.

---

72 Cal. App. 663

In re JOHNSON'S ESTATE. (Civ. 2975.)

(District Court of Appeal, Third District, California. May 14, 1925. Hearing Denied by Supreme Court July 13, 1925.)

1. Wills ⟹53(9)—Fact that will is unnatural may be considered with other evidence of mental unsoundness, in determining mental capacity of testator.

Though person has legal right to make an unnatural will, fact that it is so made may be considered with other evidence of mental unsoundness, in determining mental capacity of the testator.

2. Wills ⟹53(2)—Evidence that testator was mentally incapacitated to make will is not limited to direct evidence of mental condition at time will was made.

Burden is on contestants of will to show mental incapacity of testator at the very time will was executed, but incompetency need not be proved by direct evidence of his mental condition at that time, and nature of disease with which afflicted, his mental condition, acts, and conduct, both before and after execution of will, and terms thereof, may be considered.

3. Wills ⟹55(1)—Evidence held sufficient to sustain finding that testator was of unsound mind at time he signed will.

Evidence *held* sufficient to support finding that testator was not of sound mind at time will was signed.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Application by F. G. Bremer and another for the probate of will of J. W. Johnson, deceased. From a judgment for contestants Henry Johnson and others, refusing to admit the will to probate, Hattie M. Sligar, beneficiary, appeals. Affirmed.

Ray Manwell and J. E. Ebert, both of Marysville, for appellant.

Arthur Coats, of Yuba City, and W. H Carlin, of Marysville, for respondents.

FINCH, P. J. A document purporting to be the last will of the above-named decedent was duly offered for probate. Three of the heirs of decedent duly appeared and filed their opposition to the probate thereof, upon the grounds that the same was not executed by the decedent and that at the time of the purported execution thereof the decedent was not of sound and disposing mind. The con-

test was tried by the court without a jury. The court found that at the time the instrument was executed the decedent was not of sound and disposing mind. Judgment was entered upon the findings denying probate of the purported will. From this judgment Hattie M. Sligar, one of the beneficiaries under the purported will, has appealed. The only ground urged for a reversal of the judgment is that the evidence is insufficient to support the finding to the effect that the decedent was mentally incompetent to make a will. The provisions of the purported will, material here, are as follows:

"1. I direct my executors, hereinafter named, to convert into money all real and personal property owned by me at the time of my death.

"2. I give, devise and bequeath my entire estate as follows, to wit: To my son, Arthur Johnson, the sum of ten thousand dollars, to my daughter, Lillie Johnson, the sum of ten thousand dollars; to my son, Henry Johnson, the sum of four thousand dollars; to my grandchildren, Clara Burton and Elna Burton children of my deceased daughter, each the sum of ten thousand dollars; to my grandchildren, Dorothy May Johnson and Laura Johnson, children of my said son, Henry Johnson, each the sum of ten thousand dollars; to my friend Hattie M. Sligar, the sum of ten thousand dollars; to my friends W. E. Tucker and A. C. McLaughlin, each the sum of two thousand dollars; and to my friend, Elizabeth Conant, of Marysville, California, the sum of one thousand dollars; and all the rest, residue and remainder of my property I give, devise and bequeath to my said son, Arthur Johnson, and my said daughter, Lillie Johnson, share and share alike.

"3. In the event that my estate, after payment of my just debts, expenses of my last illness and funeral expenses, and the expenses and charges of administration of my estate, should be less than the aggregate of the above bequests then said bequests shall be reduced proportionately."

The evidence bearing upon the mental capacity of the decedent, in addition to the terms of the will itself, consists of the testimony of witnesses as follows:

M. J. Wilcoxon: "I am the warden in the Sutter County Hospital. * * * I have known the testator, J. W. Johnson, all my lifetime, but was never personally acquainted with him. I * * * am one of the subscribing witnesses to the instrument purporting to be his will. The will was executed at the hospital on the 1st day of July, 1922. * * * At that time J. W. Johnson, testator, was of sound and disposing mind. * * * Mr. Johnson arrived at the Sutter County Hospital on June 29th, 1922, in the evening. He was quite sick, and I think he was delirious the first day. On the next day * * * he remained in the hospital in bed. The document * * * was by him signed on the 1st day of July, 1922, about 4 o'clock in the afternoon. Mr. Johnson * * * remained there until July 5, 1922, when he left. He again returned to the hospital on July 12, 1922, and remained until July 17, 1922, when he again left. During this last time, from July 12th to July 17th, I observed his condition. His mental condition was very bad. I considered him insane. * * * I don't know that I would call him insane, but he seemed to be awful delirious. He wouldn't keep any clothes on himself. He just ran around like a crazy man."

Walter L. Barrett: "I was present at the time the will was executed and the testator, who could neither read nor write, asked me to subscribe his name thereto, and he made his mark in my presence, and I also subscribed his name thereto."

Mrs. Elizabeth Conant, a beneficiary under the will: "I * * * nursed him [testator] from said 30th day of June, 1922, until the 5th day of July of the same year. * * * I saw the testator when he came to the hospital on the 29th day of June. * * *

"Q. On the 30th day of June, what was his physical condition? A. Rather bad. * * * He seemed to have hemorrhages of the bladder, and he had a high temperature at the time, * * * on the evening of the 30th. * * * The first thing he asked me was to call Mr. McLaughlin and I said, 'Don't you think you better wait until morning? It is rather late.' * * * He said, well, that would be all right, and he was restless more or less all night. * * * The first thing in the morning he asked me if I would call Mr. McLaughlin, and I told him I would as soon as breakfast was over, and after breakfast he asked me again if I would call Mr. McLaughlin. He said he was very anxious to see him because he wanted him to fix some papers, and so I called Mr. McLaughlin."

Allen E. Gray: "I am a physician and surgeon. I have known Mr. J. W. Johnson by sight for a long time, but had never known him intimately, except that I had talked to him and examined him once previous to the 29th day of June, 1922. I attended the testator * * * from the time he came to the Sutter County Hospital until the 5th of July. * * * At the time he was brought in, the man was a sick man. He had a running fever. He had no hallucinations or delirium or any signs of insanity at the time, except he was suffering with pain at the time. I would not say he was of unsound mind. I was not treating him for that at all, and did not pay much attention to his conversations that I had with him. For the first few days he was in pain, and was a little delirious the first day that I saw him, the first evening. After that his condition seemed to improve. I talked with him every day that I saw him. I would say that from the 29th day of June until the 5th day of July, 1922, he was in as sound mind as any person under his physical condition that he had at that time. I did not discuss any business matters with him at all."

A. C. McLaughlin, who drafted the will and was named as a beneficiary thereunder: "I have known decedent for over 30 years. I suppose I have rendered favors to Mr. Johnson in his lifetime, but not such as I would call particular favors. I was attorney for his son in a little matter that came up a number of years ago, and he consulted me on various occasions, particularly at that time when he

had some one arrested for taking a shot at him. I was called to the hospital on July 1st, at the request of Mr. Johnson, and was informed by Mr. Johnson that he desired to execute his will, and I was then and there informed of the terms and provisions he desired placed therein. * * * I discussed the terms and provisions with the decedent at that time, returned to my office in Yuba City, and prepared the document, * * * and returned with it to the hospital, where the terms and provisions thereof were thoroughly explained to the testator, and it was immediately thereafter duly executed by the testator. * * * At the time of the execution of this will the said decedent was of sound and disposing mind and memory."

Charles Da Kosse: "I have known J. W. Johnson personally for the last 7 years. During said time I have worked for him and frequently talked with him. During the 6 months prior and up to the 1st day of July, 1922, Mr. Johnson frequently came to my home, and we talked together, and during that period there were times when Mr. Johnson acted as if he was not in his right mind, and at other times he would carry on a conversation fairly well."

J. H. Barr: "I am a physician and surgeon. * * * I was one of the physicians who examined Mr. J. W. Johnson concerning his sanity on the 17th day of July, 1922. * * * Possibly I had known Mr. Johnson personally for about 29 years in this vicinity. I frequently saw him and met him. * * * On the 17th day of July, 1922, I found that he was insane, suffering from acute mania, also from paresis, which is a form of softening of the brain, a general gradual breaking down of the brain tissue. * * * We found Mr. Johnson suffering from paresis, and, as far as the period of time is concerned, that would depend altogether on the amount of lesion taking place in the brain. It may be fast, or it may be of long duration, depending on the individual himself, as to how long he is in breaking down. * * * It is quite probable that it existed at that time (July 1st), * * * because that would be very rapid. His physical condition was not bad; it was not poor as it might be. Mr. Johnson had stripped himself, and I was surprised that the physical condition was as good as it was under the mental condition. * * * He was in a maudlin condition. * * * I will say that it could be this mental condition which we found * * * did not exist 2 or 3 weeks before, but it is more than likely that that trouble occurred in not a less period than 2 or 3 weeks, and it gradually came up to this breaking point. That is the shortest period that I gave you and the longest period might extend over 3 or 4 years."

Samuel Gray: "I have known Mr. J. W. Johnson for more than 40 years. * * * We very frequently talked together, on the ranch, in town, and on the roads, and in different places. * * * I saw him July 2, 1922, in the Sutter County Hospital. It was in the evening, and I then considered him of unsound mind. I had with me his cousin, a Mr. Tom Hutchinson, who was here from Iowa for 3 or 4 days. * * * I introduced Mr. Hutchinson to Mr. Johnson, and told him who he was, and asked him if he recognized Johnnie Hutchinson, his cousin, and he said, 'Yes,' and we took chairs alongside of him. * * * Mr. Hutchinson was a grown man. * * * When we sat down, Mr. Johnson said to me, 'Where did you get that boy?' * * * I tried to introduce him again, and told him who he was, and I didn't seem to attract his mind, and he went on talking about something else. * * * He said, 'My head hurts like everything.' * * * He told me that he had made his will, he didn't say when, and he said he left his boys well fixed. I said to him, 'I see by the papers that you sold your ranch,' and he said, 'Yes; I sold the ranch for $120,000, and the papers are all fixed up, and we are going to sign them tomorrow.' * * * I ascertained shortly afterwards the fact that he had not sold his ranch at all."

Thurlow Dowell: "I knew Mr. J. W. Johnson prior to his death for a period of 4 or 5 years. During a period of 6 or 7 months up to the time of his death I saw him often, probably once a week on an average, and talked with him. I usually saw him at my garage in Yuba City, and during that time some days he would be regular and some days irregular, but I don't believe that during any of said time that he was of sound mind. * * * Just before he went to the Sutter County Hospital he gave me the names of a dozen or so men around the courthouse here that he thought were not doing their official capacity, and that they should be removed from office, said he was a Deputy United States Marshal, and was going to have them all taken out. * * * During that period he came to my garage there one day, he was in there, and took the water hose and opened up the front of his shirt, and let the water run there for a period of 3 hours off and on, most all the time on."

Morris Peters: "I knew Mr. J. W. Johnson for a period of approximately 30 years up to the time of his death, * * * and during all that time frequently talked with him and observed his condition. For a period of 1 year prior and up to the 1st day of July, 1922, I did not consider Mr. Johnson of sound mind. At times he would talk rational. During that time a disease came on him along about the 1st day of May, 1922. He would stop at my house 4 or 5 nights a week * * * and talk with me. * * * When he would be at my place talking, he would talk along rationally, and all at once he would cry out, and was going after this fellow and that fellow, and on one occasion he stopped me on the highway * * * and run his automobile in front of me, and I stopped and asked him, 'What is the matter, Billy?' * * * He said, 'I am going to arrest you; * * * run your machine out to the side of the road, and go along with me.' * * * He said, 'I will let you go this time, but I want you tomorrow.' * * * He said, 'There is a fellow I am after, and I am going to get him; I am a United States Marshal now.'"

W. E. Tucker: "I am one of the persons named as beneficiaries in the document offered for probate here. * * * I had some personal dealings with Mr. Johnson, collecting some bills for him and something like that when he was in the butcher business. I have not had much dealings with him in the last 4 or 5 years. Afterwards he would meet me. I would stop and talk and possibly pass the time of the day. There is no blood relation existing between him and me. I did not charge him for

collecting bills except one large bill. There were no social relations existing between us. My family did not visit his family."

July 17, 1922, the decedent was adjudged to be insane and committed to the state hospital at Napa, where he died 5 days later. The evidence does not show the value of decedent's estate, but in the petition for the probate of the alleged will the estimated value of the estate is given as $95,000. The bequests aggregate $79,000. The alleged will is drafted upon the theory that the assets of the estate may be insufficient to pay the legacies in full, for it provides that in such case the "bequests shall be reduced proportionately." The evidence does not show that there was any estrangement between the decedent and his children. It does not appear that any of the legatees who were strangers in blood had any claim upon the bounty of decedent, and it affirmatively appears that some of them had no such claim.

[1] Under all the circumstances it clearly appears that the will is unnatural in its provisions. While a person has the legal right to make an unnatural will, the fact that it is so may be considered with other evidence of mental unsoundness in determining the mental capacity of the testator. Estate of Gallo, 61 Cal. App. 163, 175, 214 P. 496, and cases there cited.

[2, 3] The burden was upon contestants to show the mental incapacity of the testator at the very time the will was executed, but this does not mean that his incompetency must be proved by direct evidence of his mental condition at that time. The nature of the disease with which he was afflicted, his mental condition, and his acts and conduct, both before and after the execution of the will, and the terms of the will itself, may all be considered in determining whether he was of sound mind when he signed it. Intimate acquaintances testified that the testator was of unsound mind shortly before and after the day that the instrument was signed. On the day following its execution, he could not be made to understand that his cousin from a distant state was visiting him and in his presence, and within a few days thereafter his mental affliction developed into pronounced and hopeless insanity. In view of all the foregoing facts and circumstances, it cannot be held that the evidence is insufficient to support the finding that the decedent was not of sound and disposing mind at the time he signed the instrument offered for probate as his will.

The judgment is affirmed.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

72 Cal. App. 660

KELLEY v. CAMERON et al. (Civ. 2878.)

(District Court of Appeal, Third District, California. May 13, 1925.)

1. Partnership ⟸327(1)—Complaint held to contain allegations entitling plaintiff to relief.

Where plaintiff and defendant agreed to engage in oil filling station business, defendant advancing money to plaintiff to acquire leases on such stations, allegations of complaint, in suit for accounting, that plaintiff was conducting seven service stations, leases of which had been acquired by him when defendant assumed control of such stations, *held* sufficient as against general demurrer to entitle plaintiff to some relief, independent of their agreement.

2. Partnership ⟸327(1) — Complaint held good as against general demurrer.

Where complaint, in suit for accounting, alleged facts entitling plaintiff to relief from time defendant assumed control of oil filling stations, leases of which had been acquired by plaintiff, it stated a cause of action good as against general demurrer.

3. Pleading ⟸205(2)—General demurrer raised only question as to whether complaint stated cause of action.

General demurrer raised question only as to whether complaint stated cause of action.

Appeal from Superior Court, Tulare County; W. B. Wallace, Judge.

Action by Franklin Kelley against J. D. Cameron and others. Judgment for defendants, and plaintiff appeals. Reversed, with direction to overrule demurrer to petition.

A. M. Drew, of Fresno, and Feemster & Cleary, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondents.

JONES, Justice pro tem. The plaintiff brought this action to obtain an accounting from the defendant J. D. Cameron, who interposed a general demurrer to plaintiff's amended complaint, which demurrer was sustained by the court without leave to amend. From the judgment thereupon rendered against the plaintiff, he has appealed.

From the allegations of the amended complaint, it appears that the plaintiff and the defendant Cameron entered into an agreement, the contents of which may be generally stated as follows: That, whereas, the first party (Cameron) was engaged in the business of manufacturing and refining oils and gasolines and of selling said products to wholesale or retail trade, and whereas, the second party (Kelly) desired to engage in the retail oil and gasoline business in the city of Fresno, and desired to operate what are commonly called "filling stations"; and, whereas, the first party had advanced and was about to

advance various sums of money to the second party for the purpose of purchasing such stations: It was, therefore, agreed that the first party should advance such sums to the second party as they may mutually agree upon for the purpose of acquiring the lease, stock in trade, business, and good will of service stations in the city of Fresno, for which advancements the second party should execute to the first party his promissory note. The second party should purchase and operate the stations in his own name, without obligating the first party in any way, and, upon securing an assignment of the lease of any filling station, the second party should transfer such lease to the first party; the lease thereupon becoming his absolute property. The second party should operate the stations to the satisfaction of the first party, and should promptly pay all bills or indebtedness incurred in operating the stations; should keep all stock and property used in connection with said stations insured, which insurance should be payable to each of the parties, according to their interest in the property; should keep accurate books of account, which books should be subject to the inspection of the first party at all times; should purchase all gasoline and lubricating oils sold in said stations from the first party. It was further agreed that the first party should not be obligated to pay any loss incurred in the transactions of the business, or to pay any bills of any kind or character contracted by the second party in the transaction thereof.

Plaintiff alleged that, pursuant to this agreement, he acquired five stations in the city of Fresno and in addition thereto "turned over" two stations already owned and operated by him, and commenced and carried on the business of selling at retail gasoline and other automobile supplies furnished by the defendant, at said stations in the name of Kelley Service Stations.

It is alleged that the defendant later refused to be bound by the terms of the agreement and "did assume control of the business of the said Kelley Service Stations, and of the books, papers, and records kept by this plaintiff, under and pursuant to the aforesaid agreement, and demanded of and took from said plaintiff herein * * * the funds received and on hand and in the bank in the name of said Kelley Service Stations and of this plaintiff in the sum of $2,500, and did assume control of said service stations and directed the management thereof;" and further allegations are that, following the breaching of the agreement by the defendant Cameron, he assumed the control of the said service stations and conducted the same jointly with this plaintiff, and directed the management and conduct thereof, and required the men employed to report directly to him, said defendant, and compelled the payment of the funds to him, and took the said funds from plaintiff for his own use and benefit, and in all manner conducted the said business jointly with plaintiff, and the said defendant asserted a right, title, and interest in and to said property leased as aforesaid and in and to the business conducted as "Kelley Service Stations, and in and to the management and control of said business."

There is a further allegation to the effect that plaintiff offered to transfer to the defendant the leases acquired by plaintiff to all of the filling stations, but the defendant rejected said offers, and refused to accept said leases pursuant to the terms of the agreement.

Plaintiff prayed for the appointment of a receiver; for an accounting of all the dealings and transactions under the agreement and of the money received and paid by plaintiff and defendant in relation thereto; for the restraint of the defendant from interfering with the properties, moneys, or effects of the said business; for the sale of the property and business, the payment of the debts and liabilities, and the payment of the surplus, if any, to the parties according to their respective interests; and for general relief.

[1] Respondent contends that "upon the construction of that agreement and the rights and liabilities assumed by the parties thereto depends the decision of the sole question involved in this case." With this contention we do not agree, for, it it be conceded that the agreement did not create such a relationship between the parties as would entitle the appellant to maintain an action for an accounting thereunder, yet the amended complaint does contain allegations which entitle him to relief, even though that relief may not be as extensive as that for which he prays, and which is not dependent upon the construction to be given the agreement. According to these allegations, the plaintiff was conducting seven service stations under the name of Kelley Service Stations, the leases of which stations had been acquired by him, when the defendant assumed the control of the business of said stations, requiring the men employed to report directly to him, compelled the payment of the funds to him, and took the funds for his own use and benefit.

[2, 3] While it must be admitted that there are inconsistent allegations with reference to the action of the defendant in assuming the control of the stations, yet the demurrer interposed by defendant was a general one, and raised the question only as to whether the complaint stated any cause of action. We are of the opinion that facts are alleged at least entitling the appellant to an accounting from the time that the respondent assumed the control of the stations, and, appellant being entitled to that relief, it would fol-

low that the amended complaint does state a cause of action, and was not subject to general demurrer.

The judgment is reversed, with direction to the trial court to overrule the demurrer.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 713

CRAVEN v. DOMINGUEZ ESTATE CO. et al. (Civ. 4323.)

(District Court of Appeal, Second District, Division 1, California. May 21, 1925. Hearing Denied by Supreme Court July 20, 1925.)

1. Trusts ⇐11(2)—Trust created by declaration of trust held express trust to sell real property and dispose of proceeds.

Trust created by declaration of trust *held* an express trust, within Civ. Code, § 863 (unaffected by sections 864–866), to sell real property and dispose of the proceeds of sale pursuant to the terms of the declaration, in view of section 857.

2. Trusts ⇐134—Generally, express trust in realty vests whole estate in trustee, subject only to execution of trust.

Generally an express trust in realty, valid in its creation, vests whole estate in trustee, subject only to the execution of the trust.

3. Trusts ⇐140(1)—Trustee of express trust to sell realty and distribute proceeds has absolute title to trust property, and beneficiary, as against trustee and those claiming under him, has no interest in the land.

Trustee of express trust to sell realty and distribute proceeds has absolute title to trust property, and beneficiary, as against trustee and those claiming under him, has no interest in the land itself, but only in the proceeds thereof.

4. Trusts ⇐147(1)—Attempted transfer by beneficiary of trust property conveyed no interest therein as against trustee or its grantee.

Where a beneficiary conveyed the absolute title in realty to a trustee, under an express trust to sell it and distribute the proceeds according to declaration of trust, an attempted transfer of the trust property by the beneficiary, either in the form of a deed or lease, conveyed no interest in the trust property as against the trustee or its grantee.

5. Trusts ⇐39—Declaration of trust to hold realty for sale and distribution of proceeds held to bind beneficiary and all persons claiming under it.

Declaration of trust, creating express trust to hold realty for the purpose of sale and distribution of the proceeds pursuant to declaration, bound the beneficiary and all persons claiming under it, whether they had actual notice of it or not, where the record title to the land was in the trustee.

6. Trusts ⇐171—Trustee has all authority necessary to carry out objects and purposes of trust.

A trustee has all authority necessary to carry out objects and purposes of trust, even though the instrument creating the trust may not directly confer such power upon him.

7. Trusts ⇐135—Trust to hold realty for purpose of sale and to distribute proceeds pursuant to declaration of trust held not "simple trust" or "dry trust"; "passive trust."

A trust, under which a company held the absolute title to lands for purpose of sale and distribution of proceeds thereof pursuant to the terms of a declaration of trust, the land to be sold through an agent of the trustee, who was invested with discretion of subdividing some of the lots, *held* more than a "simple" or "dry" trust; a trust being "simple," "passive," or "dry" when the trustee has no active duty to perform, or the trust serves no purpose, or none that would not be equally served without it, the trustee being the mere beneficiary of the record title, charged with no duty and without power to take possession or exercise any control over the property.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Dry Trust; Passive Trust; Simple Trust.]

8. Trusts ⇐147(1)—Lessee of beneficiary of trust to sell realty held to have acquired no interest in trust property as against trustee or its grantee.

Lessee of a beneficiary of a trust to hold title to realty for the purpose of selling it and to distribute the proceeds *held* to have acquired no interest in the trust property as against the trustee holding the record title, or its grantee, despite grantee's notice of such lease, in view of Civ. Code, § 865.

9. Trusts ⇐147(1)—Attempted ratification by trustee of realty, of beneficiary's lease, held not to affect interest of grantee of trustee, acquired subsequent to execution of lease, but before attempted ratification.

Where trustee held the legal title to land for the purpose of sale and distribution of the proceeds according to the declaration of trust, trustee's attempted ratification of beneficiary's lease of part of the land to defendant's assignor *held* not to affect the interest of plaintiff grantee of the trustee, acquired subsequent to the execution of the lease, and with knowledge thereof, but before the trustee attempted to ratify it.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Emma E. Craven against the Dominguez Estate Company and others. From an adverse judgment, defendant George F. Carson and others appeal. Affirmed.

Hearing denied by Supreme Court; Houser, Justice pro tem., did not participate.

Joe Crail and Harold C. Morton, both of Los Angeles, for appellants.

Goodwin & Morgrage, of Los Angeles, for respondent.

CURTIS, J. The Dominguez Estate Company, a corporation, was, on the 21st day of March, 1917, the owner of a large tract of land situated in the county of Los Angeles. On that day it executed and delivered a grant deed to all of said real property to the Title Insurance & Trust Company, a corporation. This deed was recorded on the day it bore date, and on the same day the Title Insurance & Trust Company executed a declaration of trust, stating that the real property was held in trust, and setting forth the terms of said trust. This declaration of trust was not recorded. On March 20, 1920, and while said land stood of record in the name of the Title Insurance & Trust Company, the Dominguez Estate Company executed an oil and gas lease covering some 140 acres of the same land conveyed to the Title Insurance & Trust Company. This lease was executed in favor of defendant George F. Carson, and was thereafter assigned and transferred to the defendant the Carson Oil Company, and later by said company to the defendant Joe Crail. This lease, however, was not recorded until October 26, 1921. On August 21, 1921, the Title Insurance & Trust Company executed a paper in which it ratified, or attempted to ratify, said oil and gas lease, made as aforesaid by the said Dominguez Estate Company. On April 19, 1920, the Title Insurance & Trust Company executed and delivered to plaintiff a grant deed to about 4 acres of the 140-acre tract covered by the lease in favor of George Carson, and it was stipulated that plaintiff, at the time she acquired this conveyance, had notice of the execution and delivery of the lease by the Dominguez Estate Cmpany to George F. Carson, dated March 20, 1920. Upon this state of facts the trial court gave judgment in plaintiff's favor, quieting her title to the land described in her complaint, being the land described in her deed, and from this judgment the defendants George F. Carson, the Carson Oil Corporation, and Joe Crail have appealed. The Dominguez Estate Company, although made a party defendant in said action and served with process, never appeared therein, and judgment by default was entered against it.

It is appellants' contention: (1) That the trust executed by the Dominguez Estate Company to the Title Insurance & Trust Company was but a dry trust; the beneficiary and trustor, the Dominguez Estate Company, being the real owner, whose conveyance binds the plaintiff, who acquired her interest in said real property from the trustee with notice of the previous lease executed by the trustor and beneficiary. (2) That there was sufficient estate in the trustor and beneficiary to enable it to make a lease in favor of appellants, which lease was binding upon the plaintiff who had notice thereof. (3) That ratification by the trustee of the lease made by the trustor and beneficiary was binding upon the grantee from the trustee; such grantee having had notice of the lease.

The portions of the declaration of trust material to the decision of the questions involved herein are as follows:

"Know all men by these presents: That the Title Insurance & Trust Company, a corporation, organized under the laws of the state of California, with its principal place of business at Los Angeles, California, hereinafter called the trustee, has received a deed dated March 21, 1917, executed by the Dominguez Estate Company, a corporation, filed for record March 21, 1917, conveying to it that certain real property described as follows, to wit: [Then follows a description of the property.] That whereas, it is understood that the consideration paid for said real property, hereinbefore described, * * * was paid by said Dominguez Estate Company, a corporation, hereinafter sometimes called the beneficiary, no part of said consideration having been paid by said trustee hereinunder." The declaration then recites that a portion of said real property had been subdivided into 5-acre lots under the mutual agreement of the trustee and the beneficiary, and was known as tract No. 3218, and that the remainder of said real property may be subdivided "in such manner as may hereafter be agreed upon by said trustee hereunder, said beneficiary and the agent hereinafter named.

"Now, therefore, said Title Insurance & Trust Company, trustee, hereby certifies and declares that it holds and will hold the real property hereinbefore described * * * in trust under the terms and conditions, and for the uses and purposes set forth in this declaration, namely: [It is then provided that lots in tract No. 3218 might be sold for not less than $2,000 each, and that the balance of said tract might be sold upon such terms and conditions as said trustee might deem best, by lot or lots if subdivided, or by parcel or parcels if not subdivided, and "the sale prices thereof to be not less than those hereinafter to be agreed upon by said trustee, said beneficiary and said agent, to be indicated by schedule or schedules to be filed with said trustee." The proceeds of said lots in tract No. 3218 were to be distributed by said trustee, first, to the payment of the costs, fees, and expenses of said trustee; second, the sum of $1,750 to the beneficiary; third, the balance to H. H. Cotton, the said agent. The proceeds from the sale of the balance of said real property were to be distributed by said trustee, first, to the payment of its costs, fees, and expenses; second, to the said beneficiary "such sum, or sums, and at such times as may hereafter be agreed upon by said Dominguez Estate Company and H. H. Cotton"; third, the balance to the said H. H. Cotton]. H. H. Cotton is appointed agent of the said trustee in making a sale of the real property covered hereby, to collect and disburse all rents (if any) thereof and to generally assume the care and custody of said real property. * * *

"It is distinctly understood that all deeds, contracts of sale, and other instruments affect-

ing the property covered hereby, or any part thereof, shall be executed solely by the said trustee. The costs, fees and expenses of the said trustee hereunder are hereby fixed as follows: [The usual fees for preparing, executing and recording instruments and issuing guarantees showing title are to be paid to said trustee, also the sum of $250 for drawing and executing the declaration of trust; also 2 per cent. of all moneys received and disbursed under the trust, and the sum of $2 for each deed or contract executed by the trustee and a reasonable compensation for any services rendered and not covered by the above fees.]

"This trust shall not cease or terminate in any event until all of the costs, fees and expenses of said trustee hereunder shall have been fully paid. The conditions and provisions hereof shall inure to and bind said trustee, said beneficiary, said agent, their heirs, legatees, devisees, administrators, executors, successors, and assigns."

[1, 2] The trust thus created was an express trust to sell real property and dispose of the proceeds of such sale, and was authorized by the statutes of our state.

"Express trusts may be created for any of the following purposes: 1. To sell and convey real property and to hold or reinvest or apply or dispose of the proceeds in accordance with the instrument creating the trust." Civ. Code, § 857.

As a general rule every express trust in real property, valid as such in its creation, vests the whole estate in the trustee, subject only to the execution of the trust. The beneficiary takes no estate or interest in the property, but may enforce the performance of the trust. Civ. Code, § 863.

[3] Certain exceptions or limitations to this general rule are made by sections 864, 865, and 866 of the Civil Code. The provisions of these sections of the Civil Code, however, have no particular bearing upon the trust under consideration in this action. In our opinion this trust comes within the general rule expressed in section 863. As we have seen, by the terms of this section, the absolute title to the trust property is vested in the trustee, and the only interest the beneficiary has therein is to enforce the trust. As against the trustee and those lawfully claiming under him, the beneficiary has no interest in the property itself, but only in the proceeds thereof after the property has been sold by the trustee. This was so held by the Supreme Court in construing a trust similar to the one before us. In this action the court said:

"It is true that plaintiff has proceeded upon the theory that Waterman [one of the beneficiaries] had, at the time of the attachment, and still has, an equitable interest in that property, and that the claim of Stanford is in the nature of a mortgage upon that equitable interest. * * * But this is a mistaken theory which has run all through the discussion of this case, and led to much confusion. The trust created in Smith [the trustee] is an express trust, under subdivision 1, of section 857, of the Civil Code. It vests in Smith the whole title, legal and equitable. Civ. Code, § 863. By the very terms of the trust, whether we read it as originally written or as revised, Waterman had no interest in the property, and could never acquire any interest, unless he purchased it, as any stranger might do. The only right that any beneficiary under the trust had or has was to share in the proceeds of the rents and profits when realized, and of the sale of the land when sold, and the only remedy that of proceedings to enforce the execution of the trust." Ward v. Waterman, 85 Cal. 488, 506, 24 P. 930, 934.

[4, 5] The beneficiary, the Dominguez Estate Company, therefore, having no interest legal or equitable in the trust property, an attempted transfer thereof by it, either in the form of a deed or lease, as against the trustee or its grantee, would not convey any interest in the trust property. On the other hand, the trustee, being vested with both the legal and equitable title, not only could convey by deed a good title to the trust property, but it is the only person clothed with such power. The parties to the trust in this proceeding did all in their power to make this clear and definite. By reference to the declaration of trust, it will be seen that the very object and purpose of the trust was to give to the trustee the sole power to convey title to the trust property. To carry out this purpose, a grant deed to the property was executed and delivered by the Dominguez Estate Company to the trustee. This deed was absolute in form, and was, on the date of its execution, recorded in the office of the county recorder of the county in which the property is situated. The trustee thereby became the record owner of the absolute title to the property. In the declaration of trust (which is binding upon the beneficiary and all persons claiming under the beneficiary, whether they had actual notice of it or not, for the reason that the record title was in the trustee) it was provided that all deeds, contracts of sale, and other instruments affecting the trust property should be executed solely by the trustee.

[6] A trustee has all the authority necessary to carry out the objects and purposes of the trust. This is true, even though the instrument creating the trust may not directly confer upon him such power. As was said by the court in the case of Morffew v. S. F. & S. R. R. Co., 107 Cal. 587, at page 595, 40 P. 810, 813:

"The quantity of interest which passes to the trustee in case of an express trust is commensurate with the necessities of his office; the trustee shall have an estate in fee, if that is necessary, to enable him to perform the duties imposed upon him, although it is not in terms given to him by the instrument creating the trust; on this principle a devise of lands in trust to sell clothes the trustee with the fee, because necessary to the execution of the trust.

The rule being compendiously stated that the trustee 'will take an estate adequate to the execution of the trust—no more nor less' "—citing Perry on Trusts, § 320; Young v. Bradley, 101 U. S. 787, 25 L. Ed. 1044.

[7] The Title Insurance & Trust Company as trustee, therefore, took an estate in the trust property adequate to the execution of the trust, and, as the trust was to convey an absolute title to the lands and to distribute the proceeds of all sales thereof, it was necessary for it to own and hold the absolute title to the trust property. This was clearly provided for in the instruments executed by the parties and creating the trust. According to the trust, the trustee was to have the care and custody of the real property through H. H. Cotton, its agent. It was to sell the lots in tract No. 3218 and to distribute the proceeds of such sale according to the terms of the declaration of trust. As to the balance of said property, it was invested with the discretion of subdividing the same and selling it in lots, or, without subdivision, to sell it in parcels, and at such prices as might be agreed upon by its agent, the said H. H. Cotton, and the beneficiary, and to distribute the proceeds of said sale. This amounted to far more than a simple or dry trust in the trust property.

"A trust is simple, passive, or dry when the trustee has no active duty to perform, or when the trust serves no purpose, or none that would not be equally served without it; the trustee being the mere depositary of the naked title, charged with no duty and without power to take possession, or manage, or exercise any control over the property." 39 Cyc. 219.

"On the other hand, the creator (of a trust) may, by the provisions of the instrument creating the trust, be divested of an estate or interest in the trust property. Thus where a trust deed creates a valid trust and gives a power of sale to the trustee at the request, and for the benefit of, the beneficiary under the deed, no power of revocation being reserved, no estate in the premises is left in the grantor, which is capable of being transferred." 39 Cyc. 245.

See, also, Marvin v. Smith, 46 N. Y. 571; Kopp v. Gunther, 95 Cal. 63, 30 P. 301; Wilhoit v. Cunningham, 87 Cal. 454, 25 P. 675.

[8] It follows, therefore, that the Dominguez Estate Company had no interest in the trust property which it could transfer by deed or otherwise, and that the appellants acquired no interest in said property adverse to the trustee or its grantee by the lease in favor of the appellant George F. Carson. It is true respondent took her deed with notice of this lease, but, as the lease was taken subject to all of the terms of the trust, the lessee therein acquired thereby no interest in the trust property as against the trustee. Civ. Code, § 865. The lessee would, of course, have no better title as against the grantee of the trustee than he had as against the trustee.

[9] As to the contention of appellants that the subsequent ratification of the lease by the trustee gave it validity as against the trustee and its grantee, we are not able to entirely agree with appellants. Conceding that such ratification was within the power of the trustee, and bound any interest of the trustee in the lands covered by the lease, yet it could affect only such interest in said lands as was held by said trustee at the time of the ratification. The fact of the case, however, is that, at the time said trustee executed the paper purporting to ratify said lease, said trustee had no interest in the property claimed by respondent, as it had conveyed the same to respondent over a year prior to the time of its attempted ratification of said lease. The act of the trustee, therefore, in this regard was but an idle act in so far as respondent's rights in said property were concerned.

In our opinion the judgment should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

---

72 Cal. App. 611

PEOPLE v. REID. (Cr. 1183.)

(District Court of Appeal, Second District, Division 1, California. May 11, 1925. Hearing Denied by Supreme Court July 7, 1925.)

1. Criminal law ⊜706—Prosecuting attorney's request that defendant's counsel produce certain documents held not improper, where willingly produced, and no objection thereto made.

Action of district attorney, in requesting that defendant's counsel produce a certain contract of purchase of furnishings and assignment of lease, *held* not to have been improper, where no objections were made thereto, and it appeared that defendant was eager to produce documents desired and have them read into evidence.

2. Witnesses ⊜246(1)—Well-established custom for presiding judge to ask witness question to elucidate obscure points.

It is well-established custom for presiding judge to ask questions of any witness for purpose of elucidating points that might otherwise remain obscure.

3. Criminal law ⊜1036(2)—Witnesses ⊜246(1)—Presiding judge within his rights in questioning witnesses to clarify matters, and, no valid objection having been made, defendant cannot complain on appeal.

Presiding judge *held* to have been well within his rights in asking witnesses questions dealing with figures for purpose of making more clear matters that had previously been subject of testimony, but in any event, defendant having

offered no valid objection, cannot complain on appeal.

4. False pretenses ⊜44—Testimony that defendant rented apartment without charge held properly admitted on question of misrepresentation as to occupancy by bona fide tenants.

It being alleged that defendant, in selling lease to apartment house, represented that two vacant apartments were rented by bona fide tenants and deposits made thereon, *held* that testimony that defendant had permitted certain persons to occupy apartment free of rent was relevant and material and properly admitted.

5. False pretenses ⊜44 — Assignment of lease by defendant held pertinent on question of defendant's alleged representation of ownership thereof.

In prosecution for obtaining money by false pretenses, based partly on alleged misrepresentations as to ownership of lease sold by defendant, evidence as to assignment of lease by defendant to another prior thereto and release of garnishment in reliance thereon, and payment of rent to assignee, *held* properly admitted as being pertinent to representation of ownership.

6. False pretenses ⊜44—Testimony as to ownership of furniture held pertinent on question of false representations by defendant that it was clear of any lien.

In prosecution for obtaining money by false pretenses, based partly on alleged misrepresentation of unincumbered ownership of certain furniture sold by defendant, testimony that defendant purchased furniture under installment plan, and that title to most of it was in another, *held* pertinent and properly admitted.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Robert H. Reid was convicted of obtaining money by false pretenses, and he appeals. Affirmed.

Hearing denied by Supreme Court; HOUSER, Justice pro tem., not participating.

Mulligan & Ryzek, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

HAHN, Justice pro tem. In this case the defendants Robert H. Reid and Izeyl W. Reid, his wife, were charged by an information filed by the district attorney of Los Angeles county with the crime of obtaining money by false pretenses.

The allegations of misrepresentation as set forth in the information may be briefly summarized as follows: First, that defendants represented that they were the owners of a certain lease on an apartment house in the city of Los Angeles, which lease was free from any lien or incumbrance, and that the said defendants had the legal right to sell and assign said lease; second, that they were the owners of the furniture and furnishings situate in the apartment house in question, free from any lien or mortgage; third, that, during the occupancy of the apartment house by the defendants under said lease, the several apartments had at all times been rented and occupied by the permanent guests, with the exception that at the time of the negotiations between the defendants and the complaining witness two of the apartments were temporarily unoccupied, but that deposits had been made upon these two vacant apartments by prospective tenants; fourth, that all the tenants who were then occupying the apartments were permanent tenants; fifth, that the apartments had been and then were producing a total cash rental of $940 per month.

The information then proceeds to allege that each and all of the foregoing representations were false and untrue, and were made by the defendants and each of them to the complaining witness, knowing such representations to be false and untrue, and made for the purpose of inducing the complaining witness to purchase the lease and furnishings, and by reason thereof the defendants obtained from the complaining witness the purchase price by false representations.

Upon the trial, the jury returned a verdict of not guilty as to the defendant Izeyl W. Reid, and a verdict of guilty against her husband and codefendant, Robert H. Reid. Defendant Robert H. Reid now appeals from the order denying his motion for a new trial and from the judgment of the court.

The defendant, in urging his appeal, does not contend that there is not sufficient evidence to support the verdict of guilty, but contents himself with urging three grounds of error occurring during the trial: First, certain misconduct on the part of the district attorney during the course of the trial; second, errors committed by the court in examining certain witnesses; and third, errors committed by the court in admitting certain evidence.

It appears from the evidence in the case that the defendant Robert H. Reid and his wife were in possession of a certain apartment house situate in the city of Los Angeles, together with the furnishings therein contained. The defendants, desiring to sell their lease and furnishings, listed the same with a real estate agent, and, as a result of such listing, the complaining witness entered into negotiations with the defendants for the purchase of the lease and furnishings. The complaining witness testified to several conversations had with the defendants, during which the alleged misrepresentations were made by the defendants, and that she, the complaining witness, believing these representations to be true, and, relying upon them, entered into a contract for the pur-

chase of the lease and furnishings, and on April 1st consummated the negotiations by delivery of the contract, payment of the money and entry into possession of the leased premises and furnishings.

Subsequently she testified that she discovered that the defendants did not own any of the furnishings, and that certain parts of the furnishings, consisting of the linoleum and the stoves, belonged to the owner of the building, while title to practically all of the remaining furnishings was in the Morris Plan Bank. Also that the tenants occupying the premises were not permanent tenants; that the two apartments that were alleged to have been rented and deposits made thereon were not rented at all; that the other tenants were not permanent tenants, but temporary tenants; that the apartments had not been producing, and were not producing $940 per month, but only $885 per month; and that at no time during the occupancy of the premises by the defendants had all of the apartments been occupied by tenants.

[1] As to the first allegation of error, that of misconduct of the district attorney, this contention is predicated upon the request or alleged demand made by the district attorney in the presence of the jury upon defendant's counsel for a certain contract of purchase of certain furnishings, and also for a certain assignment of the lease of the apartments. It is the contention of defendant that the making of such request in the presence of the jury was prejudicial error, in that it violated the rule that the defendant shall not be compelled to testify against himself. It appears from the transcript that when Leo J. Neeson, a witness for the people and an employé of the Broadway Department Store, was on the witness stand, he was questioned with regard to a certain contract between the Broadway Department Store and the defendant relating to certain furniture and furnishings sold by the Broadway Department Store, and which constituted a part of the furnishings in the apartment house. After the witness had been interrogated as to the nature of the furniture and furnishings in question, he was asked if he had the contract in his possession. Upon his replying that he did not, that it was his understanding that it had been delivered to the defendant Reid, the court asked if Mr. Reid had the contract in court, and the attorney for Mr. Reid replied that they would make search for it during the noon hour; whereupon the district attorney made a request that the contract be produced. Thereupon the defendant's attorney replied:

"We will be glad to produce it, if we have it."

Upon reconvening of the court after the noon recess, the defendant's attorney produced the contract and delivered it to the district attorney, and the district attorney remarked:

"I wish, your honor, the record to show that counsel, Mr. Mulligan, is now delivering the contract to me."

After its identification by the witness on the stand, it was offered in evidence; whereupon the defendant's attorney remarked:

"The only thing about that is this: I don't think it is material, although we can't have any special objection to it, excepting the question of the materiality."

It will be noted from the foregoing that neither the defendant nor his counsel at any time made any objection to the request of the district attorney or the suggestion of the court that the lease contract in question be produced. In fact, the only reasonable construction that can be placed upon the language used during the episode, and particularly upon the language used by counsel for the defendant, is that the defendant was ready and willing, yes and even desirous of having the contract in question offered in evidence.

On another occasion a witness on behalf of the people, one G. Allen Mason, was on the stand. It appears that he is a brother-in-law of the defendant Reid. There was evidence in the case that on or about the 1st of February, previous to the sale of the lease and furnishings, both the defendant Reid and the witness Mason made the assertion that Reid had assigned the lease in question to Mason and that Mason was then the owner of the lease. There was also testimony from one of the tenants in the apartment house, Mrs. Muller, that defendant Reid had told her that he had assigned and transferred the lease to his brother-in-law (Mason) and that she (Mrs. Muller) should pay her rent to Mason, that, in accordance with such instruction, Mrs. Muller did pay the rent for the months of February, March, and April to Mr. Mason, and there is evidence, in addition to Mrs. Muller's statement, that Mason received these checks for the rentals of this apartment.

It also appears from the evidence in the case that the furniture in the apartments in question was sold early in July, following the sale of the lease and furnishings to the complaining witness, and that the sale was made by the witness Mason under an assignment which he claims to have had from his brother-in-law (the defendant) of the furniture in the apartment. All of these matters were pertinent to the issues in the case; and, when the witness Mason was on the stand, he was asked by the district attorney if he had in his possession the assignment made to him by the defendant and concerning which there had been testimony. The witness replied that he did not have the assignment, that it was in the hands of the lawyers; whereupon the district attorney inquired of the attorneys for the defendant if he might have the assignment, and one of

the attorneys for the defendant replied: "I have the pleasure of handing it to you." The assignment in question was identified by the witness on the stand, and, when the district attorney offered it in evidence, one of the attorneys for the defendant remarked:

"We will consent to it. We were going to put it in ourselves, and it will save us the trouble; and we will ask counsel to read it to the jury, and the date of it."

It will be noted from the foregoing excerpts from the transcript that in neither instance was there any compulsion exercised in securing the lease contract for the furniture, or the assignment. The assignment, it appears, was in the possession of one of the defendant's attorneys, and for the purpose of the consideration of the question we may consider it in the hands of the defendant himself. There was absolutely no objection offered by defendant's counsel when the inquiry was made by the district attorney as to the whereabouts of the two documents in question, or when the request was made by the district attorney of defendant's counsel for their production. Moreover, it clearly appears from the replies made by defendant's counsel to the queries and request of the district attorney and the suggestion of the court that the defendant was quite willing and even eager to produce the documents desired and have them read into evidence.

Upon this point counsel for defendant have indulged in extended quotations and arguments in support of the general proposition that a defendant cannot be compelled to testify or to furnish evidence against himself. The evidence, however, clearly shows that the defendant does not come within that rule, inasmuch as, through his counsel, he voluntarily and really eagerly presented the documents himself. In the light of the view which we take of the evidence on this point, it is unnecessary for us to consider, or even discuss, the authorities cited by the defendant on this point, except perchance to say that, in all of the cases cited, it appears that the person from whom the document was requested or evidence sought, or his counsel, made vigorous objection to the request or demand.

[2, 3] The second ground urged for reversal is based upon the assertion that substantial error was committed by the court when the court asked questions of certain witnesses. It does not appear from counsel's contention on this point that the questions asked by the court were incompetent or immaterial, or, in themselves, improper; but defendant seems to be aggrieved because of the fact that the court saw fit to ask any questions at all. It is a well-established custom, supported by both reason and practice, for the judge presiding at a trial, from time to time to ask questions of any witness that may be on the stand, for the purpose of elucidating or making clear any points that might otherwise remain obscure. We have carefully examined the record in this case, and it appears clearly that most of the questions asked by the court had to do with figures, as, for instance, the different amounts paid at different times, and also as to dates. Manifestly, the purpose in all of the questions was to make more clear matters that had previously been the subject of testimony, and, as frequently occurs, in dealing with figures a confusion often arises and the real bearing of the figures is not made clear. Furthermore, there was no valid objection made by counsel for the defendant at any time during the questioning by the court. It is true, at one place, counsel for the defendant does make the statement that, "for the purpose of the record, we wish to object to the court questioning the witness"; but no ground of objection was made and, under the well-established rule, the objection had no force. Hence, not only, in our opinion, was the court well within its rights in propounding the questions which were asked of the witnesses, but there being no valid objection offered, the defendant cannot now be heard to complain.

[4] The third specification of error has to do with the introduction of certain evidence. The witnesses Lon A. Schimpf and his wife, Irene Schimpf, were permitted to testify to the circumstances under which they entered into and occupied one of the apartments. It appears that on or about the 3d day of April the Schimpfs moved into one of the apartments that was not occupied at the time that the complaining witness took over the apartments, but which, according to the testimony of the complaining witness, the defendant represented to her had been leased and a deposit made thereon. The Schimpfs both testified that, a day or two before they moved into the apartment, the defendant, through a mutual acquaintance, had proposed to them that they come over and occupy one of the apartments while he and his wife were temporarily absent, which absence was necessary on account of the ill health of his wife; that the defendant stated to them that there would be no financial obligation on their part, except to pay for the gas and electricity used by them—in other words, they were to have the apartment free of rent for the period of a month—that, pursuant to this invitation, the Schimpfs moved into the apartment on April 3d and remained there for one month.

They further testified that they made no payment for rental, and that they had not signed any check in payment of the rental. There was evidence in the case that, several days after the complaining witness had moved into the apartment house, the defendant came to her with several checks which purported to be payments by tenants for the April rentals, and that among these checks was one for $110 which purported to be the

April rental from the Schimpfs for the apartment occupied by them. There is some conflict in the testimony as to whether this check was signed by Mr. Schimpf or not. Mr. Schimpf positively denies that he signed such a check, and there would appear to be no motive on his part to deny the writing of the check if he had given it. The Schimpfs further testified that when they moved into the apartment the defendant gave to them a receipt which purported to show that the Schimpfs had paid rental for the month of April for the apartment. The understanding on the part of the Schimpfs in receiving the receipt was that it might be necesary to show that they had paid their rent if any one should raise the question. Defendant urges that error was committed by the court in permitting this testimony, as all of the circumstances testified to occurred after April 1st, and that only circumstances involving the representations made prior to April 1st and which were made as inducements to the complaining witness to enter into the contract in question were competent and material.

It will be kept in mind that one of the alleged misrepresentations set forth in the information was that the defendant represented the two vacant apartments as having been rented by bona fide tenants and deposits made thereon. Inasmuch as the Schimpfs appeared and occupied one of these apartments, it was a pertinent question as to whether or not they were bona fide tenants as represented by the defendant. It was a proper question for the jury to determine whether the Schimpfs' occupation of the apartment for the month of April was a subterfuge or not. Manifestly the Schimpfs were not bona fide tenants.

[5] The defendant also contends that the court erred in permitting the witness William Jennings Bryan, Jr., to testify concerning a certain civil action in which the defendant here was made a defendant, and out of which certain garnishments were issued and levied upon tenants occupying the apartments in question. That action was filed about February 1st, previous to the time when the complaining witness purchased the apartments. The witness Bryan was allowed to testify, over the objection of the defendant, as to certain conversations he had relative to the ownership of the lease covering the apartments. These conversations, it appears, occurred early in February, and were had with the defendant, and one conversation with the defendant's brother-in-law, G. Allen Mason. The witness Bryan testified that, acting as attorney for a Hollywood bank which was a creditor of the defendant, he had brought the action and levied garnishments on the tenants in the apartments on the theory that the lease belonged to the defendant here; that, immediately following the levying of the garnishments, the defendant appeared in his office and asserted that he was not the owner of the apartments; that the lease belonged to Mr. Mason, and urged that the garnishments be released so that Mr. Mason could collect the rentals from the tenants. The witness Bryan further testified that subsequently Mr. Mason appeared at his office, in company with the defendant, and made the assertion that he was the owner of the lease and entitled to collect the rents. Relying upon these assertions that Mason was the owner of the apartments, the witness Bryan testified that he caused the garnishments to be released. Manifestly this testimony went directly to the question of the ownership of the lease in question, and this testimony, together with the testimony of Mrs. Muller, a tenant of one of the apartments, that she had paid the rent for her apartment for the months of February, March, and April to Mr. Mason, and made these payments upon the direction of the defendant, he (the defendant) informing her that Mason was the owner of the lease, is clearly pertinent to the alleged representation of ownership.

[6] Another specification of alleged error relates to the testimony of the witnesses Sprague, Morrison, and Alton with reference to the ownership of the furniture and furnishings in the apartments. From the testimony of these witnesses, it appears that a large portion of the furniture situate in the apartment house was purchased in October, 1923, from the Moneta Furniture Company and the Morrison Furniture Company. The purchases were made on contract which provided for installment payments. Some time prior to April 1, 1924, an arrangement was made whereby the Morris Plan Bank took over the obligation of the defendant for the payment of the balance due on the furniture, and as a part of that transaction, what in effect was a bill of sale was made of the furniture to the Morris Plan Bank. According to the testimony of these witnesses, on April 1st, and immediately prior thereto, and during the period of the negotiations between the defendant and the complaining witness which led up to the sale, the title to most of the furniture in question was in the Morris Plan Bank. This testimony was pertinent to the question as to whether or not the defendant did own the furniture free and clear of any lien, as he claimed, if the jury believed that he made the representation.

It furthermore appears from the testimony in the case that subsequently, payments being in default on account of the contract with the Morris Plan Bank, steps were taken, which, early in July, resulted in the sale and removal of the furniture from the apartment house. These proceedings had their foundation in the contract and bill of sale which had been executed by the defendant to the Morris Plan Bank.

We have covered all of the points urged

by counsel for the defendant on behalf of his appeal. It might be further added that we have carefully read the voluminous transcript of the record, and feel that the evidence is abundantly sufficient to support the verdict.

For the foregoing reasons, the order and the judgment appealed from are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

72 Cal. App. 452

PEOPLE ex rel. GOODELL v. GARRETT.
(Civ. 5000.)

(District Court of Appeal, Second District, Division 2, California. April 27, 1925. Hearing Denied by Supreme Court June 25, 1925.)

1. Appeal and error ⊂⊃102—Order sustaining demurrer is not appealable, hence appeal therefrom will be dismissed.

Order sustaining demurrer to complaint in quo warranto, is not appealable, hence appeal therefrom will be dismissed.

2. Quo warranto ⊂⊃33—Attorney General may, upon information of private party, institute proceeding in name of people to settle title to public office.

Under Code Civ. Proc. § 803, Attorney General may, upon complaint or information of private party, institute proceeding in name of people to settle title to public office.

3. Officers ⊂⊃55(2)—Office, incumbent of which is elected or accepts appointment to, another public office, becomes vacant immediately, if two offices are incompatible.

Where an individual is an incumbent of a public office, and during such incumbency is appointed or elected to another public office and enters upon the duties of the latter, the first office becomes vacant at once, if the two offices are incompatible.

4. Officers ⊂⊃55(2)—Office of justice of the peace held to become vacant upon acceptance by incumbent of appointment to "police judge."

In view of public policy exhibited in Pol. Code, § 4014 (read in connection with section 4428), and in Const. art. 4, § 20, office of justice of the peace of Santa Monica township *held* to become vacant upon acceptance by incumbent thereof, of appointment as "police judge" of the city of Santa Monica, operating under freeholders' charter (St. 1915, p. 1724), notwithstanding inhabitants never availed themselves of the two township justices of the peace to which they were entitled under Pol. Code, § 4014; a "police judge" whose eligibility to and duties of which office are therein prescribed and St. 1907, pp. 1043, 1044, art. 14, §§ 3—5, 10, and generally in Code Civ. Proc. § 103, being sometimes known as a city justice of the peace as contradistinguished from a township justice of the peace.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Police Judge.]

Appeal from Superior Court, Los Angeles County; Hartley Shaw, Judge.

Proceeding in quo warranto by the People, on the relation of Thomas Henry Goodell, against W. R. Garrett. From an order sustaining defendant's demurrer, and from a judgment for defendant, plaintiff appeals. Appeal from order dismissed, and judgment reversed, with directions.

Hearing denied by Supreme Court; SHENK, J., dissenting.

Weber & Crawford, of Santa Monica, for appellant.

Edward T. Bishop, Co. Counsel, and Everett W. Mattoon, Chief Deputy Co. Counsel, both of Los Angeles, for respondent.

Chester Coffin, City Atty., Tanner, Odell & Taft, M. F. Fogel, and F. D. Macomber, all of Santa Monica, W. Blair Gibbens, of Ocean Park, B. G. Hulbert, Willard Conklin, and F. W. Shapleigh, all of Santa Monica, C. E. Salisbury and Alfred Black, Sr., both of Los Angeles, and N. D. Miller and A. E. O'Flaherty, both of Santa Monica, amici curiæ.

WORKS, J. This is a proceeding in quo warranto instituted for the purpose of testing the right of defendant to hold the office of justice of the peace. A demurrer to the complaint was sustained without leave to amend, and judgment went for defendant. Plaintiff appeals from the order sustaining the demurrer and from the judgment.

[1] The order sustaining the demurrer is not an appealable one. The appeal from the order must therefore be dismissed.

The complaint alleges that respondent was elected a justice of the peace of Santa Monica township, in Los Angeles county, in November, 1922, and that he qualified as such justice on January 4, 1923; that at all times since the date last mentioned he has been such justice except as in the complaint later alleged; that Santa Monica township is a judicial township, created under the Constitution and laws of the state; that the city of Santa Monica is a municipal corporation, operating under a freeholders' charter adopted and ratified as provided in the Constitution; that the freeholders' charter of the city of Santa Monica provides for a police judge; that the civil jurisdiction of the police court of Santa Monica is coextensive with that of the Santa Monica township court, but that the former has "exclusive jurisdiction over all high grade misdemeanors as provided by law"; that on April 21,

1924, a vacancy, having arisen in the said office of police judge, by the death of the incumbent theretofore exercising the duties of the office, respondent was appointed police judge to fill such vacancy; and that respondent accepted said appointment, thereafter qualified as such police judge and has ever since acted as such. The complaint contains other allegations, but with the view which we entertain of the law as applied to those already set forth, there is no necessity for referring to other averments of the pleading. The prayer is that it be decreed that respondent unlawfully holds the office of justice of the peace, that the office be adjudged to be vacant, and for general relief.

[2] It is contended by the friends of the court—and several authorities are cited to support the contention—that: "No private citizen has any right to compel an officer to show title (to an office) until he has shown his own right in the first place to attack it" (Vrooman v. Michie, 69 Mich. 42, 36 N. W. 749), and that therefore the complaint is insufficient. The case from which the language of the point is taken was one in which a relator claimed title to an office as a holdover, because of an alleged defect in the title of the defendant, or respondent, whom he sought to displace. No such claim is made here. The relator in the present instance cuts no figure in the litigation, evidently, except as an informant to the Attorney General, who institutes the proceeding in the name of the people for the purpose of settling a question in which the public appears to have an interest. At any rate, the complaint will bear no other construction. Such an action is provided for by the terms of section 803 of the Code of Civil Procedure, and the enactment is by express provision made mandatory upon the Attorney General whenever a proper case is shown him. While the name of this officer of the state is not upon the briefs on this appeal, it is appended to the copy of the complaint which appears in the record brought up from the trial court. The point made seems therefore to have no application here. Lamb v. Webb, 151 Cal. 451, 91 P. 102, 646, has no bearing upon the present case.

[3, 4] The rule is settled with unanimity that where an individual is an incumbent of a public office and, during such incumbency, is appointed or elected to another public office, and enters upon the duties of the latter, the first office becomes at once vacant if the two are incompatible (Mechem, Public Officers, § 419; 22 R. C. L. tit. "Public Officers," § 63). It is contended by appellant that the two offices now held by respondent are incompatible, and that under the rule stated he is an interloper in the first office entered by him, that of justice of the peace, because of his occupancy of the second office, that of police judge. The question whether the two positions are incompatible is the question of moment to be determined on the appeal.

The doctrine arising from attempts by single individuals to exercise the functions of incompatible offices springs out of considerations of public policy (Mechem, Public Officers, § 422; 22 R. C. L. tit. "Public Officers," § 55; Bryan v. Cattell, 15 Iowa, 538; State v. Buttz, 9 S. C. 156; State v. Jones, 130 Wis. 572, 110 N. W. 431, 8 L. R. A. [N. S.] 1107, 118 Am. St. Rep. 1042, 10 Ann. Cas. 696; State v. Wait, 92 Neb. 313, 138 N. W. 159, 43 L. R. A. [N. S.] 282; State v. Wittmer, 50 Mont. 22, 144 P. 648), such considerations arising naturally from the view that two offices cannot be held by one person when, from the divergent character of the offices, the public interest will suffer thereby. In a leading case, which deals with the doctrine, the following dogmatic and apparently exclusive language is employed:

"Incompatibility between two offices, is an inconsistency in the functions of the two; as judge and clerk of the same court—officer who presents his personal account subject to audit, and officer whose duty it is to audit it. The case of Bryant (4 T. R. 715, and 5 Id. 509), cited by appellant, does not conflict with this view. It was decided upon the meaning of the particular statute, which required the personal presence of the officer at the prison. Where one office is not subordinate to the other, nor the relations of the one to the other such as are inconsistent and repugnant, there is not that incompatibility from which the law declares that the acceptance of the one is the vacation of the other. The force of the word, in its application to this matter is, that from the nature and relations to each other, of the two places, they ought not to be held by the same person, from the contrariety and antagonism which would result in the attempt by one person to faithfully and impartially discharge the duties of one, toward the incumbent of the other. Thus, a man may not be landlord and tenant of the same premises. He may be landlord of one farm and tenant of another, though he may not at the same hour be able to do the duty of each relation. The offices must subordinate, one the other, and they must, per se, have the right to interfere, one with the other, before they are incompatible at common law." People v. Green, 58 N. Y. 295, 304.

It is not meant by this decided language that offices will not be incompatible unless they fit or come within some expression contained in the language quoted.

"It is extremely difficult to lay down any clear and comprehensive rule as to what constitutes incompatible offices." 22 R. C. L. tit. "Public Officers," § 55.

"It seems to be supposed that, in order to render two offices incompatible, there must be some such relation between them as that of master and servant—that the one must have 'controlment of the other,' or that the one must be charged with the duty of auditing or supervising the accounts of the other, or that the one must be chosen by or have the power

of removal over the other. Now, while authorities have been cited to show that offices bearing such relations to each other have been held to be incompatible, they merely afford instances of incompatible offices, and do not furnish, nor do they pretend to furnish, definitions; and therefore it does not by any means follow that these are all the instances in which offices can be said to be incompatible. For example, the case of Rex v. Jones, 1 B. & Adol. 677 (20 E. C. L. R. 467), is cited apparently for the purpose of introducing what is called 'a definition' of incompatible offices by Lord Tenterden. But it is apparent, not only from the context, but from the very phraseology quoted, that his remark was not intended as a definition but merely as an instance or an illustration of what would be incompatible offices." State v. Buttz, supra.

These expressions of the South Carolina court and others of a like character, which are to be found in the opinion from which the quotation is taken, apply as well to People v. Green, supra, as they do to Rex v. Jones. It is evident from this circumstance, as well as from the general nature of the subject involved, that the New York court intended merely to specify particular situations which would stamp two offices, when considered together, with the quality of incompatibility, not that the situations named by the court furnished an all-inclusive guide for the ascertainment of incompatibility. The relationship between offices, which will lead to a judicial determination that they are incompatible, and cannot therefore be held by one person, will always appear when, to quote from a standard text-book:

"The nature and duties of the two offices are such as to render it improper, from consideration of public policy, for one incumbent to retain both." Dillon, Mun. Corp. (5th Ed.) § 419.

The nature and the duties of two offices, asserted to be incompatible, may be found, as a matter of course, in legislative enactment or constitutional provision. For example, the Constitution of Indiana either provides, or formerly did provide, that no man may hold two lucrative offices, either state or national, at the same time (Foltz v. Kerlin, 105 Ind. 221, 4 N. E. 439, 5 N. E. 672, 55 Am. St. Rep. 197), and the organic law of Texas inhibits the holding by one person at one time of more than one office of emolument (Odem v. Independent School Dist. [Tex. Civ. App.] 234 S. W. 1090). Our own Constitution provides (article 4, § 20):

"No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this state."

Many inhibitions of a kindred character are to be found in the Constitutions and statutes of the various states. Leaving such positive declarations, it is obvious that less direct provisions may be found in legislative enactments, necessarily to be construed as so operating as to prevent the holding of a plurality of offices by one and the same individual. In other words, the public policy which dictates that two offices should not be held by the same person may be ascertained from statutes the effect of which is to render such offices incompatible. State v. Anderson, 155 Iowa, 271, 136 N. W. 128, Ann. Cas. 1915A, 523; Howard v. Harrington, 114 Me. 443, 96 A. 769, L. R. A. 1917A, 211.

With this introduction we proceed to inquire into the expressions of the legislative will concerning the two offices which are in question here. The officer to whom we have heretofore referred as a police judge is sometimes known in the legislative parlance of the state as a city justice of the peace, as contradistinguished from a township justice of the peace, the latter office being that to which respondent had been elected before he accepted an appointment as "police judge," and of which he has been performing the duties since such appointment, despite the objections of appellant as to his right so to do. City justices of the peace (police judges) can be selected, under the general law, only from that class of persons who have been admitted to practice law. Code Civ. Proc. § 103. The same test of eligibility is found in the freeholders' charter of the city of Santa Monica. Stats. 1915, p. 1724. No such requirement applies to township justices of the peace. It is required by the freeholders' charter that all elective officers of the city of Santa Monica, among which is the "police judge," shall have resided in the city continuously one year next preceding their election. Stats. 1915, p. 1724. The law contains no provision as to the place of residence of one who would become a township justice of the peace. It is provided in the freeholders' charter of the city of Santa Monica that the police court of the municipality shall have exclusive jurisdiction of criminal proceedings for the violation of city ordinances, of all civil actions and proceedings arising out of such violation, and for the collection of any license required by ordinance, except when jurisdiction exists in other courts under the Constitution. Stats. 1907, p. 1043, art. 14, § 3. By the charter the tribunal is also given exclusive jurisdiction of certain public offenses against the statutes of the state, when not prosecuted under indictment or information (Id. p. 1044, art. 14, § 4), and it is given concurrent jurisdiction with the justice court of Santa Monica township of civil cases arising in the city which would be cognizable under the law by the justice court. Id. § 5. By the organic law of the city, the police court is required always to be open for the transaction of business, except on legal holidays. Id. § 10. No such provision of law exists as applied to township justice

courts. The foregoing will exhibit some of the differences between the two tribunals over which respondent now presides, and it must be admitted that under the many authorities bearing upon the subject they probably furnish little, if any, weight in impelling to the view that the two offices are not compatible.

There is, however, one enactment which in our view is of controlling moment in a determination of the question before us. Section 4014 of the Political Code provides, in part, italics, of course being ours:

"The *officers* of a township are, *two justices* of the peace, * * * and such subordinate officers as are provided by law. In townships containing cities, or parts of cities, of the second, third, fourth, or fifth class, in which city justices (police judges) or recorders are elected or appointed, there shall be but one justice of the peace."

It is conceded in the briefs that these provisions apply to Santa Monica township. To our minds they appear to be plain in their application and to require but little comment. They import to us that the people of Santa Monica, speaking of the place as both a city and a township, are entitled, but for the interposition of the freeholders' charter, to two officers known as township justices of the peace, not to two township justice courts which might be presided over by one and the same person. This view, if not plain from what has been quoted from the section, is rendered impregnable by reference to a provision of the enactment which follows soon after the portion above set forth. The provision alluded to reads that "in townships containing cities of the first and one-half class there shall be four justices of the peace." Could these four justices be one person? If they could not, how could the two which are provided for townships like Santa Monica be one person? If the four could be one and the two could be one, what sense is there in the enactment? What efficient administration of justice is by the law then provided for townships of differing populations, classification, of course, being made according to population? The answers to all these questions seem obvious. Then to the next step: It appears certain that section 4014 intends that, when a police judge is to be appointed in a city like Santa Monica, he is to take the place in the scheme of things of one of the township justices of the peace. It appears to us idle, under the language of section 4014, to suppose that, having been entitled to two officers, two township justices, before the adoption of a charter providing for a police judge, the people of Santa Monica must be satisfied under the law with one officer exercising two offices after the adoption of the charter. It appears to us that the provisions of section 4014 exhibit a public policy which is violated by the attempted retention of both offices by respondent. In our opinion, the two offices are incompatible. Not only do we entertain that view upon a reading of section 4014, but it is supported by State v. Hadley, 7 Wis. 700, and by State v. Anderson, supra. The office of township justice, now being attempted to be exercised by respondent, is therefore vacant under the law.

Our attention is called by respondent to the fact that the people of Santa Monica never availed themselves of the provision of section 4014 allowing them two township justices of the peace, and that there never has been in the township more than one such justice. This circumstance boots nothing in an endeavor to ascertain the meaning of the law. The question here involved is purely one of statutory construction, and that question cannot be affected by the mere fact that the statute has not been put to its full use. There the section is. The question is, merely, what does it mean?

Section 4428 of the Political Code provides that when a police judge is disqualified, ill or absent from the city of his jurisdiction he may "by written request call in any justice of the peace of the same county to act in his place and stead." It is contended by the friends of the court that this language indicates a legislative intent that a person, who is a justice of the peace, may at the same time take a police judgeship and permanently hold both posts. We cannot follow our friends in this contention. The section must be read in connection with section 4014 of the same Code, which we have already construed. Section 4428 means only that, despite the provisions of section 4014, a justice of the peace may temporarily occupy the bench of a police judge, to the end that the administration of justice may not be impeded by the disqualification, illness or absence of the incumbent magistrate. Exactly this view of the law, under similar circumstances, is taken in at least one case (In re Corum, 62 Kan. 271, 62 P. 661, 84 Am. St. Rep. 382). The section in no way casts light upon the question before us.

The judgment must be reversed, but, under the circumstances of the case, we cannot direct the trial court to overrule the demurrer to the complaint. The demurrer was both general and special, and it is stated in the briefs that the court sustained it upon the theory that the general demurrer was good, without reference to the special demurrer. This situation is also indicated by the court's refusal to permit an admendment of the complaint. The question, as to the integrity of the complaint, when tested by the special demurrer, has not been argued in the briefs, and we have not, of course, considered it. The special demurrer may be good or it may not. If it is good, the complaint doubtless may be

perfected by amendment. All we decide is that the pleading states a cause of action.

The appeal from the order sustaining the demurrer is dismissed. The judgment is reversed, with directions to the trial court to proceed with the action in accordance with the views expressed in this opinion.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

72 Cal. App. 468

RILEY et al. v. BROWN. (Civ. 4384.)

(District Court of Appeal, Second District, Division 2, California. April 29, 1925.)

1. Evidence ⊜70—Presumption of correctness does not attach to entries in private books of one of partners.

Presumption of correctness, which, as between partners, attaches to entries in partnership books to which all partners have access, does not attach to entries in private books of one of partners, which entries must be established by extrinsic proof.

2. Partnership ⊜332—Stipulations ⊜14(11)—Stipulation and order for accounting of partnership held to include all account books kept by defendant.

In action for dissolution of partnership and an accounting, stipulation and order, for reference to accountant, of all books kept by defendant to take an account therefrom, *held* to include all account books kept by defendant.

3. Appeal and error ⊜883—Stipulation, referring all books kept by liquidating partner to accountant to take account, held no ground for complaint by plaintiff on appeal.

In suit for dissolution of partnership and an accounting, both parties having expressly stipulated to refer all books kept by liquidating partner to an accountant to take an account therefrom, and reference having been made and account taken, it was too late on appeal for plaintiff to complain thereof.

4. Partnership ⊜333—Liquidating partner held entitled to credit for disbursements made from his personal funds while liquidating partnership affairs.

Liquidating partner was entitled to be credited with disbursements made by him from his own personal funds while engaged in liquidating affairs of partnership, though they were made after expiration of time during which partnership was to continue and after action for an accounting was commenced.

5. Evidence ⊜376(12)—Generally, entries of disbursements made by liquidating partner during liquidation in books kept by him are not admissible in his favor, as against copartners.

Though a liquidating partner is entitled to be credited with disbursements made by him during liquidation, entries of such disbursements in books kept by him, within his possession and under his sole control, and to which his partners have no access, are not generally admissible in his favor, as against his copartners.

6. Stipulations ⊜18(6)—Partners could not object to use of liquidating partner's books as evidence, in view of stipulation.

In suit for dissolution of partnership and an accounting, both partners, having expressly stipulated to refer all books kept by liquidating partner to an accountant to take an account therefrom, could not thereafter object to use of such books as evidence.

7. Estoppel ⊜83(1)—Liquidating partner not estopped to claim credit for items shown on accountant's report by statements rendered to copartners.

In suit for dissolution of partnership and an accounting, with stipulation by both parties for reference to an accountant of all books kept by liquidating partner to take an account therefrom, liquidating partner *held* not estopped to claim credit for any item shown on report submitted by accountant because statements rendered by him to copartners showed a greater sum of money to be due than was shown by accountant's report, where neither of such statements was rendered or accepted as a final settlement and copartners were not misled to their prejudice or to liquidating partner's benefit by anything contained in either of statements.

8. Estoppel ⊜52—Each and every element must be present to constitute.

Each and every element must be present to constitute an estoppel.

9. Estoppel ⊜52—What essential to "quasi estoppel" stated.

To constitute "quasi estoppel," it is essential that party invoking it shall have been misled by prior conduct or prior inconsistent claim of other party, and that he shall have changed his position in reliance thereon, and that either he shall have been prejudiced or other party shall have been benefited by such conduct or inconsistent claim.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Quasi Estoppel.]

Appeal from Superior Court, San Bernardino County; Rex B. Goodcell, Judge.

Suit by George B. Riley and another, doing business under the firm name and style of Armacost, Riley & Co., against C. M. Brown. From the judgment, plaintiffs appeal. Affirmed.

Duke Stone, of Los Angeles, and Harry C. Wesley, for appellants.

Leonard, Surr & Hellyer, of San Bernardino, for respondent.

FINLAYSON, P. J. This is an action for the dissolution of a partnership and for an accounting of its affairs. Plaintiffs, at the times herein mentioned, were copartners doing business in the state of Ohio under the firm name of Armacost, Riley & Co. Defendant was engaged in business at the

city of Redlands, in this state, where he maintained an office. Some time prior to July 1, 1917, plaintiffs and defendant formed a partnership for the growing, packing, and marketing of cantaloupes during the 1917 season. The cantaloupes were to be grown in the Imperial valley. It was for the purpose of securing a dissolution of this partnership and an accounting of its affairs that the action was brought. The appeal is by the plaintiffs, who claim that the judgment awards them a smaller sum than is due them.

The trial court found that the partnership for the growing, packing, and marketing of the cantaloupes was entered into by plaintiffs on the one side, and as one of the parties thereto, and by defendant on the other side, and as the other party thereto; that under their agreement plaintiffs, as one party, were equal partners with defendant, as the other party; that the profits and losses were to be shared and borne equally by and between the two parties; that plaintiffs, as the one party, and defendant, as the other, were to furnish an equal amount of capital; that the business of the partnership was to be conducted by defendant, and that it was to be under his direction and control. An accounting was had during the course of the trial, as the result of which the court further found that plaintiffs are entitled to be paid by defendant the sum of $107.58. A final judgment was entered accordingly on January 11, 1922, decreeing a dissolution of the copartnership as of December 24, 1921, and adjudging that plaintiffs recover from defendant the above-mentioned sum. Appealing from that judgment, plaintiffs claim that the trial court committed error in taking the account, and that but for such error a much greater sum would have been found to be due them.

The precise nature of the partnership agreement and of the respective rights and obligations of the parties thereunder could be determined only from a consideration of a mass of correspondence passing between plaintiffs and defendant over a considerable period of time. Following the introduction of this correspondence, and after the learned trial judge had announced from the bench that he would find the partnership agreement to be as above stated, an informal conversation ensued between court and counsel relative to the accounting which the parties desired should then be taken in order to determine the balance, if any, which might be due from one party to the other. This colloquy resulted in a stipulation in open court, whereby it was expressly agreed by plaintiffs and defendant:

"That a reference of the accounts involved in this action may be made to the firm of R. E. Parr & Co., certified accountants, with directions to ascertain *from the books and accounts of the defendant* [italics ours] the amount and date and source of receipts and the individual items of disbursements, and what the same were for, and to whom paid, making a report in detail to the court, furnishing one copy thereof to plaintiffs and one copy thereof to defendant, reserving to either party the right to object to the allowance of any item as a matter of law."

Thereupon the court made an order in accordance with the terms of this stipulation, referring the accounts to R. E. Parr & Co. to ascertain "from the books and accounts of the defendant" the items of receipts and disbursements, and ordering the accountants to make a detailed report to the court, reserving to either party when the matter should come before the court the right to object to the allowance of any item as a matter of law. As a part of this order the court further directed that—

"All books of original entry, and all books, documents, checks, papers, or memoranda whatsoever, pertinent to the transaction or the partnership business between plaintiffs and defendant, *now in the possession or control of the defendant* [italics ours], be furnished to the referee for the purpose of this reference."

Defendant, who was interested in a number of business ventures in California, personally attended to all of the partnership affairs in this state. Subsequently to the formation of this partnership with plaintiffs he entered into a partnership with a man of the name of Ford, who advanced for defendant some of the moneys which the latter put into the business of his partnership with plaintiffs. No set of books was ever opened which related exclusively to the transactions in which the partnership between plaintiffs and defendant was interested. Instead, defendant opened and kept, at his office in Redlands, a set of books in the name of "Brown & Ford," which, in addition to entries of the transactions of the partnership between himself and Ford, also contained the principal items pertaining to the business of defendant's partnership with plaintiffs. These books, however, did not contain entries of all of the transactions growing out of defendant's partnership with plaintiffs. Though counsel for appellants are pleased to refer to these books as the "partnership books," they were not partnership books in any true sense of the term; that is, they were not books pertaining exclusively to the business of the partnership between plaintiffs and defendant, nor was any set of books ever opened which contained only items relating to defendant's partnership with plaintiffs.

In addition to the books kept by defendant in the name of Brown & Ford, there was also a set of books kept by him in the name of "C. M. Brown, Agent," and another set in the name of "Gold Banner Association"—a corporation with which defendant was con-

nected. Some of the items pertaining to the business of the partnership between plaintiffs and defendant were entered in each of the two last-mentioned sets of books, and did not appear in the books kept in the name of Brown & Ford. The sums advanced by plaintiffs, and by Ford on behalf of defendant, and which were to meet the expenses of growing, packing, and marketing the cantaloupes, were entered in the Brown & Ford books; but of those sums which defendant disbursed from his own moneys in the business of his partnership with plaintiffs, some were entered in the books which he kept in the name of C. M. Brown, agent, and some in those which he kept in the name of the Gold Banner Association.

Following the court's order of reference, the accountants made an audit of the books which defendant kept in the name of Brown & Ford—the books which counsel for appellants have termed the "partnership books." No audit was at that time made by the accountants of the other books kept by defendant, notwithstanding these other books showed the disbursements made by defendant from his own moneys in his conduct of the partnership business. Having made this partial audit, the accountants filed their report with the court, showing a balance due from defendant to plaintiffs considerably in excess of the sum which the court found to be the amount due plaintiffs. After the filing of this report, the trial was resumed; it having previously been continued to enable the accountants to audit the books and to make their report. On resuming the trial, and upon learning that the accountants had audited only the Brown & Ford books, the court made an order, over plaintiffs' objection, re-referring the matter, with directions, to the accountants to comply with the original order of reference. Pursuant to this order of re-reference, the accountants audited the books which defendant kept in the name of "C. M. Brown, Agent," and likewise those which he kept in the name of the "Gold Banner Association." Later a report (hereafter referred to as the supplemental report) was made to the court by the accountants, showing the result of the audit made by them on this re-reference. Thereafter the trial again was resumed, and plaintiffs' counsel specifically objected to certain items shown on the original report and likewise to certain items shown on the supplemental report. Thereupon defendant introduced evidence showing the propriety of the items thus objected to and that they should be allowed. On the two reports of the accountants, and on the evidence adduced by defendant to support the items specifically objected to by plaintiffs, the court found that the amount due from defendant to plaintiffs was that which we have already stated—$107.58.

Prior to the commencement of the action, namely, on August 20, 1917, defendant rendered a statement to plaintiffs which showed that at that date there was due to the latter, as a result of the partnership venture, a balance of $1,104.28. Defendant testified that at that date it was not possible to render a complete statement, and that the one rendered by him gave only an approximate statement of the condition of the partnership affairs at that time. Again, on July 13, 1918, which was prior to the commencement of the action, defendant rendered another statement to plaintiffs, showing that at that date the balance due the latter was $4,555.72. Defendant testified that this statement was prepared by his bookkeeper, and he pointed out what he claimed were manifest errors appearing on the face of the statement and which improperly augmented the true balance due plaintiffs.

Appellants earnestly contend that the court erred in ordering the re-reference, in receiving the supplemental report in evidence, and in considering the items shown thereon. This objection is based upon the theory that the original report, showing, as it does, the result of an audit of the Brown & Ford books, is the only report which is founded upon an audit of the "partnership books," and that, therefore, no item shown on the books kept in the name of "C. M. Brown, Agent," or in the name of "Gold Banner Association" should be considered.

[1-3] Unquestionably it is true, as appellants claim, that the presumption of correctness which, as between the partners, attaches to entries in partnership books to which all of the partners have access, does not attach to entries in the private books of one of the partners. Entries in other than partnership books to which all the partners have access must be established by extrinsic proof. Wheatley v. Wheeler, 34 Md. 62; Adams v. Funk, 53 Ill. 219. But in this case we are confronted with a stipulation the terms of which are so broad that it includes all account books kept by respondent, and it expressly dispenses with extrinsic proof as to all items shown by such books, excepting only such items as might be specifically objected to by one of the parties. Indeed, in the instant case there were no partnership books. The books of the firm of Brown & Ford were not the books of the partnership between appellants and respondent. At any rate, they were no more the books of that partnership than were the books kept by defendant in the name of "C. M. Brown, Agent" and "Gold Banner Association." The entries which related to the affairs of the partnership between appellants and respondent were scattered through these three different sets of books, and were there interspersed with numerous other items relating to the different enterprises in which respondent was interested. This situation evidently was rec-

ognized by court and counsel when the stipulation was made, for, when that arrangement was entered into, it was expressly agreed, not that an audit should be made of the "partnership books"—there were none—but that the accountants should "ascertain from the books and accounts *of the defendant*" the partnership receipts and disbursements. And in the original order of reference, which was based upon this stipulation, it was ordered that—

"*All* books of original entry, and *all* books, documents, checks, papers, or memoranda whatsoever, pertinent to the transaction of the partnership business between plaintiffs and defendant, *now in the possession or control of the defendant*, be furnished to the referee for the purpose of this reference."

The terms of the stipulation and of the order were broad enough to include, as it doubtless was intended that they should include, all of the several sets of books from which the supplemental report was made. It is now too late for appellants to escape the consequences of a stipulation to which they thus solemnly committed themselves.

To protect the parties from any implication that the report of the accountants might be accepted as conclusive evidence of the correctness of the items shown therein, the stipulation included a provision to the effect that there was reserved to either party, when the report should be made and filed, "the right to object to the allowance of any item as a matter of law." From the remarks made by the court and by counsel at the time when the stipulation was being entered into, it is evident that the right thus reserved to object to the allowance of any items "as a matter of law" was understood to mean the right to object to any item which the objecting party for any reason might deem to be an improper credit or an improper charge. Immediately preceding the definite formulation of the stipulation, counsel for appellants employed this language:

"All we want is what the books show, saving our right to object to items which we do not think are proper charges."

And the court, when framing the stipulation and proposing it to counsel for their acceptance or rejection, said:

"If the books show an item that you think is not a proper charge, you have a right to object to it; and Mr. Brown will deliver everything he has in the shape of books of account."

The net result of all that was said by court and counsel at the time when the stipulation was being framed is therefore substantially this: The accountants to whom the matter was to be referred were to audit all the books and documents in respondent's office or under his control, relating to the partnership's affairs, and were to make a report thereon; and all items shown on such report were to be deemed to be correct, and were to be admitted by the parties, save alone such as might be specifically objected to as improper charges. This was the course which was pursued, and properly pursued, by the learned trial judge throughout the trial after the parties had entered into the stipulation. Pursuant to this understanding, appellants did specifically object to a few of the items shown on the two reports, upon the ground that those particular items were not proper charges against them; and thereupon respondent introduced extrinsic evidence to sustain each and every item to which objection was thus made.

[4-6] The next ground of assault upon the supplemental report is that it shows items in respondent's favor which were records of disbursements made by him after the expiration of the term during which the partnership was to continue and after this action was commenced. There is no merit in this contention. Respondent acted as the liquidating partner. After the expiration of the cantaloupe season of 1917—the season during which the partnership was to continue—respondent was engaged, over a considerable period of time, in winding up the affairs of the partnership business. Without doubt, his right to be credited with every item of disbursement made by him from his own personal funds while thus engaged in liquidating the affairs of the copartnership is as unimpeachable as is his liability to be charged with all collections made by him on behalf of the firm during that period. But, though a liquidating partner is entitled to be credited with all disbursements made by him during the period of liquidation, entries of such disbursements in books kept by him in his possession and under his sole control, and to which his partners have no access, are not, as a general rule, admissible in his favor as against his copartners. 52 L. R. A. p. 846, note to Chick v. Robinson. Where, however, as in the instant case, the parties have expressly stipulated to refer all books kept by the liquidating partner to an accountant to take an account therefrom, it does not lie in the mouth of either party thereafter to object to the use of such books as evidence. Cameron v. Watson, 10 Rich. Eq. (S. C.) 64.

[7] As a further ground of objection to the supplemental report, it is urged that respondent is estopped to claim credit for any item shown thereon, for the reason that each of the statements rendered by him on August 20, 1917, and on July 13, 1918, shows a greater sum of money to be due to appellants than is shown on the supplemental report. The circumstances testified to by respondent support the conclusion that neither of these statements was rendered or accepted as a final settlement and agreement fully settling the right of the parties. Neither statement was intended to show a final balance reached

upon consideration of all of the partnership affairs. Prepared, as they were, during the period when respondent was engaged in liquidating these affairs, the statements necessarily were intended to show only a partial or approximate settlement. Indeed, it is often, if not generally, the case that a statement rendered by one partner to another, prior to the complete liquidation of the partnership affairs, is rendered and received merely as a tentative basis for the subsequent ascertainment of the proper balance to be struck. In this respect, an account rendered by one partner to his copartner stands upon a different basis from an account rendered between a debtor and his creditor. The inherent difference between the two situations and the reason therefor is clearly pointed out in Hughes v. Smither, 23 App. Div. 590, 49 N. Y. S. 115, affirmed without opinion in 163 N. Y. 553, 57 N. E. 1112, where the court says:

"The doctrine, as between debtor and creditor, of an implied promise resulting from the preparation and rendition of an account by one party, which is received and retained by the other in silence, cannot reasonably be applied to a partnership account. In the one case the account is rendered for the specific purpose of informing the debtor of the creditor's demand, and of obtaining payment. It is expected that such an account will, with reasonable promptitude, be scanned, and either paid, if found to be accurate, or disputed, if found to be inaccurate. * * * An entirely different attitude is assumed with regard to a partnership account. That is simply one partner's summary of the partnership dealings, and his version of the partnership status. The receipt of such an account suggests no immediate demand. The implication is that it is offered merely as a basis for subsequent liquidation. *It has no element of finality.* [Italics ours.] It leaves the person who receives it entirely free to seek further information before questioning his partner's figures. Both parties naturally understand that the account as rendered is tentative, and is but the first step in the direction of an accounting. Before there is a final settlement, they must go over their partnership affairs, arrive at a mutual understanding with regard thereto, and reach an agreement as to the proper balance to be struck."

[8, 9] It has been said by our Supreme Court that a party is not precluded from asserting a claim merely because it is inconsistent with some claim previously advanced by him. Lackmann v. Kearney, 142 Cal. 115, 75 P. 668. See, also, Pearson v. Hendrick, 13 Cal. App. 732, 110 P. 586; Frank v. Crescent Wharf, etc., Co., 50 Cal. App. 276, 195 P. 79. The principle which underlies this pronouncement governs here, unless there be some special reason why the doctrine of estoppel should be applicable to the facts of this case. Manifestly, in order to sustain appellants' claim that respondent is estopped, it must appear that each and every essential element of estoppel is present in the case. The estoppel which appellants invoke is of the kind commonly known as "quasi estoppel." 21 C. J. p. 1202. To constitute such estoppel, it is essential that the party invoking it shall have been misled by the prior conduct or the prior inconsistent claim of the other party; also that he shall have changed his position in reliance thereon (Muller v. Mayor, etc., of New York, 63 N. Y. 353); and that either he shall have been prejudiced or the other party shall have been benefited by such conduct or inconsistent claim (21 C. J. p. 1205; Stein v. Leeman, 161 Cal. 502, 119 P. 663). As was tersely said by the learned author of the opinion in Allen v. Hance, 161 Cal. 196, 118 P. 529:

"Whatever may have worked the estoppel, whether the estoppel rests in judgment, deed, contract, or in pais, in its essence it amounts to but this, that a man is forbidden to show the existence of a fact because by his past conduct, his declarations, his agreement, his deed or a judgment, it would work an injustice and an injury to his adversary to permit him to do so."

The appellants in this case were not misled to their prejudice or to respondent's benefit by anything contained in either of the statements. Indeed, appellants were not misled at all, for they never acted upon either statement, nor did they change their position by reason thereof; on the contrary, they brought this action praying for an accounting by the court of all the affairs of the partnership and for a recovery of such sum as that accounting might show to be due them. To attain the purpose of their suit, they expressly stipulated, in substance and effect, that accountants to be appointed by the court should "ascertain from the books and accounts of the defendant" all of the items necessary to enable the court to strike a correct balance, irrespective of what might be disclosed by either of the statements previously received by them.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

196 Cal. 308

RUSH v. LAGOMARSINO. (S. F. 10654.)

(Supreme Court of California. June 23, 1925.)

1. Negligence ⟸138(2)—Instruction erroneous as requiring plaintiff to prove freedom from contributory negligence.

Instruction that it must appear to jury's satisfaction that plaintiff was without fault or negligence, which may in any wise have contributed to the accident, was erroneous, as requiring plaintiff to affirmatively establish that he was not guilty of contributory negligence.

2. Negligence ⟸135—Contributory negligence defense to be established by defendant.

Defense of contributory negligence must be established by defendant by a preponderance of the evidence, unless such negligence is shown by or can be inferred from evidence adduced in support of plaintiff's case.

3. Negligence ⟸141(8)—Instruction on contributory negligence erroneous as ignoring qualification plaintiff's negligence must proximately contribute to injury.

Charge that any fault or negligence on part of plaintiff, which may in any wise have contributed to the accident, would preclude his recovery was erroneous, as it ignored the qualification that, in order to defeat a recovery, the negligence of the plaintiff must have contributed proximately to the cause of the injury.

4. Municipal corporations ⟸706(8)—Instruction on automobile driver's right to assume pedestrians would exercise ordinary care held erroneous.

In action for personal injuries, instruction given at request of defendant that operator of automobile on a street had right to assume that other persons on street would exercise ordinary care and would not negligently expose themselves to danger *held* misleading in view of other instructions.

5. Municipal corporations ⟸705(2)—Persons using highway must exercise care for conservation of correlative rights.

The right of automobile drivers to use public highway is not superior to that of pedestrians, and, in exercise of common right, all persons using same must exercise constant care and caution, commensurate with special hazard, for conservation of their correlative rights.

6. Municipal corporations ⟸705(2)—Automobile driver must be vigilant and anticipate presence of others.

Automobile driver has no right to assume that the road is clear, but under all circumstances and at all times must be vigilant and anticipate presence of others, and keep his machine under such control as will enable him to avoid collision with other persons using proper care and caution, and that driver did not know that any one was on street is no excuse for conduct which would have been regarded as reckless had he known that another person or vehicle was on highway.

7. Trial ⟸253(4)—Instruction held erroneous as ignoring conditions and theories favorable to defendant's case, and question of plaintiff's negligence as cause of injury.

Instruction to find for defendant if jury believed from evidence that plaintiff suddenly appeared in path of defendant's automobile, under circumstances where his sudden presence could not have been reasonably foreseen by defendant, or defendant by reasonable care, could not have avoided accident, *held* erroneous as ignoring question of whether situation referred to was brought about by negligence of plaintiff or his violation of Motor Vehicle Act, and wholly ignoring every condition and theory favorable to plaintiff's case.

8. Trial ⟸253(7)—Instruction conditionally directing a verdict should mention every condition necessary to verdict.

Instructions conditionally directing verdict for defendant should mention every condition necessary to verdict, and were erroneous where omitting charge as to duty of defendant, at time and place of accident, to have lights (St. 1919, p. 206, § 13), to sound warning (St. 1915, p. 405, § 12), and to drive automobile at speed of not more than 15 miles per hour (St. 1919, p. 220, § 22).

9. Municipal corporations ⟸706(8)—Instruction as to sounding warning, under Motor Vehicle Act, improperly refused.

In an action for personal injuries sustained by being struck by defendant's automobile, refusal to instruct as to the necessity of sounding warning *held* erroneous, in view of Motor Vehicle Act, as amended by St. 1919, p. 206, § 13, and St. 1915, p. 405, § 12.

In Bank.

Appeal from Superior Court, City and County of San Francisco; K. S. Mahon, Judge.

Action by Abe Rush against George Lagomarsino. From a judgment for defendant, plaintiff appeals. Reversed.

J. Maxwell Peyser and Elliott M. Epsteen, both of San Francisco (Walter H. Linforth, of San Francisco, of counsel), for appellant.

Chickering & Gregory, of San Francisco, for respondent.

LENNON, J. This is an action for damages for personal injuries to the plaintiff which were inflicted by an automobile owned and operated by the defendant. The appeal is by the plaintiff from a judgment entered, upon the verdict of a jury, in favor of the defendant. The plaintiff's complaint alleged that while plaintiff was walking on Market street in the city of San Francisco at about 6:10 o'clock a. m. of the morning of the 22d day of December, 1921, the defendant operated and ran an automobile owned by him recklessly and carelessly, at an unlawful rate of speed, and without lights thereon, and without giving warning of its approach, and that by reason of such negligence the

automobile struck and injured the plaintiff to his damage in the sum of $52,500.

The defendant, answering plaintiff's complaint, did not deny that his automobile, while operated by him, struck and threw the plaintiff to the ground. The defendant did, however, deny that the automobile was driven recklessly or carelessly, or at any unlawful rate of speed, or without lights, or that defendant failed to give any warning of its approach, or that defendant was guilty of any carelessness whatsoever. The defendant's answer further denied that the plaintiff was lawfully walking upon the street at the time of the accident, and, as an affirmative defense, alleged that the accident was caused by the negligence and carelessness of the plaintiff in negligently and carelessly crossing the street where the accident happened, in carelessly and negligently failing to observe the approach of the defendant's automobile, in carelessly and negligently placing himself within the path of the automobile, in carelessly and negligently failing to take any care for his own safety.

The only point urged in support of the appeal is the claimed error of the trial court in giving certain instructions of its own motion, and refusing to give certain other instructions at the request of the plaintiff. It seems appropriate that a succinct statement of the evidence pertinent to the point presented should be made.

The evidence adduced in support of the plaintiff's case, substantially stated, is as follows: The plaintiff, as he testified, was a clerk in a cigar store. On the morning of the accident and just prior thereto he had been to a nearby restaurant for breakfast. Shortly after 6 o'clock a. m. he left the restaurant. Arriving at the corner of Market and Brady streets, he proceeded across Market street toward his place of business which was located at the corner of Gough and Market streets. The morning was dark and stormy. It was raining heavily, and the street was wet and slippery. Before attempting to cross Market street the plaintiff looked up that street toward Valencia street for possible approaching vehicles, and, not seeing any, he proceeded on his way; as he stepped from the curb, and while walking across the street, he again looked up the street. He saw no vehicle of any kind approaching, no automobile headlights were visible, and no automobile horn was sounding. Just as he approached the south street car track he was struck down by the defendant's automobile. The testimony of the plaintiff as above outlined is fully corroborated in all of its material and substantial details by the testimony of a witness for the plaintiff who witnessed the accident at a point about 18 feet distant from where it occurred. This witness testified, among other things, that he saw the defendant's automobile a fraction of a second before it struck the plaintiff; that it was without any lights at all; that no warning horn was sounded; that the impact of the automobile threw the plaintiff a distance of 20 or 25 feet from the point where the collision occurred and that the defendant's automobile traversed a distance of 50 or 60 feet before stopping after it struck the plaintiff.

The defendant, as a witness in his own behalf, testified, in substance, that, at the time of the accident, he was riding in an open car. He turned from Valencia street into Market street. Thence he proceeded down Market street between the curb and the first street car tract—that is to say, the south street car track on Market street. He maintained that position until the happening of the accident. At the time of the accident his lights were burning, and he was driving at a speed estimated by him to be from 15 to 16 miles an hour. It was very dark and raining hard at the time of the accident. The defendant first saw the plaintiff just as the plaintiff stepped in front of his right headlight 3 or 4 feet in front of the defendant's automobile. At that time the plaintiff was walking rapidly. When plaintiff stepped in front of the defendant's car the plaintiff was looking north. He was not looking at defendant's automobile. The defendant threw on his emergency brake and his foot brake as fast as he could, but there was no chance to avoid hitting the plaintiff. At the time of the accident there was no other traffic on the street. On seeing the plaintiff the defendant did not blow any horn or sound any warning. The defendant did not see plaintiff as plaintiff stepped off the sidewalk. At the time of the accident the defendant was traveling in a straight line on Market street towards the ferry building, and there was nothing to obstruct his vision in front of him. Defendant had a straight path in front of him and could see 75 feet ahead. At the time of the accident there were three or four automobiles standing at the curb line. There were two automobiles near the corner, and there was one a little further down, near the curb. The defendant did not see plaintiff come out from the sidewalk. He saw him first in the middle of the street when plaintiff stepped in front of defendant's automobile. At the time of the accident it was 6 o'clock in the morning. The street lights were out. It was very dark, and the defendant could not see a man coming out between any of the automobiles at the curb.

[1, 2] The trial court, after correctly charging the jury as to the degree and burden of proof required of the plaintiff to establish his case, then proceeded to instruct the jury that, "It must also appear to your satisfaction, that the plaintiff was without fault or negligence on his part which may in any wise have contributed to the accident." The

instruction thus given was manifestly erroneous, because, in effect, it instructed the jury that the plaintiff could not recover unless he affirmatively established that he was not guilty of contributory negligence, and that any fault or negligence on the part of the plaintiff, no matter how slight or remote, which "in any wise" contributed to the accident would warrant a verdict for the defendant. The pleaded defense of contributory negligence was a defense to be affirmatively established by the defendant by a preponderance of the evidence, unless such negligence is shown by or can be inferred from the evidence adduced in support of the plaintiff's case. Whatever negligence there may have been on the part of the plaintiff must, in order to prevent his recovery, have contributed directly or proximately to the accident, and it was not necessary in order to entitle the plaintiff to recover that he should show that the accident occurred without his fault. Green v. Southern Pacific Co., 132 Cal. 254, 257, 64 P. 255; Schneider v. Market Street Ry. Co., 134 Cal. 482, 487, 66 P. 734; Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513; Bidwell v. Los Angeles, etc., Ry. Co., 169 Cal. 780, 783, 148 P. 197; Hall v. San Francisco, 188 Cal. 641, 643, 206 P. 459; Howard v. Worthington, 50 Cal. App. 556, 559, 195 P. 709.

The evidence adduced in support of the plaintiff's case in nowise carried any imputation of negligence on the part of the plaintiff. On the contrary it negatives even the suggestion of any contributory negligence on his part. The court nowhere instructed the jury that the burden of proving the contributory negligence of the plaintiff was on the defendant, or that the plaintiff, upon the showing of the negligence of the defendant, was entitled to recover unless the plaintiff's negligence as a proximate, contributing cause of the accident was affirmatively shown. No instruction in any wise alleviating the error of the instruction above quoted was given to the jury, and the trial court refused, upon the request of the plaintiff, to give other instructions which, standing alone, or when read in conjunction with instructions elsewhere given by the court, would have formulated a clear, correct, and consistent statement of the law relative to the rule covering and controlling the doctrine of contributory negligence.

The instruction in question, having in effect charged the jury that the plaintiff could not recover unless he had established to the satisfaction of the jury that he was free from contributory negligence, placed a burden upon the plaintiff not sanctioned by the law, and, in view of the conflict of the evidence adduced upon the entire case, the error of the instruction must have prejudiced the plaintiff and contributed to the verdict found for the defendant.

[3] The trial court further erred in the same instruction when it charged the jury that any fault or negligence on the part of the plaintiff, "which may in any wise have contributed to the accident," would preclude a recovery by the plaintiff. The vice of this instruction is that it ignores the important qualification that, in order to defeat a recovery, the negligence of the plaintiff must have contributed proximately to the injury. Fernandes v. Sacramento City Ry. Co., 52 Cal. 45. The error of this instruction was accentuated by the further charge of the trial court that:

"When the negligence of the injured party contributed to the injury complained of the law will afford no redress, and if, therefore, you find in this case that plaintiff was negligent and such negligence contributed to the injury complained of, I instruct you that the plaintiff cannot recover against the defendant."

The negligent act or omission of a plaintiff which will exculpate a defendant from responding to the plaintiff in damages resulting from the plaintiff's negligent act or omission must be a contributing, proximate cause of the damages. Flynn v. S. F. & S. J. R. R. Co., 40 Cal. 14, 19, 6 Am. Rep. 695; Basler v. Sacramento Gas & Electric Co., 158 Cal. 514, 519, 111 P. 530, Ann. Cas. 1912A, 642. "The formula is, not that any degree of negligence on the part of the plaintiff which directly concurs in producing the injury * * * will constitute a defense; but if the negligence of the plaintiff, which amounts to the absence of ordinary care, shall contribute * * * proximately to the injury, the plaintiff shall not recover." Robinson v. W. P. R. R. Co., 48 Cal. 409, 422, 423; Strong v. S. & P. R. R. Co., 61 Cal. 326, 328.

While it is true that the trial court, prior to the giving of the instructions immediately under consideration, gave a definition of contributory negligence which included the element of proximate cause, nevertheless, the instructions complained of were so specifically and emphatically at variance with the requirements of the rule relating to contributory negligence that there is, we think, no escape from the conclusion that they must have confused and misled the jury to the prejudice of the plaintiff.

[4] The trial court at the request of the defendant charged the jury that:

"The operator of an automobile upon a street or public highway has a right to act upon the presumption that others thereon are exercising due care and will not negligently expose themselves to danger, and that they will attempt to avoid danger. I therefore instruct you that the defendant in this case had a right to assume that persons upon the street would exercise ordinary care, and that they would not negligently expose themselves to danger, and that they would exercise ordinary care to ascertain the approach of motor vehicles, and

before you hold that the defendant was negligent in this case, you must take into consideration these assumptions which the defendant had a right to rely upon."

[5] Applied to the facts of this particular case the instruction last quoted was likely to mislead the jury. Coupled with the trial court's instruction previously given that the defendant, while operating his automobile, was required to exercise only ordinary care, the last quoted instruction practically told the jury that the defendant, rightfully relying upon the assumption that pedestrians would take care of themselves, was exercising ordinary care even though he ignored or was not aware of the fact that a pedestrian was crossing the street. The right of drivers of automobiles to use public highways is not superior to that of the humblest pedestrian, and, in the exercise of a common right to the use of the public highways, all persons using the same must exert constant care and caution for the conservation of their correlative rights, commensurate with the special hazard which is peculiar to and nowadays ever present in the use of public highways.

[6] Accordingly, the driver of an automobile "has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. * * * The fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway." Meyers v. Bradford, 54 Cal. App. 157, 159, 201 P. 471. Even though the operator of an automobile may be rigidly within the law, "he still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop." Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, 127.

The instruction immediately under consideration in effect declared the law to be that "it is not a part of the duty of an operator of a motor vehicle to keep his machine always under control, or that it is his duty to keep it under control only a part of the time; that he has the right to assume that the road is clear, and under no circumstances and at no time must he be vigilant or anticipate or expect the presence of others; and if he does not know that any one else is on the highway, he is excusable for conduct that would amount to recklessness if he did know that another was using it." Of course such is not the law. Meyers v. Bradford, supra.

Having instructed the jury that the defendant had a right to drive his automobile in the security of the assumption that the roadway was clear, the statement of the court elsewhere in its charge to the jury to the effect that it was generally the duty of drivers of automobiles to look out for foot passengers can hardly be said to have sufficed to relieve the instruction in question of its misleading and its injurious effect upon the minds of the jury.

[7] The trial court instructed the jury:

"If you believe from the evidence in this case that the plaintiff suddenly appeared in the path of defendant's automobile, under circumstances where his sudden presence could not have been reasonably foreseen by the defendant, and that the defendant by the exercise of reasonable care could not have avoided the accident, your verdict in this case must be in favor of the defendant and against the plaintiff."

This instruction ignores all reference to the question of whether or not the situation therein referred to was brought about by any negligence of the plaintiff, or was due wholly to the negligence of the defendant, and in effect tells the jury that the mere fact that if the defendant was suddenly confronted with a situation demanding immediate action, and "in the excitement he decided to do and did do what seemed best at the time," then the defendant was not liable. In other words, the jury was practically told that regardless of whether or not the injuries of the plaintiff were caused by the reckless, careless, and unlawful driving of the defendant, he was not liable for plaintiff's injuries, if he was not aware of plaintiff's presence until the automobile was almost upon him. Moreover this instruction ignores every condition and theory favorable to the plaintiff's case, including the evidence which tends to show that the sudden appearance of plaintiff in front of defendant's automobile was caused by the defendant's disregard of the provisions of the Motor Vehicle Act. In effect the court by the instruction last referred to told the jury that, without regard to any question as to whether or not the defendant may have been driving his automobile recklessly and carelessly, and without a light or warning of any kind, and by reason thereof the plaintiff while crossing the street without knowledge or reason to expect the approach of the defendant's automobile, was suddenly confronted by defendant's automobile, the defendant was entitled to a verdict if the defendant did his best to avoid the accident, after such situation was brought about by defendant, and when it may have been too late to avoid injuring the plaintiff.

[8] A review of the several instructions which the trial court gave in response to the issues presented and tried shows that each in effect conditionally directed a verdict for the

defendant. When such is the effect of an instruction the instruction should mention every condition necessary to the verdict. Pierce v. United Gas & Electric Co., 161 Cal. 176, 184, 118 P. 700. Under the general laws it was the duty of the defendant, at the time and place of the accident, to have at the front of his automobile two lighted lamps (Stats. 1919, p. 206, § 13); to have thereon a horn, and to sound it whenever necessary "as a warning of danger but not at other times, or for any other purpose" (Stats. 1915, p. 405, § 12); and it was his duty to drive the automobile at a rate of speed not to exceed 15 miles per hour (Stats. 1919, p. 220, § 22.) If any one of these provisions of the statute was violated by the defendant at the time mentioned, such violation became negligence per se. Stein v. United Railroads, 159 Cal. 368, 113 P. 663. While the issue presented by the pleadings and the theory upon which the case was tried involved the elements above enumerated which constituted negligence per se, the trial court failed to mention them in any one of the instructions complained of. Admittedly, the presence of lights or no lights and the rate of speed at which the automobile was being driven were, under the evidence adduced upon the entire case, matters of much importance, and the omission of all mention thereof in the particular instructions now under consideration was prejudicial error.

[9] The trial court refused the plaintiff's request to instruct the jury as follows:

"Under the California Motor Vehicle Act, as amended in 1919, § 12 (Stats. 1915, p. 405, § 12) every motor vehicle shall be equipped with bell, gong, horn, whistle, or other device, in good working order, capable of emitting an abrupt sound adequate in quality and volume to give warning of the approach of such vehicle to pedestrians, and to the riders or drivers of trains, and to the riders or drivers of animals or of other vehicles, and to persons entering or leaving the street, interurban or railroad cars. Every person operating a motor vehicle shall sound bell, gong, horn, whistle, or other device, whenever necessary as a warning of danger, but not at other times or for any other purpose."

Under the issues and evidence presented in this case, we are of the opinion that it was error for the trial court to refuse the above-quoted instruction. While it may be true, as defendant contends, that when he saw the plaintiff it would have been useless to have sounded his horn as a warning because in all probability it was then too late to avoid the accident, and that therefore the failure to give the requested instruction was not prejudicial error, nevertheless the statute provides that "whenever necessary" a warning of approaching danger shall be sounded by every person operating an automobile. Keeping in mind the facts, as were shown in evidence, that there were three automobiles parked on the side of the street at the point at which the plaintiff attempted to cross the street, and where pedestrians would be likely to cross, that the defendant was driving his automobile without lights at a speed of 15 to 16 miles per hour on a very dark morning and in a heavy rain over a wet and slippery street which was without lights, it was certainly a matter for the jury to determine whether or not, under all the circumstances, it was necessary for the defendant to sound his horn as a warning of danger, and the failure to submit that question to the jury as requested was error which doubtless redounded to the prejudice of the plaintiff.

Judgment is reversed.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; WASTE, J; SEAWELL, J.; LAWLOR, J.

---

196 Cal. 323

In re WALKER'S ESTATE. (S. F. 11362.)

(Supreme Court of California. June 26, 1925. Rehearing Denied July 23, 1925.)

1. Wills ⊂⊃858(1)—When property passes to heirs at law on failure of bequest stated.

Where property was not intended to be included in the residuum on a bequest of such property failing, it passes to heirs at law and not to residuary legatee.

2. Wills ⊂⊃858(2)—Property, on failure of bequest, held to pass to residuary legatee.

Testatrix bequeathed to W. and C. each an undivided one-half in land. She provided that if land was sold by her, proceeds of sale on hand at her death should go to W., C., and L., but if L. negotiated sale for her, and received commissions, he was to receive no part of proceeds. Residue of estate was bequeathed to L. *Held*, in view of Civ. Code, § 1332, that C. having predeceased testatrix, his lapsed bequest became part of residuum.

3. Wills ⊂⊃858(2)—Lineal descendants of deceased residuary legatee held entitled to residuum.

Where testatrix bequeathed property to W. and C., and will impliedly provided that, should either predecease testatrix, lapsed devise should go to residuary legatee, whether latter survived or predeceased testatrix, residuum would come to him under will as well as by Civ. Code, § 1332, and hence his lineal descendants were entitled thereto under section 1310.

4. Appeal and error ⊂⊃110 — No appeal lies from order denying motion for new trial.

No appeal lies from order denying motion for new trial.

In Bank.

Appeal from Superior Court, Humboldt County; George D. Murray, Judge.

In the matter of the estate of Mary Walker, deceased. From a judgment of the superior court, decreeing distribution, the heirs at law of deceased appeal. Affirmed.

H. C. Nelson and J. F. Coonan, both of Eureka, Geo. M. Harker, of Los Angeles, and F. K. Lemon, of Clinton, Ill., for appellants.

W. F. Clyborne and J. S. Burnell, both of Eureka, for respondent.

LAWLOR, J. The decedent, Mary Walker, died February 2, 1923, in Humboldt county, in this state. No husband or children, or the child of any deceased child, or father or mother, or brother or sister, survived her. As her only heirs at law she left certain nieces and nephews and grand nieces and nephews—the appellants here being among said heirs at law.

By a will dated October 16, 1920, the decedent devised certain land in the Mattole valley in Humboldt county to Isam Walker and Levant Cook, nephews of her deceased husband, share and share alike. In the event of a sale or disposition of the oil and mineral rights of said land in the Mattole valley, the will provided that the money realized or to accrue therefrom should be distributed one-third to Isam Walker, one-third to Levant Cook, and one-third to her own nephew, Louis C. Watts, the latter being an heir at law; that in case such sale was made by Isam Walker, under her authority, and he obtained a commission therefor, he should not receive a portion of the proceeds realized, but, in that event, said proceeds should be divided equally between said Levant Cook and said Louis C. Watts. The residuary clause of the will named said Louis C. Watts as residuary devisee and legatee.

Levant Cook predeceased the testatrix. As appears above, he was not a relative of said testatrix. Louis C. Watts, the residuary devisee and legatee, and who was a relative of said decedent, also predeceased the testatrix. Surviving him were two sons, Benjamin R. Watts and Raymond H. Watts, and a daughter, Amy Watts Zook.

The will was duly admitted to probate, and after the filing of a final account a petition for distribution was filed by the executor, which, among other things, prayed for the distribution of the lapsed devise to Levant Cook of an undivided interest in the Mattole valley property to the said three children of Louis C. Watts, as heirs at law of said residuary devisee and legatee, and to their grantees. Opposition to said petition for distribution was filed on the part of the heirs at law of the decedent, and asking for the distribution of said lapsed devise to such heirs at law. The court thereafter, against said opposition, made its decree distributing the said lapsed devise in accordance with the petition of the executor to the grantees of the children of Louis C. Watts, deceased residuary devisee and legatee. A motion for a new trial was interposed by said heirs at law and denied. This appeal was taken from said decree of distribution and from the order denying the motion for a new trial, the record consisting of the judgment roll alone. The appeal involves the third, fourth, and fifth clauses of the will, which respectively read as follows:

"Third. I give, and devise unto Isam Walker and Levant Cook, nephews of my deceased husband, John Walker, each an undivided one-half of all the property now owned by me in Mattole valley, in the said county of Humboldt, state of California, it being in township 1 south, range 2 west, Humboldt base and meridian, and being known as the John Walker ranch.

"Fourth. In the event of a sale or disposition by me of the oil and mineral rights in the land owned by me in Mattole Valley, * * * and known as the John Walker ranch, then and in such case the net sum realized by me on account of such disposition or sale and on hand at the time of my death, or money coming to my estate on account of such disposition or sale, I hereby give and bequeath to said Isam Walker and Levant Cook and my nephew, Louis C. Watts, share and share alike, each receiving one-third thereof, but in case any such sale is made by Isam Walker under any authority from me during my life time, and he receives under such authority a commission for making such sale or a part of the proceeds thereof, then in such event he is not to receive, under the terms of this will, any part of the money netted me on account of such sale, but the whole of said money is to be divided equally between said Levant Cook and my said nephew, Louis C. Watts.

"Fifth. I hereby give, bequeath and devise all the rest and residue of my estate and property, real, personal, and mixed, of every kind and character and wherever situated, to my said nephew, Louis C. Watts."

[1] On the "question of law whether or not under the facts at bar the decree was in accordance with law in distributing said lapsed legacy [devise] to the grantees of the children of Louis C. Watts, deceased," the appellants set forth two propositions, as follows:

"Proposition 1. If Louis C. Watts had lived would the lapsed legacy [devise] have fallen into the residuum? * * * Now, in this case, there is a clause in the will that cannot possibly be reconciled with an intention on the part of the testatrix to include the Mattole lands in the residuum given to Louis C. Watts. [The fourth clause of the will, above quoted, is then set forth by appellants.] * * * Thus it has been held by this court that 'where, however, it is manifest from the context, or from the provisions of the will that the testator used the words in some more restricted sense, it will be given the meaning, in which it is clear that the testator used it.' * * * Where it is clear that certain property is not intended to be included in the residuum upon a bequest of such property failing, the

property passes to the heirs at law and not to the residuary legatee."

[2] It is proper to state, in this connection, that we concede the soundness of the above-stated rule, but question its application to the facts here involved. We fail to see how or wherein the fourth provision of the will, above quoted, and referring to the contingent disposition of the oil and mineral rights of the land in the Mattole valley, tends to preclude the devise of said land to Isam Walker and Levant Cook from passing into the residuum in the event either or both of said devisees should predecease the testatrix. In our view, there is no indication of an intention on the part of the testatrix to have this real property pass to her heirs rather than fall into the residuum and go to the residuary devisee and legatee, in the event of its lapse either in toto or pro tanto. The language of the residuary clause, as above indicated, is broad enough to include all property of the decedent not effectually disposed of by the will. In a note to Hill v. Hill, 149 Ga. 741, 102 S. E. 151, appearing in 10 A. L. R. at page 1522, and cited by respondents, the general rule is thus stated:

"For the purpose of this note the general rule is assumed that a general residuary clause will carry ineffectual or lapsed legacies. In determining the devolution of lapsed legacies, the courts assume that, by the use of a general residuary clause, the testator evinced his intention not to die intestate as to any of his estate, real or personal. To overcome this presumption the residuary clause must contain language indicating that it was the intention of the testator to except and withdraw from the operation of the clause, the property he attempted to dispose of by a bequest or legacy, or the surrounding facts and circumstances must show such intention. In this regard the mere fact that the bequest or legacy was primarily for the benefit of some person other than the residuary legatee is not sufficient to show that the testator intended that if the legacy failed, it should inure to the benefit of the heirs or next of kin, rather than the residuary legatee."

Section 1332 of the Civil Code reads:

"A devise of the residue of the testator's real property passes all the real property which he was entitled to devise at the time of his death, not otherwise effectually devised by his will."

It is said in Estate of Russell, 150 Cal. 604, 605, 89 P. 345, cited in the above note:

"But it is well settled that section 1332, above quoted, abrogates this rule of the common law. * * * It is thus the accepted rule in this state that where there is a valid general residuary devise real property mentioned in a lapsed or void devise goes to the residuary devisee, and not to the heirs, unless a contrary intent is clearly expressed by the terms of the will."

We cannot accept appellants' contention that:

"She was about to dispose of an interest in the realty, and knowing that, in the event of death of Isam Walker or Levant Cook, the lapsed legacy [devise] so falling in would go to Louis C. Watts, she deliberately apportions to Louis C. Watts, in a certain event, a certain pro rata of a certain interest in the Mattole property, and made no provision as to what would happen in the event of the death of either except by the general residuary clause. * * *"

The testatrix as appellants concede, is presumed to know that in the event of a total or partial lapse of the devise to Isam Walker and Levant Cook said lapsed devise or part thereof would pass to Louis C. Watts as residuary devisee and legatee. The fact that the will further provided for a possible and contingent sale or disposition of the oil and mineral rights of said land and the distribution of the proceeds in such a manner as to give the residuary devisee and legatee a pro rata share thereof, merely indicates to us that, in such event, the testatrix desired and intended that Louis C. Watts, residuary devisee and legatee, should receive this additional specific legacy, along with any possible residuum that might come to him.

Appellants further state that:

"To hold that the testatrix intended the lapsed legacy [devise] of Cook to fall into the residuum under these circumstances would be to hold that the testatrix intended to bequeath to one who died a portion of the residue happening in consequence of his own death."

Crawford v. Mound Grove Cemetery Ass'n, 218 Ill. 399, 75 N. E. 998, is then cited and quoted from as follows:

"Where legacies are given to several legatees, and the residue is bequeathed to the same legatees, it follows that the residue will not include a lapsed legacy to one of them. To hold, in such a case, that the testator intended the lapsed legacy to fall into the residuum, was said, in Craighead v. Given, 10 Serg. & R. 351, to hold that the testator intended to bequeath to one who died a portion of the residue happening in consequence of his own death—a construction which could never be supported."

Appellants' brief continues:

"Assume that testatrix had in fact disposed of the oil rights for $100,000 cash and 10 per cent. royalty on the product. And that Louis C. Watts by the will got one-third of the cash and one-third of the royalty under the will, and Louis C. Watts died. Then it is apparent that, to hold that these amounts passed into the residuum, is to hold that the testatrix intended to give to Louis C. Watts by the residuary clause a portion of the residue happening in consequence of his own death, and as the question is as to the intention of the testatrix as to said lapsed legacy, that intention when found from one point of view is applicable to the other."

If the oil and mineral rights of said land had been sold, and the dispute here concerned the disposition of any portion of the proceeds thereof, perhaps the above quotation from the Illinois case would be applicable; such is not the case here, however, for we

are concerned with the devolution of the lapsed part of a devise made to two persons neither one of whom is a residuary devisee or legatee. We do not perceive, then, how it can be maintained that if Louis C. Watts, residuary devisee and legatee, who was not a party to said lapsed devise, or his heirs at law or their grantees, should take the lapsed portion thereof as part of the residuum is to hold that the testatrix "intended to bequeath to one who died a portion of the residue happening in consequence of his own death." It should be kept in mind that this case is concerned with the devise of said real property to two persons, neither one of whom is a residuary devisee or legatee, and not with the contingent bequest of the proceeds of a possible sale of the oil and mineral rights of said land. We see no merit in appellants' "proposition 1."

[3] "Proposition 2. Do the heirs of Louis C. Watts take the lapsed legacy [devise]?"

In reply to their own question, appellants contend that the children of Louis C. Watts, residuary devisee and legatee, do not take the lapsed devise, for section 1310 of the Civil Code "expressly provides that the children of Watts shall take the estate given by the will, and this particular property was not given by the will, and can only go to Watts' children by invoking the provisions of the law" (that is, section 1332, Civ. Code). In other words, it is insisted by appellants that "it cannot be seriously claimed that it was the intention of testatrix at the execution of the will as shown by the will itself to give to Louis C. Watts the legacy [devise] to Cook which had not yet lapsed. They therefore must rely on the force of section 1332 and not on the intention of the testatrix. But section 1310 does not say, 'the estate given by the will and by the statutes,' but instead says, 'the estate given by the will.'"

Section 1310, Civil Code, reads:

"When any estate is devised or bequeathed to any child or other relation of the testator, and the devisee or legatee dies before the testator, leaving lineal descendants, or any such child or other relation is named in a will as a devisee or legatee and is dead at the time the will is executed, but leaves lineal decendants surviving the testator, such descendants take the estate so given by the will in the same manner as the devisee or legatee would have done had he survived the testator."

As indicated above, this lapsed devise of Levant Cook's would pass by virtue of the residuary clause (section 1332, Civil Code) to Louis C. Watts, had he survived the testatrix. He would receive such property under the will, for the testatrix, by the employment of a general residuary clause, impliedly declares that the person named therein as residuary devisee and legatee shall take all of the property left by her death and not otherwise effectually disposed of; it follows that such property would have come to him, not alone by virtue of the provisions of section 1332, Civil Code, but by the express act of the testatrix. The question, therefore, seems to reduce itself to this: Do the lineal descendants of a residuary devisee and legatee take the residuum under the provisions of section 1310, Civil Code, in the event the residuary devisee or legatee predeceases the testatrix?

Appellants cite authorities to the effect that:

"A residuary clause may itself lapse or fail to take effect, in which event the property which otherwise might fall into it because of lapsed legacies will pass to the testator's heirs at law. * * * The residuary legatee [and devisee] is dead. It is attempted to have his heirs stand in his place in that clause. The only manner or way in which these heirs may stand in the place of residuary legatee [and devisee] is by virtue of this statute [section 1310, Civil Code], and the statute permits these heirs to take whatever is given the ancestor by the will. If that is true, the utmost that could be claimed for the heirs at law of Louis C. Watts is the real estate owned by the testatrix at the time of her death, and not included in any other devise mentioned in the will; because * * * the Mattole valley property is given by the will to others, and not to Louis C. Watts. If the Mattole valley property goes into the residuary clause and becomes a part of it, it is by virtue of the law of California, and not by virtue of the will."

In other words, appellants appear to go the length of claiming that any property received under a residuary clause of a will is not received under the will, but solely by virtue of section 1332, Civil Code.

We have already shown that this contention is erroneous. It is true the will devises the Mattole valley property to Isam Walker and Levant Cook, but it goes further and impliedly provides that, should either or both of said devisees predecease the testatrix, said lapsed devise or part thereof should descend and go to Louis C. Watts as residuary devisee and legatee. That is to say, by the residuary clause of the will he is given all the property of the testatrix not otherwise effectually disposed of. In view of this and the plain import of section 1310, Civil Code, which draws no distinction between a specific devise or bequest and a devise or bequest under the residuary clause, we think that Levant Cook's share of the Mattole property passed, on the death of the testatrix, to the lineal descendants of said Louis C. Watts, residuary devisee and legatee, and to their grantees. Estate of Kunkler, 163 Cal. 797, 798, 127 P. 43, and Estate of Wyman, 182 Cal. 645, 648, 189 P. 267, are authority for the proposition that the provisions of section 1310, Civil Code, apply to a lapsed residuary devise or legacy as well as to a lapsed specific devise or legacy. It is clear, therefore, that whether Louis C. Watts, residuary devisee and legatee, survived or pre-

deceased the testatrix, any residuum would come to him under the will as well as by section 1332, Civil Code, and hence his lineal descendants are entitled thereto under the provisions of section 1310, Civil Code. It follows that by virtue of privity, distribution was properly made to their grantees.

[4] The decree of distribution is hereby affirmed. No appeal lies from the order denying appellants' motion for a new trial.

We concur: MYERS, C. J.; RICHARDS, J.; LENNON, J.; WASTE, J.; SHENK, J.; SEAWELL, J.

---

196 Cal. 366

In re IRWIN'S ESTATE.

CROCKER et al. v. RILEY, Controller.

(S. F. 11318.)

(Supreme Court of California. July 2, 1925.)

1. Taxation ⟸876(2)—Statute, exempting organizations engaged in charitable work from payment of state inheritance tax, construed.

St. 1917, p. 886, § 6, subd. 1, exempting property transferred to societies, corporations, institutions or associations, engaged in charitable work, from payment of state inheritance tax, *held* to differentiate between a corporation and an unincorporated association, and to grant exemption to both.

2. Charities ⟸20(3)—Legatee of bequest for benefit of charity need not be a corporation.

Legatee of a bequest for benefit of charity need not be a corporation; an unincorporated association being competent to take, in view of Civ. Code, § 1313.

3. Taxation ⟸876(2)—Charitable foundation held to constitute an association within statute exempting property transferred to "associations" from payment of state inheritance tax, though formal functioning consummated subsequent to testatrix's death; "association."

Where organization of trustees into a permanent association to administer a charitable foundation was contemplated by testatrix, and authorized by terms of her will, it constituted an "association," organized or existing under laws of the state within St. 1917, p. 886, § 6, subd. 1, exempting property transferred to associations engaged in charitable work from state inheritance tax, though its formal functioning was consummated subsequent to testatrix's death; "association" being an unincorporated organization composed of a body of men partaking in general form and mode of procedure of characteristics of a corporation.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Association.]

4. Charities ⟸20(4)—Trustees of charitable foundation held not to take bequest in personal capacity.

Where organization of trustees administering charitable foundation into a permanent association was contemplated by testatrix, and authorized by her will, they did not take charitable bequest in their personal capacity, but in capacity of the association, which on death of testatrix became vested with corpus of the trust.

5. Taxation ⟸860—Law should be liberally construed to encourage charitable foundations.

Law should be liberally construed so as to encourage charitable foundations and not to lay heavy burden of inheritance taxes on property devoted to such uses.

6. Taxation ⟸895(1)—Inheritance tax on bequest based upon such an amount as would net amount of legacy after payment of tax.

Inheritance tax on legacy of $100,000, "free and clear of all inheritance taxes," which were directed to be paid from residue of testatrix's estate, was a tax on an amount which, after paying inheritance tax, would net $100,000 to legatees, but the tax upon the residue should be computed after, and not before, the payment of the tax on the legacy of $100,000.

7. Taxation ⟸906—Penalty for deferred payment of inheritance taxes not imposed, where delay in payment caused by litigation possessing sufficient merit to warrant presentation of questions involved to a court for determination.

St. 1917, p. 887, § 7, subd. 2, providing for penalty of 10 per cent. interest for deferred payment of inheritance taxes, *held* inapplicable, where delay in payment was due to litigation instituted by contestants to determine if any tax was due on legacy to charity foundation, and correctness of amount of tax fixed upon another legacy, and grounds of opposition possessed sufficient merit to warrant their presentation to a court for determination of questions involved.

Myers, C. J., dissenting in part.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Proceeding by Helene Irwin Crocker and others to review the fixing of an inheritance tax on the estate of Fannie M. Irwin, deceased, opposed by Ray L. Riley, as Controller, etc. From an order fixing the tax, both parties appeal. Reversed in part, and affirmed in part.

P. F. Dunne and J. F. Shuman, both of San Francisco, for appellants.

Dion R. Holm, of San Francisco, for respondent.

A. W. Brouillet, of San Francisco (Ralph W. Smith, of Sacramento, of counsel), for Controller.

LENNON, J. These are appeals from an order fixing the inheritance tax upon the transfer by will of certain property of Fannie M. Irwin, deceased. We shall first discuss the questions involved in the appeal of

those who, interested in the estate, are contesting the validity of the tax imposed by such order. That appeal involves two distinct questions: (1) The validity of the imposition of a state inheritance tax of $453,854.45 upon the property bequeathed to the William G. Irwin Charity Foundation; and (2) the validity of the imposition of a tax of $7,602.27 upon a legacy of $100,000 to Charles Templeton Crocker rather than an imposition of a tax of $6,690 on said legacy.

The order fixing the inheritance tax shows that Mrs. Irwin died December 6, 1919; that she was at the time of her death a resident of the city and county of San Francisco; and that her will was dated and executed May 6, 1919, and was admitted to probate by the superior court December 29, 1919.

Paragraph 19 of the will, which deals with the establishment of the William G. Irwin Charity Foundation, reads as follows:

"19. I hereby declare it is my intention and purpose to establish, and I do hereby make permanent establishment, of a trust fund, to be known as 'the William G. Irwin Charity Foundation.'

"I do hereby appoint, and give, devise and bequeath to Helene Irwin Crocker, Charles Templeton Crocker, Edward I. Spalding, John D. McKee, and William I. Brobeck, as trustees of 'the William G. Irwin Charity Foundation,' their survivor or survivors, and successors, in perpetuity, the sum of one million dollars ($1,000,000) in United States gold coin, or such number of shares of stock of the William G. Irwin Estate Company, as shall equal, at a fair valuation, said sum, at the election of said trustees, to be by them held as such trustees, and administered to the uses and purposes, and with the powers and authorities herein declared, that is to say,

"(a) To be by them, or the survivor or survivors of them, or their successors, held and administered, as a perpetual charitable fund in trust, to hold, manage and administer the same, and to invest and reinvest the funds thereof in such properties as, in their judgment, or in the judgment of the survivor or survivors of them, or their successors, shall yield the greatest net income consistent with conservative and safe administration thereof, and to pay out the net income thereof to such charitable uses, including medical researches and other scientific uses, designed to promote or improve the physical condition of mankind, as in their judgment may be deemed worthy of support, and to expend, in aid thereof, such amounts, at such times and on such conditions, as to them, or the survivor or survivors of them, or their successors, shall seem proper, provided, always, that the said net income from said foundation shall be expended in aid only of such charitable uses as do or may exist in the Hawaiian Islands or the state of California. * * *

"(b) The said trustees shall have power to sell, convey, partition, divide, mortgage, hypothecate, pledge, lease, let, hold, invest and reinvest, in their discretion, the whole or any part of said trust estate, with the same force and effect as if they were the absolute owners thereof, and they, or the survivor or survivors of them, or their successors, shall receive and be paid the sum of five hundred dollars ($500) each, per annum, in full compensation for all services rendered by them or any of them, in the administration of said trust. Such nominal sum is so named by me to cover the personal expenses which might be incurred by them in the administration of such trust, and not as an expression of my appreciation for, or of, the value of the charitable services which they will render.

"(c) Said trustees shall keep true records of all their transactions. They shall have further power to employ agents, secretaries and attorneys, and to fix and pay their salaries or compensation, and to make by-laws for the government and administration of the trust, and for the appointment of their successors in office; provided that such by-laws shall only be adopted or amended by and with the unanimous consent in writing of all of the trustees.

"Said by-laws may provide for meetings of the trustees, and prescribe the notice upon which meetings shall be called, and for the number of trustees, not less than a majority, who shall constitute a quorum for the transaction of their business, and they may also provide that any acts of the trustees which shall be approved in writing by any number of the trustees less than all, but not less than a majority, shall be as effectual as if done by all."

The will leaves three-quarters of the residue of the estate of the testatrix to her daughter, Helene Irwin Crocker, absolutely. The remaining quarter of the residue, by the terms of the will, goes into an income trust for the benefit of the daughter during her life. Upon the death of the daughter the trust residue is to vest in her children, or issue of the children. If there be no children or issue to take the residuary one-quarter, the same "shall vest and shall be transferred, delivered and paid over to the trustees of said 'the William G. Irwin Charity Foundation,' to be by them held as part of the corpus of said trust and administered accordingly."

The order fixing the inheritance tax adjudged the William G. Irwin Charity Foundation liable for an inheritance tax in the sum of $453,854.45, and assessed and fixed the tax at that sum.

Section 6, subdivision 1, of the Inheritance Tax Act of 1917 governs and controls the liability of the William G. Irwin Charity Foundation for the payment of a state inheritance tax.

Section 6, subdivision 1, of said act reads as follows:

"The following exemptions from the tax are hereby allowed:

"(1) All property transferred to societies, corporations, and institutions now or hereafter exempted by law from taxation, or to any public corporation, or to any society, corporation, institution, or association of persons engaged in or devoted to any charitable, benevolent, educational, public, or other like work (pecuniary profit not being its object or purpose), or to any person, society, corporation, institu-

tion, or association of persons in trust for or to be devoted to any charitable, benevolent, educational, or public purpose, by reason whereof any such person or corporation shall become beneficially entitled, in possession or expectancy, to any such property or to the income thereof, shall be exempt; provided, however, that such society, corporation, institution or association be organized or existing under the laws of this state or that the property transferred be limited for use within this state." Stats. 1917, c. 589, pp. 880 to 902.

[1, 2] We are satisfied that the William G. Irwin Charity Foundation falls within the category of legatees eligible for exemption from taxation under the terms of the proviso to section 6, subdivision 1, of the Inheritance Tax Act of 1917, just quoted, which grants exemption to societies, or associations, organized or existing under the laws of this state. It is not necessary, in our opinion, that the William G. Irwin Charity Foundation should be a corporation rather than an unincorporated association in order to be entitled to the benefit of the exemption.

The proviso does not require that it should be a corporation. On the contrary, it expressly provides that it may be a society, institution or association. The William G. Irwin Charity Foundation aptly answers to the description of an "association." The usual meaning of the term "association" is an "unincorporated organization, composed of a body of men partaking in its general form and mode of procedure of the characteristics of a corporation." Knight v. Stevens, 66 App. Div. 267, 72 N. Y. S. 815. It is not the rule in this state that the legatee of a bequest for the benefit of charity shall be a corporation. An unincorporated association is competent to take. Civ. Code, § 1313; Estate of Winchester, 133 Cal. 271, 65 P. 475, 54 L. R. A. 281. See, also, Estate of Merchant, 143 Cal. 537, 77 P. 475; Estate of Uphams, 127 Cal. 90, 59 P. 315; Kauffmann v. Foster, 3 Cal. App. 741, 86 P. 1108. This being so, clearly it cannot be fairly said that the Legislature intended by the use of the terms "society, corporation, institution or association" to mean only corporations. There can be no escape from the conclusion, it seems to us, that the proviso clearly makes a differentiation between a corporation and an unincorporated association and grants exemption to both.

[3] There can be no question but that the organization of the trustees into a permanent association was contemplated by the testatrix and authorized by the terms of her will. By the will five associates of the testatrix' choice are named as trustees of the William G. Irwin Charity Foundation, and the management of the endowment fund of $1,000,000 is intrusted to these associates, a definite, concrete body, and "their survivor or survivors, and successors, in perpetuity." They are clothed with functions and vested with powers similar to those of a corporation. They were empowered to invest and reinvest the funds, and to pay out the income for the laudable purposes which the testatrix had in view. They were empowered to employ agents, secretaries, and attorneys, and to fix and pay their salaries and compensation. They were required to keep true records of all their transactions, and authorized "to make by-laws for the government and administration of the trust, and for the appointment of their successors in office." The will even goes so far as to specify that the by-laws are to provide for the meetings of those whom the testatrix has designated to govern the William G. Irwin Charity Foundation, for the notice upon which the meetings shall be called, and for the number of trustees not less than a majority which shall constitute a quorum. Tracing its origin and existence to the will of the testatrix, it may be fairly said, we think, that the William G. Irwin Charity Foundation answers the requirement of the proviso that it be an association organized or existing under the laws of this state, although its formal functioning was consummated subsequent to the time of the death of the decedent.

[4] The persons named in the will of Mrs. Irwin do not take the charitable bequest in their personal capacity, or, in other words, as "persons," but do so in the capacity of an association under the name of "the William G. Irwin Charity Foundation," the complete organization of which is provided for in said will, and which only awaited the death of Mrs. Irwin to become eo instante vested with the corpus of the trust. Estate of Graves, 171 N. Y. 40, 63 N. E. 787.

[5] The law should be liberally construed so as to favor and encourage such charitable foundations, and should not be construed so as to lay the heavy burden of inheritance taxes upon the property devoted to such uses, and thus, to the extent of such burden, hamper and limit the resources of the trust intended for such beneficial uses. Blakemore and Bancroft on Inheritance Taxes, § 241, p. 196.

It would be a narrow interpretation of the statute to hold that a testatrix desiring to devote a lawful portion of her property to benevolent, charitable, educational, or public purposes could only do this so as to relieve the income of such property from the inheritance tax by causing her trustees to formally function as a corporation or association under the laws of this state prior to her death and prior to the time when her will became effective and prior to the date when the trust could come into being. In re Graves, supra; Matter of Le Fevre, 233 N. Y. 138, 135 N. E. 203.

The question here presented is similar to that propounded in the case of In re Curtis'

Estate, 88 Vt. 445, 92 A. 965. That case involved a statute strikingly similar to the one under discussion here. The statute there provided that—

"Every person other than the father, mother; * * * and every charitable, educational or religious society or institution other than one created and existing under and by virtue of the laws of this state and having its principal office herein, that shall receive in trust or otherwise a legacy or distributive share consisting of or arising from property or an interest therein passing by will, the law of descent or the decree of a court in this state * * * shall * * * pay to the state a tax of five per cent. of the value in money of such legacy or distributive share."

The question presented therein was whether or not a board of trustees was a "charitable, educational, or religious society or institution, created and existing by virtue of the law of this state and having its principal office herein." The claim was made there, as here, that the society was not in existence at the time of the death of the testator, and that therefore the legacies were not exempt. The court there said that it was only necessary to consider whether the trustees were a society authorized under the terms of the will, and held that the board of trustees was entitled to the benefit of the exemption.

The case of Pierce v. Stevens, 205 Mass. 219, 91 N. E. 319, is cited by respondent to the point that organization of an association prior to the death of the decedent is essential to an avoidance of the tax. That case is not precisely in point here, and is in a material measure distinguishable from the case at bar. No provision was made in the will of the testator, nor was there even a suggestion therein, that the trustees to whom the bequest was made should be an association for the execution of the trust, and it was held in effect that the formation of a corporation by the trustees on their own motion subsequent to the death of the testator for the execution of the trust would not suffice to relieve the bequest from the burden of taxation. Assuming, however, that the case last referred to may be construed as holding as the respondent contends, nevertheless we are satisfied that the better rule is enunciated in the case of In re Curtis' Estate, supra, which is founded, as previously indicated, upon a statute substantially the same as the statute of this state covering and controlling the same subject-matter.

It follows from what we have said that the order fixing the inheritance tax, in so far as it imposes a tax upon the bequest to the William G. Irwin Charity Foundation, is erroneous.

[6] The controversy as to the tax upon a legacy to Charles Templeton Crocker involves the correctness of the manner and method of the computation of the tax. Upon this phase of the case it is insisted that the tax should amount only to $6,690 rather than $7,602.27 as fixed by the decree of the court below. The legacy is given by paragraph 5 of the will, which reads as follows:

"5. I give and bequeath to my son-in-law, Charles Templeton Crocker, the sum of one hundred thousand dollars ($100,000) in United States gold coin, free and clear of all inheritance taxes, which I direct to be paid from the residue of my estate. This bequest is made as a slight expression of my esteem and affection for him."

In the absence of such a provision as that contained in paragraph 5 of the will that the bequest of $100,000 shall be free and clear of all inheritance taxes and directing the payment of the taxes out of the residue of the estate, it is apparent that the bequest of $100,000 would itself be liable for the payment of the inheritance tax thereon. The actual value of the property therefore transferred to Charles Templeton Crocker by paragraph 5 of the will was not the sum of $100,000, but the sum of $100,000 plus an amount sufficient to permit him to take the $100,000 free from all liability for the inheritance tax, or a total of $107,602.27. That is to say, the amount bequeathed to him by the will was such an amount as would net $100,000 after the payment of the inheritance tax thereon. In short, by making the payment of the tax payable out of the residue of the estate, the legatee was bequeathed an additional amount sufficient to pay the tax and the tax upon the tax ad infinitum.

The amount which the residuary legatee actually received was the residuum after the payment of the inheritance tax upon the bequest of $100,000. It is necessary that the tax upon the distributive interest passed to the residuary legatee be computed, not upon the residue before the payment of the inheritance tax upon the bequest, but upon the residue after the payment of the tax. Estate of Kennedy, 157 Cal. 517, 526, 108 P. 280, 29 L. R. A. (N. S.) 428. It is at once apparent that upon appellants' theory that the tax is to be computed only upon the bequest as specified in actual figures in the will, and upon the residuum after the deduction of the payment of the tax upon the bequest of $100,000, that no tax would be computed upon the money left by the testatrix to be applied to the payment of the inheritance tax upon the various bequests. By this means a testator by a direction to pay all inheritance taxes out of the residue could defeat the payment to the state of the tax on a very substantial part of his estate. The manner and method of computing the tax upon this particular legacy was, we think, correct.

[7] The appeal by Ray L. Riley, as controller, is based upon the ground that the interest rate pursuant to the Inheritance Tax Act of 1917 should have been fixed by the

court at 10 per cent. per annum from the date of decedent's death, and not at 7 per cent. per annum from the 6th day of June, 1921, said date being 18 months following the date of the death of the decedent. There is contained in the record a stipulation signed by respective counsel to the effect that "no cause or reason for the fixing of interest at 7 per cent. per annum was shown other than the desire to appeal of Helene Irwin Crocker et al." It is appellant's contention that under these circumstances the provisions of section 7, subdivision 2, of the Inheritance Tax Act of 1917 require the imposition of interest at the rate of 10 per cent. Said section and subdivision read as follows:

"(1) All taxes imposed by this act, unless otherwise herein provided for, shall be due and payable at the death of the decedent, and if the same are paid within eighteen months, no interest shall be charged and collected thereon, but if not so paid, interest at the rate of ten per centum per annum shall be charged and collected from the time said tax accrued. * * * (2) The penalty of ten per cent. per annum imposed by subdivision (1) of this section for the nonpayment of said tax, shall not be charged in cases where, in the judgment of the court, by reason of claims made upon the estate necessary litigation, or other unavoidable cause of delay, the estate of any decedent, or a part thereof, cannot be settled at the end of eighteen months from the death of the decedent; but in such cases seven per cent. per annum shall be charged upon the said tax from the expiration of said eighteen months until the cause of such delay is removed, after which ten per cent. interest per annum shall again be charged until the tax is paid; but litigation to defeat the payment of the tax shall not be considered necessary litigation."

It is insisted by Ray L. Riley, as appellant, that, under the proviso last quoted of subdivision 2 of section 7, the litigation instituted by contestants to determine if any tax was due from the William G. Irwin Charity Foundation and the correctness of the amount of tax fixed upon the legacy to Charles Templeton Crocker cannot be considered necessary litigation, and that the penalty of 10 per cent. interest for the deferred payment of the taxes should have been imposed. In short, appellant insists that the proviso deals with any and all litigation in which the validity of the tax is involved.

Contestants insist that the litigation therein specified must be construed to mean litigation instigated without justification and upon grounds which are not meritorious. The construction insisted upon by contestants seems to us to be the proper one. If the proviso be construed to mean "any or all litigation," it would necessarily follow that even a litigant who had successfully proved in court his contentions as to the invalidity of a tax imposed would be liable for the imposition of the interest of 10 per cent. as a penalty for submitting his objections to a court for adjudication, for even successful litigation would be "litigation to defeat the payment of a tax." Such a result would obviously be an absurdity. As was said in San Joaquin, etc., Irr. Co. v. Stevinson, 164 Cal. 221, 229, 128 P. 924, 927:

" 'Where a statute is fairly susceptible of two constructions one leading inevitably to mischief or absurdity, and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted.' * * * 'A construction should not be given to a statute, if it can be avoided, which will lead to absurd results, or to a conclusion plainly not contemplated by the Legislature.' "

The state is, of course, interested only in securing the payment of taxes rightfully due, and it cannot have been the intention of the Legislature to coerce, by the threat of a heavy penalty for a resort to the courts, the payment of taxes to which the state may not be rightfully entitled. The result undoubtedly intended to be accomplished by the enactment of the proviso was the prevention of unjustified delay in the payment of taxes rightfully due the state by reason of unnecessary litigation. This result would be accomplished by limiting the imposition of a penalty for resort to the courts to litigation which was unjustified, leaving it for the court to decide in each instance whether or not the litigation was justified. If the litigant be successful, the court necessarily would hold that the litigation was not unnecessary and unjustified. If the litigant be unsuccessful, the court could determine in each case whether the grounds of opposition were or were not meritorious. Such a construction of the proviso is much more fair and just to both sides of a controversy involving a tax than the strict and harsh construction insisted upon by the appellant.

In view of the construction of the provision which we deem to be the correct one, the question of its constitutionality, if another construction be given, need not be discussed and decided.

The grounds of opposition presented by counsel for the estate possessed sufficient merit in our opinion to warrant their presentation to a court for a determination of the questions involved. Inasmuch as no penalty was imposed, this doubtless was also the opinion of the court below. The fixing of the interest rate at 7 per cent. commencing 18 months after the death of the decedent without the imposition of a penalty, was therefore correct.

The order, in so far as it relates to the fixing of the inheritance tax upon the bequest made to the William G. Irwin Charity Foundation, is reversed.

That portion of the order fixing the tax upon the bequest to Charles Templeton Crocker is affirmed.

Likewise the order fixing the rate of interest upon the tax due upon the bequest to Charles Templeton Crocker is affirmed.

We concur: RICHARDS, J.; SEAWELL, J.; WASTE, J.; LAWLOR, J.; SHENK, J.

MYERS, C. J. I dissent from so much of the decision herein as relates to the fixing of the inheritance tax upon the bequest made to the William G. Irwin Foundation. The question involved relates solely to the construction to be given to the language of our own statute. So far as the decisions of other courts which have a bearing upon this question are concerned, I find no substantial preponderance of authority either way.

It seems to me plainly apparent that the alternative conditions expressed in the proviso to subdivision 1 of section 6 were intended to be taken distributively, reddendo singula singulis. Sargent v. Shumaker, 193 Cal. 122, 127, 223 P. 972. The first of such conditions relates to transfers to any society, etc., engaged in or devoted to charitable work. The second relates to transfers in trust for any charitable purpose. This subdivision should therefore be read as if it provided at length as follows (eliminating the portions which are foreign to the question here under consideration):

"All property transferred * * * to any society, corporation, institution, or association of persons, engaged in or devoted to any charitable * * * work * * * shall be exempt; provided, however, that such society, corporation, institution or association be organized or existing under the laws of this state.

"All property transferred * * * to any person, society, corporation, institution, or association of persons, in trust for or to be devoted to any charitable * * * purpose * * * shall be exempt; provided, however, that the property transferred be limited for use within this state."

The situation which confronted the testatrix, therefore, was that, in order to secure the statutory exemption for her proposed bequest, she was required to adopt one of two alternatives, either (1) to bequeath the fund to a society, corporation, institution, or association actually engaged in or devoted to a charitable work and which was existing under the laws of this state, or (2) to bequeath the fund in trust for a charitable purpose limited for use within this state. As the bequest herein does not conform to either of these alternatives, I am of the opinion that it is not entitled to the claimed exemption.

I concur with the majority opinion as to the other two points decided herein.

196 Cal. 355

In re SHAY'S ESTATE.

FIRST TRUST & SAVINGS BANK OF PASADENA et al. v. SHAY et al.

(L. A. 8244.)

(Supreme Court of California. July 1, 1925.)

1. Wills ⟹31—Show of utter incapacity essential to overthrow will.

In contest of will for testamentary incapacity, mere proof of mental derangement or insanity in medical sense is not sufficient, but such complete mental degeneration as denotes utter incapacity to know and understand what law prescribes as essential to making valid will, or the existence of a specific insane delusion which affected will in question, must be proved.

2. Wills ⟹52(6) — Evidence insufficient to overcome presumption of testamentary capacity.

In attempt to overthrow will of 77 year old man, evidence that he suffered intensely from cancer of the bladder, looked sick, on one occasion seemed not to recognize neighbor or understand business neighbor had come about, and that at one time he had difficulty in understanding a daughter-in-law's conversation, *held* insufficient to overcome presumption of testamentary capacity.

3. Wills ⟹49—Illiteracy has no bearing upon testamentary capacity.

That testator was uneducated and illiterate, unable to read handwriting, and unable to write, except to sign his name, *held* to have no bearing upon his mental sanity or testamentary capacity.

4. Wills ⟹55(3)—Mistaken belief that daughter was drug addict held not insane delusion sufficient to show testamentary incapacity.

In suit to overthrow will, proof that testator had expressed belief that a daughter was addicted to liquor and drugs, where in fact she was not, *held* not sufficient proof of testamentary incapacity, in absence of any showing that belief was without reason or evidence, or adhered to against reason and evidence, since an insane delusion to invalidate a will must be belief which is spontaneous product of a diseased mind, coming into existence without, and adhered to against, reason and evidence.

5. Wills ⟹166(2)—Proof of undue influence by testator's daughter insufficient.

In attempt to overthrow will, proof that daughter with whom testator had been living sent for brother to have new will made when testator was seriously ill, and that she knew of execution of will and its provisions prior to death of testator, whereas none of other children except the brother she sent for did, *held* insufficient proof of undue influence, notwithstanding she was in confidential relationship with testator and profited unduly by will, in absence of any proof that she was active in procuring execution.

6. Wills ⟹166(2)—Evidence of undue influence by son of testator insufficient.

In attempt to overthrow will, where one of testator's sons was called when he was ill

and transacted testator's business for several weeks before mentioning making will, evidence that he thereupon took notes from testator, at latter's request, for manner of disposing of property, and took them to intimate friend of testator for preparation of will, which son read paragraph by paragraph to testator, who approved thereof, and then left town before execution of will, *held* insufficient to show undue influence, notwithstanding son sustained confidential relationship for testator in absence of any undue profit by him under will or any show that he actively procured execution of will.

7. Wills ⊂⊃163(4)—Facts held not within rule that one in confidential relationship who unduly profits by will and has actually participated in procuring it has burden of proving no fraud.

Fact that legatee was not active in procuring execution of will *held* not to bring facts within rule that one who unduly profits by will and is in confidential relationship with testator and actually participated in procuring execution of will has burden of showing that it was not induced by coercion or fraud.

8. Wills ⊂⊃82—Disposition of property to children, though in unequal amounts, is not an "unnatural will."

Testamentary disposition of property to children, including all the natural objects of testator's bounty, though in unequal amounts, is not an "unnatural will," which expression is applied to disposition of estate or large portion thereof to strangers, to exclusion of natural objects of testator's bounty without apparent reason.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Unnatural Will.]

9. Wills ⊂⊃82—Court or jury may not pass on injustice of distribution among children.

Court or jury is not entitled to substitute its opinion for that of testator as to whether distribution of property among children is unjust, or to determine whether reasons present in mind of testator for discrimination among them were good or bad.

10. Wills ⊂⊃166(10)—No fraud in son in failing to correct testator's belief that daughter was drug addict.

In attempt to overthrow will which testator had dictated to son to have transcribed, failure of son to correct testator's mistaken belief, expressed during dictation, and shown by property disposition, that one of daughters was liquor and drug addict *held* not to show fraud, in absence of any showing that son had basis for knowing whether belief was correct or not.

11. Appeal and error ⊂⊃930(1)—Evidence will be most strongly construed in support of verdict on appeal.

Upon reviewing sufficiency of evidence, it will be construed most strongly in support of verdict.

In Bank.

Appeal from Superior Court, Los Angeles County; Elliot Craig, Judge.

Application by George W. Shay and others for probate of the will of Henry J. Shay, deceased, opposed by William Shay and another. From judgment revoking probate, contestees appeal. Reversed.

R. W. Richardson, of Los Angeles, and Cruickshank, Brooke & Evans, and J. Russell Morton, all of Pasadena, for appellants.

Louis F. Laberere, John A. Cronin, and Collier & Laberere, all of Los Angeles, and Clifford P. Grua, of South Pasadena, for respondents.

MYERS, C. J. This is an appeal from a judgment revoking the probate of a will upon a contest thereof instituted after probate. The will in question was executed February 27, 1922, about four months prior to the testator's death. The testator's next of kin at the time of the execution of the will and at the time of his death consisted of two daughters and four sons of the testator, all of whom were of mature years, and all of whom are parties hereto, either as contestants or defendants. The estate, which consisted of real and personal property of the aggregate value of $21,500, was disposed of by the will as follows: After making provision for the payment of debts and expenses, $500 was provided for the erection of a monument upon the family burial lot and $100 for the saying of masses. Two thousand dollars was bequeathed in trust to pay the income thereof to the testator's daughter Ellen, one of the contestants herein, during the term of her life, and upon her death to distribute the principal among the testator's descendants then living, to take by right of representation. One thousand dollars was bequeathed in trust to pay the income thereof to testator's son William, one of the contestants herein, during his life, and upon his death to distribute the principal among the testator's descendants then living, to take by right of representation. The testator's home place, consisting of a house and lot, together with the household furniture, apppraised at $4,500, was devised to the testator's daughter Margaret, with whom the testator lived for several years immediately preceding and up to the time of his death. The remainder of the estate was bequeathed in equal shares to the daughter Margaret and the sons Edward, George and Daniel, defendants and appellants herein. The grounds of contest were unsoundness of mind and undue influence and fraud alleged to have been exercised by the daughter Margaret and the son George. The jury found in favor of contestants upon each of these issues, and the judgment revoking the probate of the will followed. Numerous points are presented and argued by appellants, but they resolve themselves in the main to the contention that the evidence was insufficient as a matter of law to sustain each of the findings of the jury.

[1-3] It is well settled that mere proof of

mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a valid will, or the existence of a specific insane delusion which affected the making of the will in question. Estate of Russell, 189 Cal. 759, 769, 210 P. 249. Upon the question of general testamentary capacity we find no evidence in the record which conflicts with the conclusion that the testator at the time of the making of the will understood the nature of the business in which he was engaged; that he had a recollection of the property he meant to dispose of and of the persons to whom he desired to bequeath it and of the manner in which he desired to distribute it. This being so it follows that the evidence was insufficient to overcome the presumption of sanity in these respects. The evidence relied upon by respondents in this connection shows that the testator was 77 years of age; that he was suffering from cancer of the bladder, with which he had been afflicted for some time, and from which he ultimately died; that at times he suffered intense pain therefrom, but that he was able to be up and dressed and about the house nearly every day; that on Saturday, 2 days prior to the execution of the will, when his son William called to see him, "he was lying on the couch. I went over to look at him, and he turned part way around, and his eyes seemed glassy, and he was awful sick"; that some time during the January preceding the making of the will a daughter-in-law of the testator called upon him while he was at the hospital following an operation, when he seemed to be in a stupor and did not recognize her; that a neighbor called to see the testator at a time which may have been a week or 10 days following the execution of the will when he was in bed sick and did not speak to her and did not give any sign of recognition; that a month or two prior to the execution of the will a neighbor, upon whose property the testator held a mortgage, concerning which there was "a little trouble," called upon testator to discuss the matter, and testified in effect that testator did not seem to be able to readily understand what the witness wanted; that a daughter-in-law of the testator upon an occasion in January preceding the execution of the will, in a conversation with testator, had to repeat things to him two or three times before he understood what she meant. The circumstance that the testator was uneducated and illiterate, unable to read handwriting, and unable to write, except to sign his name, manifestly has no bearing upon his mental sanity or testamentary capacity. All the witnesses who testified directly as to testator's mental condition stated unequivocally that in their opinion he was sane and of sound mind. But, disregarding this, and giving consideration only to the testimony most favorable to contestants upon this issue, it is utterly insufficient to sustain a finding of general testamentary incapacity. Estate of Holloway (Cal. Sup.) 235 P. 1012; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Relph, 192 Cal. 451, 221 P. 361.

[4] There remains to consider under this issue the question of the ability of the testator to know or understand his relation to the natural objects of his bounty, and this brings us to a consideration of respondents' claim of insane delusions. This rests solely upon the circumstance that the testator, when dictating the terms of the will, expressed a belief that his daughter Ellen was addicted to the use of liquor and drugs, and stated in effect that the trust provision for her benefit was because of his fear that she would squander the money. The evidence shows that this daughter was neither a drunkard, a drug addict, nor a spendthrift, and it is argued that the will is therefore the product of a delusion which affected the testamentary purpose of the testator. But the existence of a mere delusion; that is to say, a false or mistaken belief concerning the existence of a fact, does not affect testamentary capacity. A delusion to invalidate a will must be an insane delusion, that is to say, a belief which is the spontaneous product of a diseased mind, which comes into existence without reason or evidence to support it, and which is adhered to against reason and against the evidence. Estate of Scott, 128 Cal. 57, 60 P. 527; Estate of Kendrick, 130 Cal. 360, 62 P. 605; Estate of Perkins (Cal. Sup.) 235 P. 45; Estate of Allen, 177 Cal. 668, 171 P. 686; Estate of Hess, 183 Cal. 589, 192 P. 35; Estate of Calef, 139 Cal. 673, 73 P. 539. There is nothing in the record to indicate that this belief of the testator mistaken though it may have been, was without reason or evidence, or that it was adhered to against reason or against evidence. The finding of testamentary incapacity is not sustained by the evidence.

[5-9] On the issue of undue influence the charges made against the defendants George and Margaret are many and serious, but the evidence in support thereof is for the most part insubstantial and purely conjectural. That chiefly relied upon by respondents is, when construed most strongly in support of the verdict, to the following effect: The daughter Margaret was living with the testator at his home in Pasadena. William also lived in Pasadena, while George and Ed-

ward lived in Pennsylvania. There was some ill feeling between Margaret and George on one side and Ellen and William on the other. The testator had 8 years previously executed a will by which, after making bequests for masses and a monument, he had divided his estate into six equal parts, one of which was bequeathed to each of his children, except that portion set apart for Ellen was bequeathed in trust to pay the income to her during her life, together with so much of the principal as she might urgently need, with remainder over at her death to the testator's children who might then be surviving. This will remained in the custody of William, who was named therein as executor, but it was believed by the testator to have been lost. Upon several occasions during the few years preceding the execution of the will here under attack Margaret had expressed an intention of sending for her brother George to have a new will made. In the latter part of January, 1922, when testator was seriously ill, Margaret sent a telegram to George requesting him to come, and a letter explaining that their father had some business to attend to, in response to which George and Edward came to California to visit their father. George did not advise his brother William of his arrival in Pasadena, and was there about a week before William learned of his presence. While there he assisted his father in the preparation of an income tax return, and when he had been there about 3 weeks George mentioned the subject of a will to his father. Thereupon the father requested George to get a pencil and paper and take notes of the manner in which he desired to leave his property, and then to take those notes to the testator's intimate friend, John McDonald, and request the latter to have a will prepared in accordance therewith. This was done, and Mr. McDonald turned the notes over to counsel for the First Trust & Savings Bank, of which he was an officer, for the drafting of the will. When this had been done George called at Mr. McDonald's office and procured a copy of the proposed will, which he read to his father paragraph by paragraph, and the latter expressed himself as satisfied therewith. It was then arranged that Mr. McDonald would call at testator's house, bringing with him witnesses for the execution of the will. Before this had been done George left Pasadena upon his return to his home in Pennsylvania and upon the same day after George had departed the testator went alone to Mr. McDonald's office, stating that he had come to execute the will, and that he desired to save Mr. McDonald the trouble of bringing witnesses to his house. The will was then again read to the testator in the presence of Mr. McDonald, the latter's son, and his secretary, Miss Christ; was executed in their presence, and they signed the same as subscribing witnesses, no one else being present. The three subscribing witnesses were wholly disinterested, and were, in effect, strangers to all of the parties to this litigation, though Mr. McDonald, Senior, was and had been for many years an intimate friend of the testator. There is evidence from which it may be inferred that the daughter Margaret knew of the execution of this will and of the nature of its provisions prior to the death of the testator, whereas none of the other children other than George knew that such a will had been executed. This evidence falls far short of showing such undue influence as in effect destroyed the testator's free agency and overpowered his volition at the time of the making of the will. Estate of Holloway, supra; Estate of Relph, supra; Estate of Newhall, 190 Cal. 709, 214 P. 231, 28 A. L. R. 778; Estate of Kilborn, 162 Cal. 4, 120 P. 762; Estate of Baird, 176 Cal. 384, 168 P. 561; Estate of Morey, 147 Cal. 495, 82 P. 57; Estate of Gleason, 164 Cal. 756, 130 P. 872. Respondents, perhaps realizing this insufficiency, invoke the rule that, where one who unduly profits by the will sustains a confidential relationship to the testator, and actually participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by coercion or fraud. Estate of Gallo, 61 Cal. App. 163, 175, 214 P. 496. But the facts of this case do not bring it within the purview of this rule. It may be conceded that Margaret and George sustained a confidential relationship toward the testator. It may be further conceded that Margaret unduly profited by the will, although the fact that she had lived with and constantly cared for the testator throughout the last years of his life would seem to afford a perfectly good reason for his preferment of her. But there is no evidence that she was active in procuring the execution of the will, or that she participated therein to any extent. There is no evidence that she even knew of the execution of the will until some time thereafter. The circumstances above mentioned of her expressed intention to send for George to have a will made, and the fact that she did send for him, do no more than give ground for a suspicion that she may have participated in procuring the will to be executed. But a finding to that effect based upon such evidence would be the product of speculation and conjecture. The things done by George in this connection as above related, when measured by the decisions, do not constitute such activity in procuring the execution of the will as to bring this rule into operation. Estate of Anderson, 185 Cal. 700, 198 P. 407; Estate of Morcel, 162 Cal. 188, 121 P. 733; Estate of Calef, supra; Estate of Higgins, 156 Cal. 257, 104 P. 6; Estate of Lavinburg, 161 Cal. 536, 119 P.

915; Estate of Purcell, supra. Neither can it be said that he will unduly profit from this will. The amount which he will receive under it is substantially the same as he would have received under the will executed in 1914, which is asserted by respondents to have been wholly valid and free from any suspicion of fraud or undue influence. The amount which he will receive under this will is but slightly greater than he would have received had the testator died intestate. Much is said in respondent's brief upon the subject of an unjust and unnatural will and the inference of undue influence to be deduced therefrom. That expression is usually applied in a case where a testator leaves his estate or a large portion thereof to strangers to the exclusion of the natural objects of his bounty without apparent reason therefor. The will here under attack cannot be said to be an unnatural will. Estate of Packer, 164 Cal. 525, 129 P. 778. By it the testator made provision for all of the natural objects of his bounty. That he did not provide for them equally is but to say that he exercised his legal right of testamentary disposition instead of leaving his estate to be distributed according to the law of succession. Whether or not the will is unjust is a matter of opinion, as to which we have no right to substitute the opinions of the jurors or of the members of this court for that of the testator. The evidence discloses that there were reasons present in the mind of the testator for the discrimination against these contestants. Whether those reasons were good or bad was not for the jurors to say and is not for this court to determine.

[10] Upon the issue of fraud contestants made numerous charges of fraudulent misrepresentations of fact alleged to have been made to the testator by Margaret and George for the purpose of inducing him to execute a will favoring them, to the detriment of contestants. At the trial contestants produced no evidence which even tended to substantiate any of those charges. The sole evidence upon which they now rely as supporting the finding of fraud is found in the testimony of George. He testified that when his father was dictating to him the provisions to be included in his proposed will the father expressed a belief that his daughter Ellen was addicted to the use of liquor or drugs. Respondents argue that because George failed to contradict this statement and did not endeavor to disabuse his father's mind of this belief he must be held guilty of fraud. Respondents invoke the rule that, "where there exists a relationship of trust and confidence, it is the duty of one in whom the confidence is reposed to make full disclosure of all material facts within his knowledge relating to the transaction in question and any concealment of material facts is a fraud." 12 Cal. Jur. 772. The rule is a sound one, but has no application to the situation here in question. Assuming, without deciding, that the situation was such as to make it the duty of George to disclose to the testator any facts of which he had knowledge which would have a bearing upon the provisions to be included in the will, it does not appear that he had any knowledge whatsoever as to the truth or falsity of this belief of the testator. On the contrary, it does appear by uncontradicted evidence that he had not seen nor heard from his sister for 6 years last past, and that he had no knowledge as to whether she was or was not addicted to the use of liquor or drugs. He cannot be held guilty of fraud in failing to disclose facts of which he had no knowledge.

[11] We are not unmindful of the rule that upon a review of the sufficiency of the evidence it must be construed most strongly in support of the verdict, and, in cases of conflict, the evidence which tends to support the verdict must be accepted as true, and that which conflicts with it rejected, and, where conflicting inferences may reasonably be deduced from facts proved, those must be adopted which tend to support the verdict. Giving full application to this rule, however, we are of the opinion that the evidence herein is insufficient to support any of the findings in favor of the contestants. The claimed errors of law for the most part resolve themselves upon analysis into the same contention, namely, the insufficiency of the evidence, and do not require separate consideration herein.

The judgment is reversed.

We concur: RICHARDS, J.; SHENK, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; WASTE, J.

---

72 Cal. App. 688

FINK & SCHINDLER CO. v. GAVROS et al.

(Civ. 4935.)

(District Court of Appeal, First District, Division 1, California. May 19, 1925. Rehearing Denied June 18, 1925. Hearing Denied by Supreme Court July 16, 1925.)

1. Judgment ⊂⊃155—Notices of motion to vacate defaults held sufficient to apprise plaintiff that relief was from mistake, inadvertence, and excusable neglect.

Notices of motion stating that motion would be "made and based on records, proceedings herein, this notice and papers copies of which are attached," and thereto were attached affidavits and proposed answers, *held* sufficient to apprise plaintiff that motion sought relief under Code Civ. Proc. § 473, and grounds of motion were alleged mistake, inadvertence, and excusable neglect of defendants within section 1010.

⊂⊃For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

2. Judgment ⟸143(3) — Facts held not to show "misunderstanding, mistake, or excusable neglect" of one defendant.

That defendant jointly sued with another made no effort to employ counsel until after default, and that denials of his verified answer were in form of negative pregnant admitting value of labor and materials were of any sum less than amount sued for, was not evidence of misunderstanding, mistake, or excusable neglect within Code Civ. Proc. § 473.

3. Judgment ⟸162(4)—Failure to answer on account of sickness held due to "mistake, inadvertence, and excusable neglect."

Evidence of verified answer and affidavit that defendant consulted attorney and intended to employ him, but, due to sickness, did not demur or answer before default, *held* to sufficiently show "mistake, inadvertence, and excusable neglect" within Code Civ. Proc. § 473.

4. Judgment ⟸143(3)—Granting relief from default not abuse of discretion.

Where failure to demur or answer complaint was alleged to be due to sickness of defendant, and verified answer alleged value of work and materials sued for was not greater than named sum, there was no abuse of discretion in granting relief from default.

5. Judgment ⟸160—Affidavit of merits to vacate default held sufficient.

Affidavit of merits of defendant and attorneys to vacate default alleging that defendant had stated facts fully and fairly to his attorneys, and was advised he had good and meritorious defense to action, with allegations of verified answer served and filed, *held* sufficient.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by the Fink & Schindler Company against John Gavros and others. Judgment by default was rendered for plaintiff, and, from an order vacating and setting it aside as to the defendant named and defendant George Panagiotaros, plaintiff appeals. Reversed as to defendant first named. Affirmed as to defendant Panagiotaros.

George W. Walker, of San Francisco (Russell W. Cantrell, of San Francisco, of counsel), for appellant.

Julian H. Biddle, of San Francisco, for respondent Gavros.

Franklyn M. O'Brien, of San Francisco, for respondent Panagiotaros.

CASHIN, J. Appeal by the Fink & Schindler Company, a corporation, from an order of the superior court of the city and county of San Francisco, vacating and setting aside as to each of the respondents John Gavros and George Panagiotaros a default judgment entered therein.

The facts are as follows: The appellant, on January 15, 1924, filed its complaint against respondents in said court, alleging an indebtedness of $1,404, with interest, based on two counts—one for the reasonable value of materials and labor furnished; the other for such materials and labor at the agreed price alleged as above. Summons was served on respondents in said city and county on January 21, 1924. Thereafter, respondents not having demurred or answered to the complaint, judgment for the amount prayed was on February 14, 1924, entered against them. Thereafter, on February 27, 1924, respondents separately served and filed their motions to vacate the judgment of default, which motion was on April 1, 1924, granted, with permission to file their proposed separate answers, on condition that the appellant be paid the sum of $50, which sum was by respondents deposited with the clerk of the court. The affidavit attached to appellant's complaint as a verification, made by its attorney, was not in substance or form sufficient to constitute a verification thereof under the provisions of section 446 of the Code of Civil Procedure.

[1] It is urged by appellant that respondents' several motions were insufficient in that the notices failed to state the grounds thereof in accordance with section 1010 of the Code of Civil Procedure, and that no facts were stated in the attached affidavits and answers showing diligence, mistake, inadvertence, or excusable neglect on their part or a defense to the action, and that the court, in granting the motion, abused its discretion.

The notices of motion each stated that the motion would be "made and based on the records, proceedings herein, this notice and papers copies of which are attached herewith," and thereto were attached the affidavits and proposed answers referred to. We are of the opinion that the notices with the papers attached were sufficient to apprise appellant that the motion sought relief under section 473 of the Code of Civil Procedure, and that the grounds of the motion were the alleged mistake, inadvertence, and excusable neglect of respondents. Reher v. Reed, 166 Cal. 525, 137 P. 263, Ann. Cas. 1915C, 737; Savage v. Smith, 170 Cal. 472, 150 P. 353.

Respondent Gavros, by affidavit in support of his motion, states that on January 23, 1924, he consulted attorney James J. McEntee, Jr., who had also been consulted by respondent Panagiotaros; that respondents were jointly interested in the matters alleged in the complaint; that he did not employ Mr. McEntee, believing that his interests would be protected by the attorney in representing Panagiotaros. It further appears from the affidavits of Mr. McEntee and from his testimony taken at the hearing on the motions, with the affidavit of respondent Panagiotaros in support of the Gavros motion, that Mr. McEntee was not employed by Gavros, and, according to Mr. McEntee, he was not employed by either respondent, but

requested to procure by stipulations from appellant an extension for each until February 10, 1924, within which time to plead, and which stipulations were obtained. Respondent Gavros, relying on the belief as stated, made no effort to procure the assistance of counsel until after the entry of judgment. His verified answer denied on information and belief the corporate existence of appellant, and conjunctively the allegations of both counts of the complaint; as to the first count denying that the reasonable value of the merchandise and labor was the sum of $1,404, and, as to the second, that the agreed price thereof was said sum. The denials in the form of a negative pregnant admitted that the value of the labor and materials and the agreed prices therefor were of a value and agreed price of any sum less than $1,404. Schroeder v. Mauzy, 16 Cal. App. 443, 118 P. 459.

The evidence presented in support of the motion of respondent Panagiotaros was that he had consulted Mr. McEntee, knew the necessity of filing his answer before the expiration of the time fixed by the stipulation; that he understood and believed that the attorney had undertaken to represent him; that an engagement had been made with Mr. McEntee for a meeting on the day before the last day for answer for the purpose of preparing his answer to the complaint; that on the day before the day of the engagement said respondent became ill, and as a result of the illness became incapacitated for a period including the day of the engagement and for several days after the last day for appearance in the action; that he failed for that reason to visit the attorney, and did not communicate with him until after the entry of judgment. The attorney, not understanding that respondent finally and definitely intended to employ him, and not hearing from respondent on the agreed day, and not knowing his address, believed that other counsel had been employed, and made no appearance by demurrer or answer in the action, and under such belief stated to counsel for appellant before the entry of the default that he did not intend to appear for respondent. It further appears that no payment as a retainer or for costs had been made. The verified answer filed by respondent Panagiotaros was, as to its denials, in form substantially the same as that of Gavros, but, as a special answer and defense, alleged that there was no agreement as to price as averred in the complaint, and that the merchandise and labor furnished were of the reasonable value of $550 and no more.

On these facts the trial court concluded that the default was due to mistake, inadvertence, and excusable neglect on the part of respondents; that each had a defense to the action on the merits, and that the default and judgment should be set aside.

[2] We are of the opinion that the evidence on which the court based its conclusion as to respondent Gavros was wholly insufficient to support it; that no misunderstanding, mistake, or excusable neglect was shown as to him which would warrant relief under section 473, Code of Civil Procedure.

[3, 4] As to respondent Panagiotaros, we cannot say that the evidence does not reasonably support the conlusion of the court that his failure to answer was due to his mistake, inadvertence, and excusable neglect. All presumptions being indulged in favor of the court's action, we cannot say that it abused its discretion in granting relief to respondent Panagiotaros. Moore v. Thompson, 138 Cal. 23, 70 P. 930; Smith v. Pelton Water Wheel Co., 151 Cal. 394, 90 P. 934; Johnson v. Schenck, 162 Cal. 747, 124 P. 426.

[5] Appellant urges the further point that the affidavit of merits filed by respondent Panagiotaros was insufficient. The affidavits of said respondent and his attorneys set forth that he had stated the facts of the case fully and fairly to his attorneys, and was advised that he had a good and meritorious defense to the action. This, with the allegations of the verified answer served and filed, was in our opinion sufficient.

The order is reversed as to respondent John Gavros and affirmed as to respondent George Panagiotaros.

We concur: TYLER, P. J.; KNIGHT, J.

---

72 Cal. App. 694

CHAVEZ v. TIMES-MIRROR CO.
(Civ. 5178.)

(District Court of Appeal, First District, Division 2, California. May 19, 1925.)

1. Libel and slander ⟹112(3)—Evidence held to sustain verdict for defendant on plea that publication was truthful.

Evidence in libel suit in which defendant pleaded truth of publication *held* not to justify interference with verdict for defendant.

2. Damages ⟹87(2)—Exemplary damages not recoverable, unless right to compensatory damages established.

Under Civ. Code, § 3294, exemplary damages are not recoverable in any case, unless plaintiff establishes his right to compensatory damages.

3. Appeal and error ⟹1056(4)—Exclusion of evidence directed to recovery of exemplary damages harmless, where jury found that plaintiff not entitled to actual damages.

Jury having found, in action for libel, that plaintiff was not entitled to actual damages, exclusion of evidence as to value of defendant's business, directed to recovery of exemplary damages, was harmless.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Appeal and error ⊂⊃1068(4)—No prejudice from exclusion of question of exemplary damages, where jury found that plaintiff not entitled to actual damages.

Jury having found, in action for libel, that publication was true statement, and that plaintiff was not entitled to actual damages, plaintiff suffered no prejudice by reason of instruction that no exemplary or punitive damages could be awarded because there was no showing of evil motive or actual malice.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action for damages for libel by E. V. Chavez against the Times-Mirror Company. Judgment for defendant, and plaintiff appeals. Affirmed.

J. W. Satterwhite and E. V. Chavez, both of Los Angeles, for appellant.

Daniel M. Hunsaker and Hunsaker, Britt & Cosgrove, all of Los Angeles, for respondent.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against him in an action brought to recover damages for an alleged libelous publication. This matter came before the Supreme Court of this state upon an appeal from a judgment entered after a demurrer to the complaint had been sustained, and the opinion filed upon that appeal is reported in 185 Cal., at page 20, 195 P. 666. Therein the judgment was reversed. We shall not repeat herein the statement of facts, but merely refer to the former opinion, which fully embodies them. In that opinion the complaint was carefully analyzed, and many of the statements in the article complained of are designated as fair comment, provided there was truth in the statement that the plaintiff had circulated "a deliberate lie maliciously framed." The Supreme Court said that the quoted language necessarily implied full knowledge on the part of plaintiff of the untruth of the statement on the card as to Walton J. Wood and a deliberate statement thereof with such knowledge.

On the coming down of the remittitur, the demurrer was overruled, and the defendant answered the complaint. After denying certain of its allegations, for further defense, it was alleged that the article published by defendant, of which complaint was made, was true. Upon this issue between the parties the jury was instructed:

"This article on its face, if untrue, is libelous per se. * * * Therefore the plaintiff is entitled to a verdict at your hands, unless it is established that the article in its gist or substance is true. Defendant pleads in its answer that the article in its gist and substance is true. If this plea is established, then the plaintiff is not entitled to recover, and your verdict must be for defendant."

Also:

"The plaintiff is not required to show that it was false, but the law places upon the defendant * * * the burden of alleging and proving by a preponderance of the evidence that the defamatory statements contained in the publication were true."

The jury brought in a verdict that the defendant recover its costs from the plaintiff. There is testimony in the record to support this verdict. Appellant sets out in his brief portions of the record which he contends disprove the charge that the statement made by him was a "deliberate lie, maliciously framed." If the jury had believed the explanation of plaintiff, it might have reached a different verdict, with which this court would not have interfered upon appeal; but the jury was not bound to accept this testimony. It had a right to draw contrary inferences from all the facts and circumstances of the case, and to believe that the plaintiff, as a practicing attorney in Los Angeles for over 11 years, knew that Walton J. Wood was not a superior judge, but that he was the public defender. Mr. Wood had occupied the latter position for 5 years at the time the plaintiff made the statement commented upon by the defendant; he had been actively engaged in the trial of cases in the courts, and had been mentioned frequently in the newspapers. Plaintiff testified that he had secured his information as to the candidacy of certain superior judges to succeed themselves from the newspaper. There was ample reason, afforded by the facts and circumstances appearing in the record, to warrant the jury in concluding that plaintiff knew that Walton J. Wood was not a judge of the superior court at the time he made the statement of that fact. There is equally good reason, evident from the record, for the jury to believe that the plaintiff did not include, inadvertently, the name of Walton J. Wood as a judge of the superior court in the place and stead of J. Perry Wood, a judge of the superior court. The plaintiff gave such an explanation of his conduct, but it also appeared that J. Perry Wood was not a candidate for re-election at that time, and his name had not been mentioned in any of the newspapers for re-election. Certainly the record in this case would not warrant an interference with the conclusion reached by the jury upon the questions of fact involved.

[1, 2] Complaint is made of rulings relating to the admission of evidence directed to the recovery of exemplary damages. It is contended that the court should have received evidence as to the value of the business of defendant. Discussion of this matter becomes unnecessary because the jury has found that plaintiff is not entitled to actual damages. Exemplary damages are not re-

coverable in any case, unless plaintiff establishes his right to compensatory damages. Civ. Code, § 3294; Pickwick Stages v. Board of Trustees, 54 Cal. App. 730, 731, 215 P. 558; Gilham v. Devereaux, 67 Mont. 75, 214 P. 606, 33 A. L. R. 381. As stated in Yaeger v. So. Cal. Ry. Co., 5 Cal. Unrep, 870, 51 P. 190:

"The jury having found, as we must assume, that there was no damage, plaintiff was not injured by excluding evidence that went to enhance that to which he was found not entitled."

[3] What has just been said applies with equal force to the complaint of appellant that the court erred in instructing the jury that, in view of the record, no exemplary or punitive damages could be awarded because there was no showing of evil motive or actual malice. Had the jury found the plaintiff entitled to actual damages, the correctness of this instruction would have been a vital consideration upon appeal, but, since we must assume that under the instructions the jury found that the publication in question was a true statement, there is no right to recover either actual or exemplary damages, and no prejudice is suffered by plaintiff by reason of any action of the trial court in regard to the question of exemplary damages.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

72 Cal. App. 582

PEOPLE v. SPRADO. (Cr. 829.)

(District Court of Appeal, Third District, California. May 11, 1925. Rehearing Denied June 10, 1925.)

1. Embezzlement ⊂⊃49—Verdict of guilty of "petit" embezzlement held direct and certain.

In prosecution for embezzlement, in violation of Pen. Code, § 508, verdict finding defendant guilty of "crime of petit embezzlement, within said charge as charged in the information," and fixing value of property embezzled "under $200," *held* to be direct and certain; it not being necessary that jury specifically find and fix value of property, and word "petit" meaning anything petty or small, clearly shows that offense was that of misdemeanor embezzlement.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Petit.]

2. Embezzlement ⊂⊃44(1)—Evidence held to sustain conviction.

Evidence *held* to sustain conviction of misdemeanor embezzlement, in violation of Pen. Code, § 508.

3. Embezzlement ⊂⊃44(2)—That employee conceived intent to fraudulently convert property to his own use during tenure of his employment need not be shown.

To establish crime of embezzlement by employee, in violation of Pen. Code, §§ 508, 509, by fraudulently appropriating property of employer to his own use, it need not be shown that he conceived intent to fraudulently convert property while still an employee, as it is sufficient if it be shown that property came into his control by virtue of his employment.

4. Criminal law ⊂⊃1168(2)—Admission of testimony on rebuttal held not prejudicial, where relevant and material and not cumulative.

Admission of testimony on rebuttal, while not strictly rebuttal testimony, was not prejudicial, where it was relevant and material and not cumulative of other testimony.

5. Criminal law ⊂⊃409—Place, persons present, and time held not prerequisites to introduction of testimony of conversation relating merely to testimony of substantive fact.

Where question calling for conversation by witness with defendant was not for impeachment purposes, but called for testimony of statement by defendant amounting to admission, the place where, persons present, and time when, conversation took place, were not necessary to be shown as prerequisites.

6. Criminal law ⊂⊃1186(4)—Refusal to permit defendant to explain circumstance of incriminating nature held not to require reversal, in view of conclusive evidence of defendant's guilt.

In prosecution of defendant for embezzlement of radio from his employer, in violation of Pen. Code, § 508, defendant having sold radio to another and had check drawn in his wife's name, refusal to permit defendant to explain why check was drawn in his wife's name, though error, *held* not to require reversal, in view of Const. art. 6, § 4½, where defendant's guilt was conclusively shown.

7. Criminal law ⊂⊃719(4)—Erroneous refusal to permit explanation of incriminating circumstance not ground for denying district attorney right to comment thereon in argument.

Fact that it was error for court not to allow defendant to explain circumstance of incriminating nature was no reason for denying district attorney right to comment on same in argument to jury.

8. Criminal law ⊂⊃1170(4)—Exclusion of testimony as to conversation held harmless, where later admitted.

Refusal to permit defendant to give substance of conversation with another, in which other was alleged to have given defendant permission to retain radio equipment, for alleged embezzlement of which defendant is being prosecuted, was harmless, where court later allowed defendant to state such conversation.

9. Criminal law ⊂⊃1141(2)—Duty of counsel to show appellate court how trial court erred in refusing to give requested instructions.

It is duty of counsel to show how trial court erred in refusing to give instructions, and it is

not for appellate court to examine record to determine whether instructions were pertinent or covered by general charge.

10. Criminal law ⟨⟩1171(1)—Judgment not reversed for remarks of judge or district attorney, unless defendant's right seriously prejudiced, denying him a fair and impartial trial.

Unless remarks of district attorney or trial judge are so grossly improper as irresistibly to lead to no other conclusion than that defendant was seriously prejudiced and denied a fair and impartial trial, result below for that reason cannot be reversed.

On Petition for Rehearing.

11. Criminal law ⟨⟩1169(11)—Question as to defendant buying phonograph under assumed name and arrest in connection therewith, held not to require reversal, in view of conclusive evidence of his guilt.

In prosecution for embezzlement of radio set, questions as to defendant having purchased phonograph under assumed name and having been arrested therefor were not proper impeachment, under Code Civ. Proc. §§ 2049, 2051, 2052, but, where objection to latter question was sustained, and there was nothing either on face of first question or defendant's prompt answer thereto, tending to reflect on defendant's character, *held* that no miscarriage of justice resulted, especially in view of abundant proof of defendant's guilt.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Hugh R. Sprado was convicted of petit embezzlement, and appeals. Affirmed.

Wallace Shepard and Clifford A. Russell, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Chas. Jones, Deputy Atty. Gen., for the People.

HART, J. The defendant, upon an information filed in the superior court, in and for the county of Sacramento, was charged with and tried for felony embezzlement, and convicted of petit embezzlement, and thereupon sentenced to serve a term of 6 months in the county jail of the said county. He duly made an application for a new trial, and the same was denied. He prosecutes this appeal from the judgment of conviction and the order denying his motion for a new trial.

The information was based on section 508 of the Penal Code, which provides:

"Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement."

Section 514 of said Code provides that—

"Every person guilty of embezzlement is punishable in the manner prescribed for feloniously stealing property of the value of that embezzled."

Section 487 of said Code provides:

"Grand larceny is larceny committed in either of the following cases: 1. When the property taken is of a value exceeding two hundred dollars. * * *"

And section 488 provides that—

"Larceny in other cases is petit larceny."

Section 489 of said Code fixes the penalty for grand larceny at "imprisonment in the state prison for not less than one nor more than ten years," and section 490 provides that the punishment for petit larceny shall be by "fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding six months, or both."

The information charges that—

The defendant "on the ——— day of February, A. D. 1924, in the said county of Sacramento, in the said state, * * * was then and there the clerk, agent, and servant of Kimball-Upson Company, a corporation, * * * and doing business in the county of Sacramento, and then and there by virtue of his said employment as such clerk, agent, and servant, then and there came into his possession, care, custody, and control of him, the said Hugh R. Sprado, radio equipment of the value of $246, in gold coin of the United States, the personal property of the said Kimball-Upson Company, * * * and he, the said Hugh R. Sprado, after the said radio equipment had come into his possession, care, and custody, as aforesaid, did then and there, to wit, in the city of Sacramento, county of Sacramento, state of California, on said ——— day of February, A. D. 1924, unlawfully, fraudulently, and feloniously convert, embezzle, and appropriate the same to his own use, not in the due and lawful execution of his trust as such clerk, agent, and servant," etc.

The points made for a reversal, stated in the language and the order in which they are stated in appellant's brief, are:

"(1) That the verdict of the jury is not direct and certain and cannot be considered by the court; (2) that the evidence does not support the verdict; (3) that the errors of the trial court were prejudicial to appellant; (4) that the court erred in denying defendant's motion for an instructed verdict after the prosecution had concluded its case."

[1] 1. The verdict reads as follows:

"We, the jury in the above-entitled cause, find the defendant, Hugh R. Sprado, guilty of the crime of petit embezzlement included within said charge of embezzlement as charged in the information, and hereby fix the value of the property then and there embezzled under $200, and recommend that probation be granted defendant."

The recommendation of probation for the accused was disregarded by the court, but that fact is inconsequential, in so far as are concerned the points urged against the validity of the verdict, as above explained. The court delivered to the jury the several written forms of verdict covering any conclusion,

within the record as made by the information and proofs, which they might, upon a consideration of the case, conceive it to be their duty to reach and declare. Among the forms so submitted to the jury was the following:

"We, the jury in the above-entitled cause, find the defendant, Hugh R. Sprado, guilty of the crime of embezzlement as charged in the information and hereby fix the value of the property then and there embezzled at $———."

It will be noted that the jury, in formulating their verdict, did not follow that form. The contention that the verdict is not direct and certain is predicated upon the fact that the jury did not specifically find and fix the value of the property alleged to have been fraudulently, and contrary to his trust, converted and appropriated by the defendant to his own use. There is no merit to the contention. The crime of petit or misdemeanor embezzlement is admittedly embraced within the crime of embezzlement as charged in the information, and, the jury having determined that the defendant was guilty of the lesser offense, it was, of course, necessary that they should so declare in their written verdict, but it was not necessary that the finding in that regard should be in any particular form of language. If in such case the verdict as returned is in language sufficiently clear to indicate beyond any doubt that the accused has been found guilty of the lesser offense than that directly charged in the information, it is enough. The verdict fully measures up to this test. It is not necessary that the jury should have specifically found and fixed the value of the property. The evidence might have been such, according to the jury's view thereof, that the triers could not have fixed precisely or even with satisfactory approximation the value of the property. Again, it might happen, as probably it did happen in this case, that the jury, after considering the evidence as to value, entertained a reasonable doubt upon the question whether the property was of value amounting to more or less than $200, but were yet not able to fix the exact value thereof, and, if so, it was their duty to give the defendant the benefit of such doubt, and, being convinced by the evidence that he had embezzled the property, find him guilty of the lesser and not of the higher offense charged. If, therefore, the general finding as to value was all that there was to the verdict as an indication of the crime of which it was the design and intention of the jury to find the defendant guilty, no one then reading the verdict or hearing it read, having in view the fact that for the lesser offense the penalty is the same as that authorized to be imposed for petit larceny, could for an instant doubt that in effect it declared that accused was guilty of the lesser offense of the two included within the crime as charged. But it will be seen that, as indicative of the intention to find the defendant guilty of the lesser offense, the verdict contains more than the mere finding as to value in the finding preceding that of value, to wit: "* * * guilty of petit embezzlement, included within said charge of embezzlement as charged in the information." This language itself, without regard to what the verdict contains as to value, makes it perfectly clear that the offense of which the jury found the accused guilty was that of misdemeanor embezzlement. While misdemeanor embezzlement is not characterized in the Code as "petit embezzlement," the word "petit" bears a well-understood legal signification as used in our Penal Code. In common parlance it means anything petty or small. Employed in our Code for the purpose of defining a crime, it means an offense of less gravity than a felony. For instance, larceny, as seen, is divided by the Penal Code into grand and petit—the first a felony, punishable by imprisonment in the state prison, and the latter a misdemeanor, punishable by fine or imprisonment in the county jail, or by both fine and imprisonment. Hence the designation in the verdict of the lesser of the two offenses included within the crime charged in the information as "petit embezzlement" is not at all inappropriate. Thus at once there is conveyed to the mind the thought that the smaller or lesser and not the greater of the two offenses so charged is referred to. It may be added that the trial court experienced no difficulty in determining from the verdict the legal effect and scope thereof, for the judgment of sentence was in accord with the penalty authorized in cases of misdemeanor embezzlement. So, if the evidence sufficiently disclosed that the accused was guilty of embezzlement, he suffered no prejudice from the awkward form of language in which his guilt was declared.

[2] 2. The verdict is sufficiently supported. The evidence shows that the defendant was for several years, and down to March 1, 1924, in the employ of the Kimball-Upson Company, and as such was manager and in charge of the radio equipment department of said corporation; that he was permitted by the corporation to take radio sets from the store for the purpose of testing them, he being required to charge against himself on the books such sets as he might so take; that previously to the last day of February, 1924, he was notified by the corporation, through an authorized officer thereof, that, after the said last day of February, his services for and connection with the corporation were to terminate or cease; that on the 28th day of February, 1924, he was asked by Mr. Kimball, a member of said corporation, whether every article of merchandise he had theretofore taken from the store had been returned to the store, to which question the defendant returned an affirmative answer. The evidence further shows that the particular radio set with the wrongful conversion of which

he is charged had not been at that time, nor was it at any subsequent time, returned to the store by the accused. It was also shown that in the month of April, 1924, the defendant sold to one Rasmussen a radio set for the sum of $256. Rasmussen identified the set shown him in court by the district attorney as the one he purchased from defendant at the time mentioned, and which had previously been identified by the witness Kimball, president of Kimball-Upson Company, as the set which the defendant had taken from the store of the corporation while he was manager of the radio department thereof. It was further shown that no record of the removal of said set from the store had ever been made in the book used for that purpose.

The defendant made no denial of having the radio set in his possession at the time he severed his connection with the Kimball-Upson Company, or that it belonged to the latter. He did deny, however, that he was asked by Kimball or any other person connected with the corporation whether he had returned to the store all the merchandise he had removed therefrom. He stated that he retained possession of the property with the consent of, and understanding with, one Deatrick, who succeeded him (defendant) as manager of the radio department of the corporation that he was to sell the set and pay the proceeds of the sale to the corporation; that in April, 1924, he sold the property to Rasmussen for $256, and received payment therefor in the form of a check, which, at his request, Rasmussen drew in the name of his (defendant's) wife; that he did not turn the money received for the set over to the corporation until the month of September, 1924, after investigation was started to ascertain the whereabouts of the set, and when a demand was for the first time made upon him for the payment of the money. He stated that his procrastination in the matter of the payment of the money received for the radio set was due to the fact that no bill for the property or no demand for the money so received had been sent to or made upon him by the corporation. Deatrick positively denied giving his consent to the retention by defendant of the radio equipment, and stated that, while he knew that a radio equipment was missing from the store, he did not know with certainty that defendant had possession thereof; that, after he had learned that the defendant had the set in his possession, he, with other employees of the corporation, proceeded in an attempt to secure either the radio set or the money paid to the defendant on the sale thereof. Deatrick also testified that when he first interviewed the defendant concerning the property the latter made to him three different statements regarding his possession of the property. One of these statements was to the effect that B. A. Mitchell, assistant general manager of the corporation, had given him (defendant) permission to retain and dispose of, if he could, the property. Said Mitchell denied, however, that he gave any such permission to defendant. He said that he asked defendant how and when he got possession of the set, and that the latter said that in the month of January he had it in his possession at his home, that he returned it on January 31 for the purpose of having it inventoried with the other property in the store, and that immediately thereafter, and before leaving the store, he had again taken it with him and had retained it until he sold it.

[3] The foregoing is a sufficient statement of the testimony to show that the verdict is well buttressed evidentially. But the specific point urged under this assignment is that, to establish the crime of embezzlement against the accused, it was necessary to show not only that he had possession of the articles constituting the radio set, but that he conceived or formed the intent fraudulently to convert them to his own use prior to the date of his retirement from the service of the corporation, or, in other words, while he was still in the employ of the corporation. We do not conceive this to be a correct view of the law. The statute (section 508, Pen. Code) upon which the information herein is founded declares, as will be seen, that every clerk, agent, etc., who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, "any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant," is guilty of embezzlement. It is clear that it is wholly immaterial under said section at what time the property has been fraudulently appropriated by such clerk, agent, or servant, or at what time the intent so to appropriate it may be formed—whether before or after his employment as such clerk, etc., has ceased—if it be shown that such property has come into his control or care by virtue of his employment as such clerk, etc. As to the particular property belonging to another, which has come into the control or care of a clerk, agent, or servant, by virtue of his employment as such clerk, agent, or servant, such clerk, etc., so long as he retains the control or care of such property, is the agent of the owner thereof, even though his employment as such clerk or servant or agent has ceased. But, aside from these considerations, the testimony to the effect that, when asked by the president of the corporation, just prior to his final severance from connection with the corporation as an employee thereof, whether he had returned to the store and the possession of the corporation all the articles of merchandise he had on prior occasions removed from the store, the defendant answered that he had, and the further testimony that, after he had terminated his connection with the corporation he sold the radio set, afforded a very strong

inference that the defendant had formed the intent to appropriate the set to his own use either before or on the day of his employment with the corporation ceased. Indeed, we think this testimony is sufficient to support the conclusion, if it were necessary to concede that such conclusion is of material consequence in determining whether the verdict stands secure against successful assault, that the intent to appropriate the property was formed by the defendant during the course of his employment as the manager of the radio department of the corporation.

[4] 3. Certain rulings assigned as erroneous and prejudicial to the rights of the accused require consideration herein. The district attorney, calling the witness Kimball, after the defendant had closed his case, asked said witness whether he had a conversation with the defendant on the 29th day of February, 1924, in the course of which he (witness) asked the defendant "if he had any of your merchandise in his charge," and to which question the defendant answered in the negative. To that question the defendant objected upon the ground that it did not call for rebuttal testimony, and, further, because the proper foundation had not been laid for the proof of such conversation, in that the "time, place, and persons present" were not stated or given. Assuming that the testimony was not strictly rebuttal, it was nevertheless relevant and material, and we cannot say that it would be an abuse of the court's discretion in allowing it, although the proper practice, when testimony is not rebuttal, but is offered after the party against whom it is offered has closed his case, is for the party offering it to ask permission to reopen his case for that purpose. In all such instances, or at least as a general rule, where the testimony is relevant and material, and not cumulative of other testimony ample to support the fact to the proof of which the alleged rebuttal testimony is addressed, such motions are allowed, and doubtless in this case, as we may assume from the ruling allowing it, the court would have granted such motion had one been made by the district attorney. So, the testimony being relevant and material, it cannot be said that the defendant was prejudiced as a result of the ruling allowing it. We have assumed, without intending to hold, that the testimony was not rebuttal in the technical sense.

[5] It was not necessary to show, as a prerequisite to the introduction of testimony of the conversation in question, the place where, the persons present, and the time when, the conversation took place. The question calling for the conversation was not for impeachment purposes. It called for testimony of a substantive fact, or a statement by the defendant not amounting to a confession but merely what is technically called in law an admission—that is, a statement which might be pregnant with the admission of a circumstance which, considered with other facts and circumstances, may tend to the establishment of the guilt of the accused. Of course, the defendant was at liberty, on cross-examination, to inquire into the particular circumstances under which the conversation occurred, including the time and the place and the persons present.

[6, 7] It was developed by the prosecution in making its case that the party to whom the defendant sold the radio set paid for the same by a check drawn in the name of defendant's wife. The witness Rasmussen, to whom the radio set was sold, testified that the check was so drawn at the request of the defendant himself. The attorney for the defendant sought to secure an explanation from his client of the reason for having the check made out in his wife's name, but an objection by the district attorney to the question designed to elicit that information was sustained. When arguing the case to the jury, the district attorney put special emphasis on the fact that the check was so drawn, and, in effect, declared that it was a strong circumstance tending to show an effort on the part of the accused to cover up his crime, or to prevent, as far as it might, disclosure of the fact that the radio set was not the property of the Kimball-Upson Company. No good reason occurs to us why the court refused to allow the defendant to explain how he came to have the check drawn in his wife's name. Whether he could have explained the circumstance in a plausible or a reasonable way is not material upon the question of the admissiblity of the testimony thus sought to be brought out by the defendant. It was a circumstance more or less of an incriminatory nature, when considered by the light of the other facts and circumstances of the case, and the accused was entitled to explain it, if he could, and of course it would have been for the jury to determine whether the explanation was or was not a satisfactory one, or whether it would or would not have the effect of destroying its apparent inculpatory force. In brief, the question was proper cross-examination, and should have been allowed. But the guilt of the defendant seems to have been conclusively shown by the evidence, and therefore no miscarriage of justice could have followed from the ruling. Section 4½ art. 6, Const. Of course, the district attorney, in his argument before the jury, was within his rights when he called attention to the circumstance of the check having been drawn at the request of the defendant in the name of the latter's wife. The fact that it would be error for a court to refuse to allow a defendant to explain, if he desired to and could do so, some competently presented circumstance which might damage his defense, would not constitute a reason for denying to the district attorney the right to make the most of

such circumstance in his argument to the jury as in support of the theory of guilt, and, as we have stated, the circumstance here being considered was relevant, material, and competent.

The defendant, on cross-examination, was asked by the district attorney whether, prior to July 1, 1922, he purchased or rented a phonograph equipment from the Hauschildt Music Company under the name of Lewis, stating that he was a member of the Olympic Club of San Francisco, which question he answered in the affirmative. After the answer was returned, defendant's counsel moved to strike the answer out "for the purpose of making an objection," and, the motion being allowed, then objected to the question on the ground that it was not cross-examination, and that the question was incompetent, irrelevant, and immaterial. The question was improper, and the alleged testimony sought thereby to be elicited wholly inadmissible. But there is nothing either upon the face of the question or the affirmative answer thereto which could have tended to reflect upon the character of the accused but what might be implied from the fact that, at the time of the transaction referred to, he assumed a name different from that under which he was proceeded against in this case. There was nothing wrong, so far as the question and the answer upon their face show, in the purchasing or hiring of the phonograph. The defendant himself seems to have regarded the transaction as one the occurrence of which he was not afraid to admit, for he appears to have answered the question unhesitatingly, even before his counsel could interpose objection thereto. Indeed, it may well be concluded that the fact that the purchasing or hiring of the phonograph was, so far as anything to the contrary is shown here, perfectly legitimate, would seem to negative rather than to carry the implication of suspicion or wrong or guilty knowledge with which the fact that an accused has committed some wrongful act under a pseudonym is ordinarily pregnant. But, waiving consideration of that suggestion, it certainly cannot be held, in view of the large amount of proof of the defendant's guilt, that the question and the answer thereto, even when put side by side with the other errors pointed out by the defendant, and so considered, produced a miscarriage of justice in the instant case.

[8] There is absolutely no ground for the complaint that the court erred in refusing, in response to objection by the district attorney, to permit defendant to give the substance of a conversation with the witness Deatrick, at the home of the former, a few days after the defendant had left the employment of the corporation, in the course of which conversation Deatrick, so the defendant testified, gave the defendant permission to retain possession of the radio equipment for the purpose of disposing of it. The objection to the testimony was upon the ground that Deatrick had not been shown to be the agent of the corporation at the time the conversation was had, and therefore not shown to have the authority to bind the corporation to any arrangements he might have made with the defendant as to the radio set. The objection was technically well founded; but later it was shown that Deatrick was the agent of the corporation, with authority to negotiate arrangements with others as to articles of merchandise which were sold by the Kimball-Upson Company, and upon that showing the court allowed the defendant to state the conversation inquired about by his attorney, and he (defendant) did state said conversation or the substance thereof.

Other alleged errors founded upon the rulings of the court receiving and excluding certain evidence are complained of. These assignments we have carefully examined, and have found no merit to many of the objections, while as to others the errors are so inconsequential that, when compared to the vast amount of proof of guilt, it may well be declared, as we do declare, that they were innocuous in their effect upon the substantial rights of the accused. No miscarriage of justice followed from the errors now referred to.

[9] Counsel for the defendant, in their brief, say:

"The court's attention is also called to the rulings of the trial court in refusing to give the instructions asked for by defendant, and which are numbered 7, 11, 12, and 13."

This is all that is said by the defendant in relation to said instructions. Nowhere is it pointed out wherein the instructions were not properly rejected. It is not for this court to examine the record to determine whether the instructions were pertinent, or, if pertinent, whether they were or were not covered by the general charge of the court. It was the duty of counsel to show this court how the court erred in refusing to give the instructions. People v. Chutnacut, 141 Cal. 682, 685, 75 P. 340; People v. McLean, 135 Cal. 306, 309, 67 P. 770; People v. Cebulla, 137 Cal. 314, 317, 70 P. 181.

[10] There is a general criticism throughout the brief of counsel for the defendant of the conduct of the court and the district attorney in the trial of the case, it being asserted that both those officers were guilty of misconduct. We have read the record carefully and cannot say that the court and the district attorney transcended the line of their duty in the management and the trial of the cause. Of course, it is to be said that in all warmly contested cases, particularly those involving prosecutions under the criminal laws, now and then there will leave the lips of either the judge or district attorney some remark or remarks which should not go

before the jury. Unless, however, it can justly be said that such remarks are so grossly improper as irresistibly to lead to no other conclusion than that the rights of a party to an action or the defendant in a criminal case were thereby seriously prejudiced and he therefore denied a fair and impartial trial according to the law of the land, then the result reached below cannot for that reason be set at naught.

The claim that the court should have advised the jury to find the defendant not guilty is answered by the discussion above.

The judgment and the order appealed from are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

On Petition for Rehearing.

HART, J. The defendant, in a petition for a rehearing of this case, makes substantially the points which were urged for a reversal in his briefs, viz: (1) That there was no proof showing the time at which he formed the alleged intent to embezzle the radio equipments introduced in evidence; (2) that this court overlooked, or at least did not notice in its opinion, the fact that, previously to asking defendant whether he, on some prior occasion, purchased or rented from a certain music company a phonograph equipment under the name of Lewis, and at that time stated that he was a member of the Olympic Club of San Francisco, asked defendant, in effect, if it was not true that he (defendant) was, in connection with the said transaction, arrested in San Francisco under the name of Lewis.

Before considering again the points above stated, we may acknowledge the error made in the former opinion in stating that the witness Kimball, president of the Kimball-Upson Company, identified the radio set introduced in evidence as an exhibit as the set which defendant had taken from the store of the corporation while he was manager of the radio department thereof. Kimball did not so testify, as we learn from a re-examination of the record. We should have said that the said radio set was unqualifiedly identified as the property of said corporation by P. A. Mitchell, assistant general manager of the corporation. The error is not material, however, since it was not denied by the defendant that the radio set in question belonged to the corporation and that he had it in his possession and sold it.

1. Counsel, in their petition here, state that we misapprehended the point made in their briefs to the effect that there was no proof as to the particular time at which defendant formed the alleged intent to convert the property in question to his own use. We did not misunderstand the point. The point, as specifically explained in the petition, is: That, it having been shown that the radio equipments referred to in the information were bought by the Kimball-Upson Company in the month of January, 1924, that defendant left the employ of said company in February, 1924, and that the discovery that said property had been sold by defendant in April, 1924, the question whether defendant formed the intent to embezzle the property while he was still an employee of the company is left entirely in the dark, so to speak. In other words, the contention is that, there being no evidence to show that he had the radio set in his possession while he was still an employee of the company, it might be true, so far as the record shows to the contrary, that he got possession of the property in some mysterious way in the month of March or April and after he had severed his connection with the company as an employee; that, as the proposition is stated by counsel, "he could have entered the store of Kimball-Upson and stolen the set during the month of March previous to the sale by him. He would then have been guilty, not of embezzlement, but of larceny." There is no force to that argument as addressed to this court. It was for the jury to determine from all the circumstances, which are recited in the original opinion, when and how the defendant got possession of the set and the time he conceived the intent to embezzle it. Nor was there any ground for such an argument before the jury, for the accused admitted that he took the set in question to his home from the Kimball-Upson store in the month of January, 1924, while he was still manager of the corporation's radio department. He stated, however, that he returned the set to the store the latter part of January, 1924, for the purpose of having it included in the inventory of stock which was conducted in the month of January of each year; that he thereafter again took it to his home, where it remained until he sold it in the month of April, 1924; that he never told any one connected with the corporation that he had sold it until July, 1924, when, the set having been found missing, an officer or employee of the corporation discovered that he had had possession of the property and sold it. There was no evidence introduced at the trial warranting an inference that the defendant stole the equipments in the month of March, nor did the defendant say he got possession in that month. He did state, however, as shown in the original opinion, that he retained possession of the set by permission of Deatrick, his successor as manager of the radio department of the Kimball-Upson store. In this connection, it is to be stated that if, as he claims, after his connection with the corporation as a regular employee had terminated, he was authorized by Deatrick as the manager of the corporation's radio department to retain the set with au-

thority to sell it for the corporation, his position in the transaction would be the same as though he embezzled the property while he was still in the corporation's employ as the manager of its radio department, since the act of Deatrick, acting for the corporation, in thus giving him such possession for the purpose of selling it for the corporation, conferred upon and constituted him an agent of the corporation for that particular purpose. Viewing, then, the transaction from either angle, the jury were legally at liberty to find, as impliedly they did find, that defendant at some time, while acting as agent of the corporation as to said property, formed the intent fraudulently to appropriate it to his own use; said set having come into his possession and control by virtue of his employment as such agent. Pen. Code, § 509. And, as pointed out in the opinion heretofore filed herein, if the property came into his control or care by virtue of his employment as clerk, etc., of the corporation, he remained agent or trustee of the latter as to said property so long as it continued in such care or control. In brief, all that is said in the original opinion upon the question of intent we still adhere to.

[11] 2. We did not overlook the question first asked defendant by the district attorney as to whether he had ever been arrested in connection with the transaction above mentioned under the name of Lewis. But the court sustained an objection to the question first asked, and the effect of that ruling should have been and probably was to impress the jury with the understanding that the question and the answer it was designed to elicit involved matters which it was not proper for them to consider in passing upon the issue of guilt or innocence. As stated in the former opinion, however, neither question should have been asked nor allowed. Neither was, obviously, a proper question for impeachment nor for any other purpose. The Legislature has specifically described the manner in which a witness may be impeached. Code Civ. Proc., §§ 2049, 2051, and 2052. The methods thus pointed out for such impeachment are exclusive. The mere fact that a witness may at some time have been arrested for some crime is not included in said sections as a ground upon which a witness may be impeached. But, as declared in the original opinion, the evidence of defendant's guilt appears to be so conclusive as to justify the conclusion that no miscarriage of justice has resulted from the misconduct of the district attorney in asking the questions on that line, or the error of the court in sanctioning the last of the questions so asked. Indeed, an examination of the defendant's own testimony will readily show that his defense as thus disclosed appears to be singularly weak—so much so, in fact, that its tendency seems to confirm rather than to negative the theory of guilt as maintained by the people.

We are satisfied with the views and the conclusions expressed and announced in the former opinion as to all the points therein considered.

The petition is denied.

We concur: FINCH, P. J.; PLUMMER, J.

MEMORANDUM DECISIONS

73 Cal. App. 1[3]

PEOPLE of the State of California, Plaintiff and Respondent, v. James WARREN, Defendant and Appellant. (Cr. 845.) (District Court of Appeal, Third District, California. June 2, 1925.) Appeal by defendant from a judgment of the Superior Court of Merced County, E. N. Rector, Judge, of conviction of sex perversion. Affirmed. A. N. Soliss, of Merced, for appellant. U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PER CURIAM. The defendant was convicted of the crime of sex perversion as defined by section 288a of the Penal Code. He moved for a new trial, and the motion was denied. This appeal is from the judgment, and the order denying a new trial. The transcript was filed in this court February 11, 1925. No brief has been filed by appellant. The cause was placed on the calendar to be orally argued June 1, 1925. No appearance was made in behalf of appellant, and the cause was ordered submitted on the record. The evidence is sufficient to sustain the conviction, and no error has been discovered in the record. The judgment and the order are affirmed.

CALIFORNIA REPORTER

238 PACIFIC REPORTER

238

196 Cal. 333

In re IBURG'S ESTATE.

WOLLESEN v. CARLSON. (S. F. 11379.)

(Supreme Court of California. June 30, 1925.)

1. Wills ⊂⊃435—Rules prescribed by Civil Code are observed in construing will, unless intent to contrary clearly appears.

In interpreting wills, rules prescribed by Civil Code are to be observed, unless intent to the contrary clearly appears.

2. Wills ⊂⊃182—Whether later will is so inconsistent that it revokes former will must be determined from later will's language.

In view of Civ. Code, §§ 1319–1321, and section 1296, providing that prior will is not revoked by later will, unless later will contains express revocation clause, or its provisions are wholly inconsistent with former will, court, in ascertaining if earlier will is revoked by later olographic will, which contained no express revocation, must determine from language of olographic will whether it is wholly inconsistent with earlier will, and in case of doubt, construction is favored which preserves prior will's contents, wholly or in part, rather than to declare total revocation by inference.

3. Wills ⊂⊃182—Later will, disposing of all property, but naming no executor, revokes earlier will, which disposes of all property and names executor.

Olographic will, containing no revocation clause, and disposing of entire property, but naming no executor, is wholly inconsistent with and revokes earlier will disposing of entire property and naming executor, so that it is error to admit earlier will to probate and to appoint person named therein as executor.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Applications by Henrietta Wollesen and John Carlson for the probate of two wills of John Iburg, deceased. Both wills were admitted to probate and from that portion of the judgment which admitted the will offered by John Carlson and appointed him executor, Henrietta Wollesen appeals. Reversed and remanded, with directions.

S. W. Molkenbuhr, of San Francisco, for appellant.

Frank M. Hultman and Wm. J. Brennan, both of San Francisco, for respondent.

WASTE, J. John Iburg made a will in 1921, leaving all his property to his friend, John Carlson, and appointing him his executor. Thereafter in 1924, he made an olographic will, leaving all his property to his sister, Henrietta Wollesen. The latter instrument contained no words of revocation, and did not appoint an executor. Upon Iburg's death, shortly after making the second will, each of the documents was offered for probate as his last will and testament. Henrietta Wollesen objected to the admission to probate of the will made in 1921 upon the ground that the same had been entirely revoked by the olographic will made in 1924. The court below admitted both documents to probate as the last will and testament of Iburg, and appointed Carlson executor thereof. Henrietta Wollesen appealed from that portion of the order admitting the will of 1921 to probate and appointing John Carlson as executor, and refusing to appoint her administratrix with the will annexed of the will of 1924. Both wills were duly executed, and the only question involved in the controversy is, Did the will executed in 1924 completely and entirely revoke the one made in 1921?

[1, 2] In interpreting a will subject to the law of this state, the rules prescribed by the Civil Code are to be observed, unless an intent to the contrary clearly appears. Several testamentary instruments executed by the same testator are to be taken and construed together as one instrument. All parts of a will are to be construed in relation to each other, and so as to form one consistent whole, if possible; but, where several parts are absolutely irreconcilable, the latter must prevail. Civ. Code, §§ 1319, 1320, 1321. Section 1296 of the Civil Code provides:

"A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

There being no words of express revocation in the will of 1924, we must determine from the language of the will whether it is wholly inconsistent with the terms of the will of 1921, in order to ascertain if the earlier will was in fact revoked by the later. If the case be doubtful, the courts incline to preserve the contents of the prior will, wholly or in part, rather than declare a total revocation by inference. The rule is thus stated in 1 Schouler on Wills (6th Ed.) par. 617:

"Where, for instance, the later will only disposes of a portion of the estate, they avoid the ill consequence of partial intestacy; and where the later paper is styled a codicil, they take this to mean that the intent was to amend and not repeal; and in either case the former

will is treated as no more than pro tanto revoked. In other cases, perhaps the context may justify a similar construction. But if the later will does not profess to be a codicil at all, and disposes moreover of the entire estate inconsistently with the earlier, a court would violate its duty not to hold that the earlier will was wholly revoked, unless the context supplied good reason for supposing that the testator otherwise intended."

See, also, 28 R. C. L., "Wills," § 132.

In Estate of Marx, 174 Cal. 762, 164 P. 640, L. R. A. 1917F, 234, this court quoted with approval the rule laid down by Jarman on Wills that in all cases where a later will is adequate to the disposition of the entire property of the deceased the case "rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, unless controlled by the context, wholly revoke the first." 1 Jarman on Wills (6th Ed.) star page 138; other authorities to the same effect are Page on Wills, § 269; 1 Underhill on Wills, § 251; 1 Redfield on Wills, star pages 362, 365.

[3] Respondent cites some authorities to support his theory that a prior will which appoints an executor is in that respect not inconsistent with a later will which makes no such provision. He contends that, where the prior will disposes of all the property and appoints an executor, and the subsequent will merely disposes of all the property, but does not appoint an executor, and contains no words of revocation, there is no inconsistency between the two instruments, so far as the appointment of an executor is concerned, and that therefore both wills should be admitted to probate, and the executor named in the earlier will should be appointed. Newcomb v. Webster, 113 N. Y. 191, 21 N. E. 77; Underhill on Wills, § 255, pp. 349, 350; In re Leese's Estate (1862) 2 Sw. & Tr. 442, 164 Eng. Rep. 1068. The court in Newcomb v. Webster, supra, was dealing with a will and a codicil, and not with two independent substantive wills. In this connection it should be remembered that a codicil is a republication and ratification of so much of a prior will as it does not revoke. In Simmons v. Simmons, 26 Barb. 68, the court said:

"A new will (if it provides for the full disposition of all the testator's estate), though inconsistent but in part with the former will, and absolutely agreeing in part, revokes the whole prior will, by substituting a new and last disposition for the former one."

See Ludlum v. Otis, 15 Hun (N. Y.) 410, 413. In the English case, In re Leese, supra, the first will disposed of the entire estate, and named executors. A second will made a different disposition of the personal property only, reappointed one of the former executors, and named another. The judge of the prerogative court held that both wills should be admitted to probate, and both sets of executors should be appointed. No appeal was taken. But, in another case, Henfrey v. Henfrey, reported in 13 Eng. Rep. (full reprint) 211, a testator left two substantive wills, each disposing of his entire property. By the first he appointed executors, to one of whom he gave the residue of the estate. By the second will, which contained no revocation of the first, he gave the whole of his property to his wife, with the exception of a small legacy, but appointed no executor. Letters of administration with the will last executed were granted to the wife. The prerogative court held, affirming the court below, that the second will operated as a revocation of the first, and was alone entitled to probate. An appeal to the privy council was dismissed; the council holding it to be the rule "that a paper, disposing of the whole property, is a revocation in toto of a previous will, also disposing of the whole," and that the doctrine to the contrary "had been exploded so far back that it would be difficult to trace it."

The rule declared by the English privy council finds ample support in the decisions of this country. In Re Edward Fisher, 4 Wis. 254, 65 Am. Dec. 309, 312, it was said that a man cannot have two independent wills at the same time, each acting upon the same subject-matter, and each professing to make a distinct and full disposition thereof. Therefore the court held that, where each of two testamentary instruments is a distinct, substantive will of itself, and one is not in the nature of a supplement or codicil to the other, and the later in time is competent to make, and does in fact make a different and full disposition of the testator's property, it revokes the earlier, and is the will of the deceased. In Gardner v. McNeal, 117 Md. 27, 82 A. 988, 40 L. R. A. (N. S.) 553, Ann. Cas. 1914A, 119, each will purported to make full disposition of the entire estate. The court said the inconsistency was as great as was possible, and that but one conclusion could be reached, which was that the former will was revoked by the later document. In Re Gensimore's Estate, 246 Pa. 216, 92 A. 134, the testator made two wills, the first giving his three daughters an equal share of all the money derived from the estate, and appointing an executor and directing a sale. The second will made another disposition of all his personal property, and named no executor. Between the time of the execution of the two wills the testator disposed of his real property. The court holds that the testamentary disposition of the land in the first will having been revoked by the sale, leaving nothing for the first will to operate on that was not covered by the second will, the second will was an entire revocation of the first, including the appointment of the executor. In re Gilman's Estate, 65 Misc. Rep. 409,

121 N. Y. S. 909, the testator made two wills. In the first he disposed of his entire estate and named an executor. The second also provided for the disposition of his estate, but named no executor. The court held the latter instrument to be inconsistent with the former will, and alone entitled to probate. It said "the fact that the 1894 [the second] will names no executor has no bearing whatever on its validity." This court has also held that the naming of an executor is not essential to the validity of a will. Estate of Barton, 52 Cal. 538, 540.

Respondent places great emphasis upon the language of this court in Re Hickman, 101 Cal. 609, 36 P. 118, where the court said that the nomination of an executor without any disposition of one's estate, or giving any other directions whatever, would constitute a will. But the point at issue here was not considered in that case. There the sole beneficiary under the will died before the testator. On petition for probate of the will the public administrator contested the right of the executor named to letters testamentary on the ground that the sole legatee and devisee under the will had died during the lifetime of the testator, whereby the devise and legacy lapsed, and the will became null and void. The court held that this last fact was not one to be determined as a preliminary question affecting the probate of the will. The fact that the document purported to appoint an executor and provide for the payment of debts was sufficient to stamp it as a will and justified its probate as such. The question of revocation of a substantive will by one of later date was not before the court. We have already referred to and distinguished the question considered in Newcomb v. Webster, supra, also strongly relied upon by the respondent.

In conclusion, we are of the view that the rule to be applied to the situation in this case is that announced in Jarman on Wills, quoted with approval in Re Marx, supra. The lower court was therefore in error in admitting to probate the will made by John Iburg on October 28, 1921, and in appointing John Carlson executor of the will of the decedent. The olographic will of Iburg executed February 4, 1924, leaving his entire estate to appellant, was alone entitled to admission to probate. Appellant's petition for letters with that will annexed should have been granted.

The portions of the judgment and order appealed from are reversed, and the cause is remanded to the lower court, with directions to proceed in accordance with the views herein expressed.

We concur: MYERS, C. J.; RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; SHENK, J.

196 Cal. 339

In re DANFORD'S ESTATE.

MASON v. DANFORD.

(S. F. 11036.)

(Supreme Court of California. June 30, 1925.)

1. Wills ⟸181—Testamentary instrument to revoke former will need not expressly declare such intention.

Civ. Code, § 1292, requiring written instrument to effect alteration in will to declare such alteration or revocation, means only that it shall appear from provisions of last will that it is intended to alter or revoke former instrument, and need not expressly declare such intention; under section 1317 intention of testator being governing principle.

2. Wills ⟸182—When new will complete revocation of former will by implication, stated.

In view of Civ. Code, §§ 1296, 1320, there is no complete revocation of former will by implication unless general tenor of later will shows clearly that testator so intended or the two instruments are so inconsistent as to be incapable of standing together.

3. Wills ⟸306—Evidence held not to show, as matter of law, that court erred in holding that first will was wholly supplanted by subsequent one.

Evidence in proceeding to probate will *held* not to show as matter of law that lower court was in error in finding that later will wholly supplanted former.

4. Executors and administrators ⟸5—Granting of letters of administration held error, where decedent left will.

Granting of letters of administration *held* error, where decedent left will which was established and admitted to probate.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Frank H. Dunne, Judge.

Petitions by Nora D. Danford for appointment as administratrix of the estate of William J. Danford, deceased, and also for the probate of a certain document as his will, and for appointment as administratrix with the will annexed, and petition by Caroline Mason for the probate of certain documents as the last will of deceased. From an order granting both petitions of Nora D. Danford and denying the petition of Caroline Mason, the latter appeals. Remanded, with directions to modify, and, as modified, affirmed.

Dunn & Brand, of Sacramento, and Nat Schmulowitz, of San Francisco, for appellant.

Dennison, Towner & Kleber, of Los Angeles, B. B. Crawford, E. J. Talbott, and J. E. Manning, all of San Francisco, for respondent.

WASTE, J. Appellant appeals from an order refusing probate to a purported will, admitting to probate a subsequently executed document, and granting letters testamentary with the will annexed to respondent. The question in the case is whether a will of William J. Danford, deceased, dated September 15, 1920, appointing appellant executrix thereof, was revoked by a later will dated September 9, 1922, in which there is no clause expressly revoking the prior will, and in which no one is designated to act as executor.

After William J. Danford died, on October 24, 1923, two documents of testamentary character were found among his effects. Nora D. Danford, the surviving wife of the decedent, filed a petition in probate, alleging that the deceased died intestate, and sought to be appointed the administratrix of his estate. Mrs. Caroline Mason, appellant here, filed a petition for the probate of the two testamentary documents as the last will of Danford, and prayed for the appointment of herself as executrix without bonds. Mrs. Danford thereupon filed a petition praying for the probate of the document bearing the later date as the last will of the deceased, and prayed that she be appointed the administratrix with the will annexed. The three petitions came on for hearing at the same time. The authenticity of the two testamentary documents was clearly established; it being conceded that each was entirely written, dated, and signed by the hand of the testator, William J. Danford. The court below granted both petitions of Nora D. Danford, and denied the petition of Mrs. Mason. It is from these orders that the latter has appealed.

The recitals in the nature of findings contained in the order denying and granting the various petitions do not disclose the grounds upon which the trial court made its decision. The only tenable theory on which it could have relied to support its action, under the findings, is that the provisions of the second instrument of testamentary character are wholly inconsistent with the terms of the former will, and work a revocation of that instrument. That is the point which has been argued in the briefs of the parties to the appeal. There is presented, therefore, for our consideration, the effect of the will of September 9, 1922, upon the will executed September 15, 1920.

A former decision in this matter was recalled on petition for rehearing, in order that a re-examination of the point at issue might be had in connection with our consideration of an exactly similar question presented by another matter, also on appeal. The opinion in that case has this day been filed. In the Matter of the Estate of Iburg (S. F. No. 11379) 238 P. 74.

The following sections of the Civil Code are applicable to the case at bar:

Section 1317:

"A will is to be construed according to the intention of the testator. Where his intention cannot have effect to its full extent, it must have effect as far as possible."

Section 1320:

"Several testamentary instruments, executed by the same testator, are to be taken and construed together as one instrument."

Section 1296:

"A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

[1, 2] It was not necessary that the will of September 9, 1922, should expressly declare that it was intended to revoke a former will. The words "declaring such revocation," used in the section of the Code providing the manner in which a written will may be revoked (Civ. Code, § 1292), mean nothing more than that it shall appear from the provisions of the last will that it is intended to alter or revoke the former, in whole or in part (Clarke v. Ransom, 50 Cal. 595, 602).

"If the subsequent instrument does not profess to be a codicil and is adequate to the disposition of the entire property, there is no such a priori improbability that it was intended wholly to supplant the prior instrument. The case then rests on the true construction of the contents of the two instruments, and the complete disposition contained in the second must, uness controlled by the context, wholly revoke the first." 1 Jarman on Wills (6th Ed.) star p. 138.

The governing principle is therefore the intention of the testator. It does not necessarily follow from the fact of the new will that full and entire revocation was intended. The purpose may have been to make supplemental provisions, consistent with the former will in whole or in part, to dispose of other property, or to amend and alter the prior dispositions only. Hence a complete revocation by implication will not follow unless the general tenor of the later will shows clearly that the testator so intended, or the two instruments are so plainly inconsistent as to be incapable of standing together. Williams v. Miles, 68 Neb. 463, 476, 94 N. W. 705, 96 N. W. 151, 62 L. R. A. 383, 110 Am. St. Rep. 431, 4 Ann. Cas. 306.

In the will executed by Danford on September 15, 1920, he recited that he had "revoked and destroyed" all previous wills and codicils made by him, and provided certain bequests and devises as follows: (2) To his son, Earl J. Danford, the sum of $100, and like sums to his son's wife and children; and, in the event either of them should file a contest of the will, the provision in their behalf is revoked. (3) To his sister, Kate Penland, for herself and her children, one-fourth of his entire estate. (4) To Mrs. C.

Mason (the appellant), one-half of his entire estate, after funeral expenses and incumbrances are paid, and naming appellant "executor without bonds." The will makes no disposition of the residue of the estate, if any remains.

The later will, dated September 9, 1922, is short, and we quote it in full:

"Tanajura, Calif. September 9, 1922.
"In case of any accident to me ~~enroute to San Francisco~~ (9-22-22 (Wm. J. D.
"I make this olographic will as my last will. I hereby revoke the codicil to my previous will made October 16th, 1921, in favor of John Hoyle and hereby remit his indebtedness to me or my estate. I hereby give $2,000.00 to Mrs. B. Gross and $5,000.00 to my sister Catherine Penland, 1859 Cleveland avenue, Chicago, Illinois. *All* the remainder of my estate and all my personal effects I give to Caroline Mason including all of our partnership properties, stocks, and good will. Wm. J. Danford."

[3] The ultimate question, whether or not the will made September 15, 1920, was wholly annulled by that made September 9, 1922, was squarely presented to the lower court on the offer of the two instruments for probate, and the objection of Nora D. Danford, the wife of the decedent, to the admission of the first on the ground that it had been so revoked. It found that the subsequent will dated September 9, 1922, is the last will and testament of the deceased. That instrument does not profess to be a codicil, and its provisions are adequate to the disposition of the entire estate. There is therefore no a priori improbability that it was intended to wholly supplant the prior will. There is nothing in the context of the two wills of such compelling force as to require their being construed as one instrument. On the facts found and the record brought here, which consists of little that is material other than the two wills and the formal proceedings in probate, we cannot say, as matter of law, that the judgment of the lower court is incorrect. Estate of Marx, 174 Cal. 762, 764, 164 P. 640, L. R. A. 1917F, 234; Estate of Iburg, supra.

[4] The order made by the trial court contains inconsistent directions. It grants the application of Mrs. Danford for letters of administration, which action could rest only on the absence of testamentary disposition of the estate. Further ordering, it admits to probate the document dated September 9, 1922, as the last will and testament of William J. Danford, deceased, appoints Nora D. Danford administratrix with the will annexed, and directs that letters be issued to her upon giving bond. As the decedent left a will, which was established and admitted to probate, the application of Mrs. Danford for letters of administration, first filed, should have been denied. Other points suggested in this case and authorities cited by counsel have been considered in the opinion in Estate of Iburg, supra.

The cause is remanded, with directions to the lower court to deny the petition of Nora D. Danford for letters of administration, first filed, the order appealed from, when so amended, to stand affirmed; respondent to recover costs of appeal.

We concur: MYERS, C. J.; RICHARDS, J.; SHENK, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.

196 Cal. 395

REED et al. v. MURPHY et al. (L. A. 8251.)

(Supreme Court of California. July 14, 1925. Rehearing Denied August 13, 1925.)

1. Appeal and error ⟸903 — Supreme Court bound to assume minutes of trial court speak truth.

Supreme Court is bound to assume minutes of trial court speak the truth.

2. Appeal and error ⟸667—Record of trial court cannot be altered or amended by proof made in Supreme Court.

Record of trial court cannot be altered or amended by proof made in the Supreme Court.

3. Appeal and error ⟸154(4)—Supreme Court will not consider appeal from consent decree.

Supreme Court will not consider appeal from consent decree under theory the parties waived any errors in it.

4. Partition ⟸95—Descriptions of parcels adjudicated to respective parties held not void as being impossible of ascertainment as matter of law by reference to other portions of record.

Descriptions in decree of parcels adjudicated to the respective parties, as authorized by Code Civ. Proc. §§ 763, 764, pursuant to their stipulation, *held* not void as being impossible of ascertainment as a matter of law by reference to other portions of the record.

5. Partition ⟸95 — Function of referees in partition suit stated.

Decree in partition does not delegate to the referees the judicial function of trying title and determining respective interests of parties in the land; their function being solely to divide the property and allot the several portions thereof to the respective parties according to their respective rights, as determined by the court pursuant to Code Civ. Proc. §§ 763, 764.

6. Appeal and error ⟸440—Fact of taking of appeal held not to preclude trial court from correcting its minutes.

Fact of taking of appeal *held* not to preclude trial court from correcting its minutes, so as to make them speak the truth.

7. Appeal and error ⟸154(4)—Appeal from consent decree held to require dismissal.

An appeal from a consent decree which was consented to in the precise form in which it was rendered, and which related to a subject of

which the court had jurisdiction, and which was not void on its face, *held* to require dismissal.

In Bank.

Appeal from Superior Court, San Bernardino County; Jesse Olney, Judge.

Partition suit by Lena Reed and another against T. C. Murphy and another. From the decree rendered, defendants appeal. On plaintiffs' motion to dismiss the appeal. Appeal dismissed.

W. E. Byrne, of San Bernardino, for appellants.

McNabb & Hodge, of San Bernardino, for respondents.

PER CURIAM. This matter is before us upon respondents' motion to dismiss the appeal. The action is in partition. Plaintiffs, in their amended complaint, allege that the plaintiff G. E. Reed and the defendant T. C Murphy are the owners as tenants in common of the premises described in the complaint; that the said plaintiff has an estate therein to the extent of an undivided one-half interest in fee; and that the said defendant has an undivided one-half interest and estate therein, and prays for a partition of the said real property. The answer denies that the plaintiffs or either of them own any interest in certain portions of the premises described in the complaint, which portions are particularly described in the answer, and alleges that the defendant T. C. Murphy is the owner in severalty of the entire fee of such described portions. It admits that the said plaintiff and defendant are the owners in common of the remainder of the premises described in the complaint, and prays that said defendant's title be quieted to the premises described in his answer, and that the remainder of the premises described in the complaint be partitioned. The cause came on for hearing April 19, 1924, evidence was received, and April 21, 1924, an interlocutory decree was signed and filed, decreeing partition of the premises described in the complaint and appointing referees for that purpose. This decree purports to ascertain and determine the respective rights of the parties in the lands in question as follows:

"Wherefore it is by the court here ordered, adjudged, and decreed that said plaintiff, G. E. Reed, under the purchases from the Southern Pacific Railroad Company and the Southern Pacific Land Company, is entitled to all those portions of real property described in the amended complaint herein acquired by him together with his improvements at the date of said purchase, and is seized and possessed of an undivided one-half interest in and to all of the remainder of said property described in said amended complaint except as otherwise specified herein. And that said defendant T. C. Murphy, under the purchases from the Southern Pacific Railroad Company and the Southern Pacific Land Company, is entitled to all those portions of real property described in the amended complaint herein acquired by him together with his improvements at the date of said purchase, and is seized and possessed of an undivided one-half interest in and to all of the remainder of said property described in said amended complaint except as otherwise specified herein."

Thereafter, and within due time, the defendants took an appeal from such interlocutory decree upon a printed transcript of the judgment roll, and filed their opening brief in this court, wherein they pointed out that the trial court had failed to find upon the controverted issues tendered by the pleadings as to title, and failed to ascertain and determine the respective rights of the parties in the land to be partitioned. Thereupon the plaintiffs moved in the trial court for an order correcting its minutes nunc pro tunc as of April 19 and April 21, 1924, so as to make the minutes of the court show the fact that the decree appealed from was a consent decree entered pursuant to the consent and stipulation of the respective parties in open court. After a hearing thereon, the trial court granted the motion and made an order so correcting its minutes nunc pro tunc as of April 19th and April 21st. The minutes of April 19th relating to this proceeding as so corrected now read as follows:

"Counsel for the respective parties stipulate that an interlocutory judgment in said action in form as prepared by respective counsel for said parties be rendered and entered by the court. It is stipulated that counsel for plaintiffs and defendants will prepare such form of interlocutory judgment and submit the same to the court for rendition and entry. Thereupon the court, without hearing further evidence, ordered the case continued until Monday, April 21, 1924, at 10 o'clock a. m."

The minutes of April 21st as corrected now read as follows:

"This cause coming on regularly to be heard, Messrs. McNabb & Hodge, appearing as counsel for plaintiffs, and W. E. Byrne, appearing as counsel for defendants, counsel for the respective parties present to the court a form of interlocutory judgment, and stipulate that an interlocutory judgment be rendered and entered by the court in accordance with said form so presented to the court, and thereupon the court renders judgment in accordance with the form of judgment so submitted."

[1, 2] Thereafter plaintiffs and respondents moved in this court to dismiss the appeal upon the ground that the decree appealed from was a consent decree, supporting their motion by a certified copy of the minutes of the trial court, as so corrected, and by an affidavit of the trial judge, who deposed that the decree in its precise terms as signed and filed by him was prepared by counsel for the respective parties, who appeared in open court upon the date mentioned, and presented the proposed decree, and stipulated and con-

sented in open court to the signing, filing, and entry thereof. Appellants submitted counter affidavits, denying that they consented to the decree as rendered, and denying that any proceedings on April 21st were had in open court. We are compelled, however, to assume that the minutes of the trial court speak the truth. The record of that court cannot be altered or amended by proof made in this court.

"It would be a departure from all principle to allow a record sent to this court to be assailed by evidence of less dignity than a record." Boyd v. Burrel, 60 Cal. 280, 284; Warren v. Hopkins, 110 Cal. 506, 42 P. 986.

[3, 4] For the purposes of this motion we must therefore conclude that the appellants consented to the rendition and entry of the decree appealed from, and thereby waived any errors in it.

"Under such circumstances the appellate court will not consider the appeal at all but will dismiss it." 14 Cal. Jur. 878, and cases cited.

[5] It may be conceded that, if a consent judgment or decree is different from or goes beyond the terms of the stipulation which forms its basis, it may be set aside upon appeal or by other appropriate procedure, as it would not be in reality a consent judgment. But such is not the case here. We are compelled to conclude that the parties consented to the rendition and entry of the precise decree here appealed from. It has been suggested, though never decided, in this state, so far as we are advised, that the rule requiring dismissal of appeals from consent judgments is subject to two exceptions, the first being in cases where the lower court did not have jurisdiction of the subject-matter of the action, and the second in cases where the complaint is fatally defective. Guigni v. Ratto, 41 Cal. App. 49, 181 P. 809. It is not claimed that the complaint herein is in any wise defective, but appellants do contend that the interlocutory decree herein was one that the superior court had no authority to make under the statute, and that lacking such authority in the first instance it could not be conferred by stipulation of the parties. This contention is rested upon the provision of Code of Civil Procedure, § 763, that the court "must order a partition according to the respective rights of the parties as ascertained by the court," and of Code of Civil Procedure, § 764, that "in making partition, the referees must divide the property * * * according to the respective rights of the parties as determined by the court." This, however, is not equivalent to saying that the court did not have jurisdiction of the subject-matter of the action, and appellants do not in fact contend that it did not. Their contention, as we understand it, is that the court violated these statutory provisions, in that it did not in and by its decree ascertain and specifically determine and declare the respective rights of the parties in and to the land to be partitioned. This is but to say that the court erred in the exercise of its jurisdiction. We may assume for the purposes hereof that a decree or judgment which is void upon its face is open to attack by any one, including the parties thereto, even though they consented to its rendition. It may be conceded, also, that, where, in a judgment adjudicating the title to real property, the description therein is so uncertain that the court can see that nothing is described therein, such a judgment may be said to be void upon its face. Newport v. Hatton (Cal. Sup.) 231 P. 987. But we are unable to say upon the record now before us that the descriptions of the parcels adjudicated to the respective parties herein are impossible of ascertainment by reference to other portions of the record. It is true that those descriptions are not in the least aided by any portion of the record which is now before us. We are not advised as to what evidence was introduced at the trial, but, if an examination of that record should disclose that there was introduced at the trial one deed from the Southern Pacific Railroad Company and the Southern Pacific Land Company, conveying to the plaintiff G. E. Reed a specifically described portion of the premises described in the complaint, and another deed from the same grantors, conveying to the defendant T. C. Murphy another specifically described portion of the premises described in the complaint, and that no other deed was produced from either of such grantors to either of such grantees in severalty, it might be justly concluded that the descriptions in those two deeds were intended to be adopted by reference in the decree as describing the portions of the premises adjudged to the respective parties in severalty. Upon the other hand, if no such means should be found of rendering certain the description in the decree herein, the conclusion would follow that the same is void for uncertainty. But upon the present record we cannot say that it is void upon its face. Newport v. Hatton, supra. The decree does not delegate to the referees the judicial function of trying title and determining the respective interests of the parties in the land. Their function is solely to divide the property and allot the several portions thereof to the respective parties according to their respective rights as determined by the court. If they are unable by the process above suggested to ascertain what the rights of the respective parties are as determined by the court, then, of course, they will be unable to make a partition of the premises.

[6] There is no merit in the contention that by the taking of the appeal the trial court was precluded from correcting its minutes

so as to make them speak the truth. Biaggi v. Ramont, 189 Cal. 675, 209 P. 892.

[7] Concluding, as we must, that the appellants consented to the decree in the precise form in which it was rendered, that they thereby waived any errors therein, and that it is not void upon its face, there remains nothing to be reviewed upon an appeal therefrom, and the appeal is dismissed.

---

196 Cal. 380

MOORE v. SCHNEIDER et al. (L. A. 7836.)

(Supreme Court of California. July 2, 1925.)

1. Fraudulent conveyances ⟸172(1)—Fraudulent conveyance is valid as to grantor, and as to all persons except creditors of grantor, who may question it in proper proceeding.

A deed to defraud, hinder, or delay grantor's creditors is valid as to him, vesting legal title in grantee, and is good against grantor, his heirs, executors, administrators, and persons claiming under him, and as to all persons except creditors of grantor who may question it in a proper proceeding.

2. Assignments for benefit of creditors ⟸184—Plaintiff, as voluntary assignee of another, acquired no greater right in property than assignor had at time of assignment.

Plaintiff, as voluntary assignee of another, acquires no greater right in property than assignor had at time of assignment, and cannot assert claim to property which assignor may not assert.

3. Assignments for benefit of creditors ⟸184—Assignee cannot maintain action to recover title to property assigned, but which assignor had previously transferred in fraud of his creditors.

In absence of statute giving such power, assignee cannot maintain action to recover title to property which assignor had transferred in fraud of his creditors.

4. Insolvency ⟸57(1)—In the case of assignee in insolvency, estate of debtor devolves in trust for benefit of others than debtor.

In the case of an assignee in insolvency, the estate of the debtor devolves in trust for the benefit of others than the debtor.

5. Insolvency ⟸78—Assignee of insolvent, voluntarily conveying to such assignee under nonstatutory assignment, held to have no greater powers than assignee under statutory assignment.

Assignee of insolvent, voluntarily conveying to such assignee under nonstatutory assignment, has no greater powers than an assignee under a statutory assignment for benefit of creditors pursuant to Civ. Code, §§ 3449, 3473, et seq.

6. Assignments for benefit of creditors ⟸268—Assignee of realty for benefit of creditors, becoming such by nonstatutory assignment executed by insolvent assignor, held entitled to sue to quiet title to property assigned.

Irrespective of Civ. Code, § 3441, an assignee of realty for benefit of creditors, who became such by a nonstatutory assignment executed voluntarily by insolvent assignor who had theretofore transferred the realty in fraud of creditors, *held* entitled to bring an action under Code Civ. Proc. § 738, to quiet title as against one claiming adversely.

7. Assignments for benefit of creditors, ⟸276—Creditors of insolvent person, assigning voluntarily by nonstatutory assignment land for benefit of creditors, held entitled to intervene in assignee's action to quiet title to property so assigned.

Creditors of insolvent person, assigning voluntarily by nonstatutory assignment land for benefit of creditors, *held* entitled to intervene under Code Civ. Proc. § 387, in assignee's action to quiet title to property so assigned.

8. Judgment ⟸567—Consent judgment binds parties and those in privity with them, in absence of want of jurisdiction, or of collusion or fraud.

A judgment by consent is res judicata and conclusive between parties and those claiming under them, in the absence of a showing of want of jurisdiction in the court rendering it, of collusion between parties, or of fraud of the party offering the record.

9. Lis pendens ⟸18—Filing for record with recorder of notice of pendency of action is constructive notice to world of pendency of such action.

The filing for record with the recorder of a notice of the pendency of an action is the mode substituted by statute for constructive notice to all the world of the pendency of such action, which arose under the common law, ipso facto, upon the institution of the suit.

10. Assignments for benefit of creditors ⟸163—Assignment of realty for benefit of creditors is subject to statutory provisions relating to transfer of real property.

Assignment of real property for benefit of creditors is a conveyance within Civ. Code, § 1215, as much subject to the provisions of section 1214 (as amended by St. 1895, p. 50), and section 1217, relating to transfers of real property, and as much within the policy of the statute as any other transfer of such property.

11. Judgment ⟸683—Judgment rendered in action to quiet title held bar to action to quiet title by assignee for benefit of creditors.

A judgment rendered in action to quiet title in favor of plaintiff, who stood in the position of a prior purchaser, *held* a bar to an action to quiet title by assignee for benefit of creditors who stood in the position of a subsequent purchaser claiming under an unrecorded assignment.

In Bank.

Appeal from Superior Court, Los Angeles County; Chas. Monroe, Judge.

Action by Wm. H. Moore, as assignee, for the benefit of creditors of William Schneider and another, copartners against Sophie M. Schneider and others, in which New-Market Company and D. Roberts intervened. Pending the action defendant Sophie M.

Schneider died, and George F. Metcalfe was substituted in her place as administrator of her estate. From an adverse judgment the administrator appeals. Reversed.

Daniel M. Hunsaker and Hunsaker, Britt & Cosgrove, all of Los Angeles, for appellant.

Davis & Rush and Alfred F. MacDonald, all of Los Angeles, for respondent Schneider.

Dana Ong, of Los Angeles, for respondent Miller.

Alfred H. McAdoo, of Los Angeles, for plaintiff and respondent and interveners and respondents.

WASTE, J. The defendants William Schneider and R. R. Miller, as copartners and as individuals, made a nonstatutory assignment of all their property not exempt from execution to the plaintiff, Moore, as assignee for the benefit of creditors signing the agreement or consenting thereto. Moore subsequently brought this action to obtain a decree declaring that he, as such assignee, is the owner of the equitable title to certain real property, it being alleged that Sophie M. Schneider, wife of the assignor, William Schneider, among others, asserted an adverse claim to that of the assignee. By complaint in intervention, certain of the creditors of Schneider and Moore intervened in the action in support of the plaintiff assignee's contentions. Sophie M. Schneider died, and the defendant Metcalfe, as administrator of her estate, was substituted in her place. As such administrator, Metcalfe, answering, denied the claims of the plaintiff, and alleged that at all times material to the transaction, and at her death, Mrs. Schneider was the owner of the property, and that upon her death her heirs became the owners thereof, subject to the administration of her estate. The trial court found that, some 2½ years before the assignment to plaintiff was made, the defendants William Schneider and Sophie M. Schneider executed and caused to be recorded a deed conveying the real property in question to Charles J. W. Saunders and Elizabeth M. Saunders, his wife; that said transfer and conveyance was wholly without consideration, and was made by the grantors for the purpose of concealing the property from Schneider's creditors, and as part of a scheme participated in by both grantors to defraud; that the transfer was accompanied by an agreement on the part of Saunders and wife with William Schneider to reconvey the property to Schneider, or to whomsoever he might direct; that thereafter Saunders and wife, by direction of William Schneider, by deed duly recorded, transferred and conveyed the property to Sophie M. Schneider, without any consideration other than in pursuance of the previous agreement with Schneider to reconvey the property; that Mrs. Schneider had transferred and conveyed the property to her husband, the defendant William Schneider, and the title stood of record in his name when this action was brought. Judgment was entered for the plaintiff, and the administrator of the estate of Sophie M. Schneider appealed.

[1] Two grounds are advanced by the appellant why the respondant Moore, as assignee of William Schneider, should not recover in this action. The first is that Schneider himself could not maintain an action against Mrs. Schneider to set aside the conveyance by which she obtained title to the property, for it was made at the request of Schneider, and as part of a scheme to defraud his creditors. The contention embodies a correct statement of the law. The grantor in a deed made for the purpose of defrauding, hindering, or delaying his creditors cannot be relieved against its operation. As to him it is valid. Ybarra v. Lorenzana, 53 Cal. 197, 199. Such a conveyance vests the legal title in the grantee. It is good against the grantor, his heirs, executors, administrators, and persons claiming under him, and as to all persons except creditors of the grantor who may question it in a proper proceeding. First Nat. Bank v. Eastman, 144 Cal. 487, 489, 77 P. 1043, 103 Am. St. Rep. 95, 1 Ann. Cas. 626; Frink v. Roe, 70 Cal. 296, 308, 11 P. 820.

[2, 3] It is next urged by appellant that, as whatever rights the respondent Moore has were acquired by him as assignee under the assignment made by Schneider and Miller, and whatever rights the respondent creditors have are founded on their having signed the agreement of assignment, and consented thereto, if Schneider could not maintain this action, it necessarily follows that the respondents cannot do so. The plaintiff, as the voluntary assignee of Schneider, acquired no greater right in the property than Schneider had at the time of the assignment. He took only the interest of the assignor in and to the property (First Nat. Bank v. Menke, 128 Cal. 103, 107, 60 P. 675), and can assert no claim to property which the assignor might not. An assignment does not carry with it to the trustee the title to property which the assignor has previously transferred in fraud of his creditors, and, in the absence of any statute giving such power, the assignee cannot maintain an action to recover it. Francisco v. Aguirre, 94 Cal. 180, 182, 29 P. 495; Babcock v. Chase, 111 Cal. 351, 353, 43 P. 1105; Southern Cal. H. & M. Co. v. Borton, 46 Cal. App. 524, 529, 189 P. 1022.

[4, 5] Respondents endeavor to avoid the effect of this rule by arguing that the respondent Moore is not a mere assignee for the benefit of creditors, representing the assignors only, but that under the assignment in this case he represents and is trustee for the creditors. "The failure to observe the well-defined distinction," they quote from

Ruggles v. Cannedy, 127 Cal. 290, 304, 53 P. 911, 916 (46 L. R. A. 371), "between the powers of the assignee in insolvency, who thus represents the creditors, and those of an assignee for the benefit of creditors, who is the representative of the assignor, has led to much conflict of authority upon this question." There is, of course, a distinction between an assignee in insolvency and an assignee for the benefit of creditors. It is this: In the case of an assignee in insolvency, the estate of the debtor "devolves in trust for the benefit of others than the debtor." That we understand to mean that when a person has been adjudicated an insolvent, and the assignee in insolvency has been appointed, the estate of the insolvent, without any voluntary act of his, passes from him to the assignee. In the case of an assignment for the benefit of creditors, either statutory or nonstatutory, the estate passes as the result of some positive act or agreement on the part of the owner of the property. In the one case, the estate of the insolvent "devolves" upon the assignee by operation of law. In the other, the estate is "granted" by the owner. First Nat. Bank v. Menke, supra. In the case of a statutory assignment, the assignee is authorized to make an assignment of property in trust for the satisfaction of his creditors, which must be made to the sheriff. Civ. Code, § 3449. After the creditors have elected an assignee, the sheriff is required to assign to such elected assignee "all the property assigned to him." It is therefore evident that the assignee takes only the property voluntarily conveyed to the sheriff by the assignor. Francisco v. Aguirre, supra. The effect is the same when an insolvent voluntarily conveys his property to an assignee of his own choosing. We find ourselves unable to agree with the respondents that, under the assignment in this case, the respondent Moore, as assignee, had any greater powers than are possessed by an assignee selected in accord with the statutory provisions relating to assignments for the benefit of creditors. Civ. Code, § 3460 et seq.

[6] For another, and second, reason, the appellant contends that none of the respondents are in position to maintain this action. He invokes the doctrine, universally held, that a creditor is not in position to attack a transfer for fraud unless he has a specific lien upon the property transferred, or has reduced his claim against the debtor to judgment. Sewell v. Price, 164 Cal. 265, 270, 128 P. 407. The creditor can avoid the act of his debtor for fraud only when the fraud obstructs the enforcement, by legal process, of his right to take the property affected by the transfer. Civ. Code, § 3441. He cannot be said to be delayed, hindered, or defrauded by any conveyance until some property out of which he has a specific right to be satisfied is withdrawn by a fraudulent conveyance. That right does not exist until he has bound the property, by judgment, or by judgment and execution, as the case may be, and as shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of his debt in a due course of law. Brown v. Campell, 100 Cal. 635, 35 P. 433, 38 Am. St. Rep. 314; Bump on Fraudulent Conveyances (2d Ed.) p. 522. The respondents concede the general rule to be as stated. Their position is that, as to the action by the plaintiff assignee, the rule has no application because he could not sue for a money judgment, and is not seeking to set aside any conveyance, fraudulent or otherwise, but it is merely endeavoring to establish title to real property to be in himself under the provisions of the assignment executed by Schneider to him. The intervening creditors, they admit, cannot recover a money judgment against Schneider, for the reason that, in signing the agreement of assignment, they have expressly released the debtors, and have no right of a direct action against them, or either of them.

[7] If this were an action in the nature of an ordinary creditor's bill brought by all or any, of the respondents, other than the plaintiff Moore, to subject the property in question to the payment of their demands, the contention of the appellant would raise an effective bar against the maintenance of the action, But that is not the kind of an action that has been brought. Section 738 of the Code of Civil Procedure provides that "an action may be brought by any person against another who claims an estate or interest in real or personal property, adverse to him, for the purpose of determining such adverse claim." We know of no reason why one in the position of the plaintiff, who is not here claiming as a creditor, may not maintain such an action as a quiet title action under the provisions of the Code. The right to recover is, of course, dependent upon matters which do not relate to the particular form of the action brought. The other respondents had such an interest in the success of the plaintiff that they were entitled to intervene in the action. Code Civ. Proc. § 387.

By apt pleading and proof in the court below, the appellant interposed, as a bar to the right of the plaintiff to recover in this action, a judgment rendered in a suit instituted by Sophie M. Schneider against William Schneider, her husband, to quiet title to the real property here in question, and in which cause a decree was entered in her favor. The trial court held the judgment had no force or effect as against the plaintiff and interveners, and was not a bar to the present action. Appellant challenges the correctness of that construction. The findings show that Mrs. Schneider received the

deed from Saunders and wife on or about March 8, 1918, and recorded it March 27th. The assignment by Schneider and Miller to Moore, as assignee, was executed April 6th following. It was not signed by Mrs. Schneider and was never recorded. On May 28, 1918, Mrs. Schneider instituted an action against William Schneider to quiet her title to the property, and filed notice of the pendency of the action in the office of the county recorder of the county in which the property was located. The assignee, Moore, was not made a party to the action, made no appearance therein, and apparently took no notice of its pendency. William Schneider appeared in the action and filed an answer. Mrs. Schneider died, and her administrator, Metcalfe, the appellant here, was substituted as plaintiff in her place. In due course, judgment and decree was entered that Sophie M. Schneider was, at the time of the commencement of the action, and at the time of her death, the owner in fee simple of the property, and that William Schneider had no right, title, interest, or estate therein. The judgment was not appealed from, and became final. It is the contention of appellant that the judgment wiped out all of the claims of the respondents, and is a complete bar to this action by reason of the provision found in section 1214 of the Civil Code that an unrecorded conveyance is void as against any judgment affecting title when due notice of action has been given.

[8] The respondents claim that the decree obtained by Mrs. Schneider was a "consent judgment," and should not be held res adjudicata as to the respondent assignee. The contention is not sound. A judgment by consent in an action in which the court had jurisdiction of the subject-matter and of the parties is res adjudicata, and conclusive between the parties and those deriving under them, and will bind them and those claiming under them as efficaciously as if it had been entered after a trial of the issues. McCreery v. Fuller, 63 Cal. 30, 32. It may be impeached, like any other judicial record, by evidence of a want of jurisdiction in the court rendering it, by showing collusion between the parties, or by proof of fraud on the part of the party offering the record; but, until that is done, it will bind the parties and those in privity with them. Partridge v. Shepard, 71 Cal. 470, 475, 12 P. 480.

[9] The assignment executed by Schneider and Miller purported to "grant, bargain, sell, assign and transfer unto" the assignee Moore all the property of the assignors, both real and personal, not exempt from execution. It therefore constituted a "conveyance." Civ. Code, § 1215. Section 1214 of the Civil Code provides that every conveyance of real property, with designated exceptions, "is void as against any subsequent purchaser * * * of the same property, or any part thereof, in good faith and for a valuable consideration, whose conveyance is first duly recorded." Section 1217 of the same Code provides that "an unrecorded instrument is valid as between the parties thereto and those who have notice thereof." Respondents contend that Mrs. Schneider was not a purchaser in good faith and for a consideration, and had actual notice of the execution of the assignment held by respondent Moore. Therefore, they contend that, reading the provisions of the two sections (1214 and 1217, supra) together, the judgment in the quiet-title action should not operate as a bar to the claim of the plaintiff in the present suit. If the contentions of respondent as to the facts and the law of the case were both correct, there might be an immediate ending of the controversy. The trial court found the transaction, by which title was vested in Mrs. Schneider alone, as one conceived for the purpose of defrauding Schneider's creditors, thereby denying the right of appellant to claim that Mrs. Schneider was a purchaser of the property in good faith. But Mrs. Schneider was not a subsequent purchaser at all. She acquired title before the assignment to Moore was made, and at a time when the latter had no interest in the property. Her position after the assignment was that of a prior purchaser holding title against a subsequent purchaser claiming under an unrecorded conveyance. It does not appear from the record, and there is no finding, that Mrs. Schneider had knowledge of the assignment to Moore before she instituted the suit to quiet title. The finding of the trial court is merely that Sophie M. Schneider, and her legal representative after her death, had notice of the pendency of the present action before trial and judgment in the quiet-title suit. The fact that she appeared in the present action to resist the claims of the assignee based on an unrecorded conveyance, while prosecuting her own action to judgment, does not, in our opinion, make the situation any better for the case of the respondents, for the reason, as we shall presently show, that knowledge and notice subsequently acquired was not sufficient to change the relative situations of the parties existing at the time the lis pendens was recorded in the quiet-title action.

Section 1214 of the Civil Code, supra, was amended in 1895, by adding thereto the provision that every conveyance of real property is void "as against any judgment affecting the title, unless such conveyance shall have been duly recorded prior to the record of notice of action." Stats. 1895, p. 50. The context indicates very clearly that the added portion, defining the effect of judgments obtained after record of notice of action, is unrelated to subsequent purchasers, questions of good faith, valuable consideration, or those who have notice. For this reason, it becomes

unnecessary to discuss the authorities cited by respondent which hold that section 1214, supra, and section 1217, supra, should be construed together. Slaker v. McCormick-Saeltzer Co., 179 Cal. 387, 388, 177 P. 155; Robinson v. Muir, 151 Cal. 118, 122, 90 P. 521; Bell v. Pleasant, 145 Cal. 410, 413, 78 P. 957, 104 Am. St. Rep. 61. They deal with situations which do not arise under the provision of section 1214 applicable to the facts in this case. Cases, such as Warnock v. Harlow, 96 Cal. 298, 31 P. 166, 31 Am. St. Rep. 209, decided before section 1214, supra, was amended in 1895, are not in point on the question here under consideration.

The rule that an unrecorded conveyance is void as against a judgment affecting title, unless such conveyance shall have been duly recorded prior to the record of notice of action, which now finds expression in our Code (section 1214, supra), is founded on, but is more drastic than a similar enactment contained in the New York Code (Old Code, § 132; Code Civ. Proc., § 1671), which provides, in part, that "a person, whose conveyance or incumbrance is subsequently executed, or subsequently recorded, is bound by all proceedings taken in the action, after the filing of the notice, to the same extent as if he was a party to the action." This provision of the Code, it was held, "so modified the rule as to make the action and its result effectual as against subsequent purchasers and incumbrancers, whose conveyances are not recorded at the time of filing the notice of pendency of the action." Kursheedt v. U. D. S. Institution, 118 N. Y. 358, 363, 23 N. E. 473, 474 (7 L. R. A. 229). In such cases the subsequent holder is as completely cut off by the judgment as if he had been made a party to the action. People's Trust Co. v. Tonkonogy, 144 App. Div. 333, 128 N. Y. S. 1055, 1057. In another case it was held that the holder of an unrecorded deed is placed in the same position as a grantee after the filing and indexing of the notice of action. Bernard v. Baldwin, 106 Misc. Rep. 631, 175 N. Y. S. 138, 140. In other words, his rights are wholly subordinated and subject to whatever equities or claims the judgment in the action shall thereafter charge upon the property. Crocker v. Lewis, 144 N. Y. 140, 143, 39 N. E. 1.

No decision of the courts of this state dealing with the precise question here involved has been called to our attention. Cases cited by appellant, holding that in foreclosure suits the holder of an unrecorded conveyance or lien need not be made a party to such action, and that the judgment therein rendered is as conclusive against the party holding such unrecorded conveyance or lien as if he had been made a party to the action, construe section 726 of the Code of Civil Procedure relating solely to actions for the foreclosure of mortages. However, that provision of the section, the precise provision found in section 1671 of the New York Code of Civil Procedure, and the opinions are helpful as indicating that the rule relating to the effect of judgment affecting title to real property as against unrecorded conveyances is well understood and equally well established.

[10] Respondents argue that the pendency of the action brought by Mrs. Schneider against her husband was "carefully concealed" from the assignee, and appellant ought not therefore to be allowed to plead the judgment in that case as a bar in this action. They have suggested, and the findings disclose, no good reason why the assignee was not made aware of the situation of which they now complain. The deed under which Mrs. Schneider claimed title was placed on record. The filing for record with the recorder of a notice of the pendency of an action is the mode substituted by statute for constructive notice to all the world of the pendency of such action, which arose under the common law, ipso facto, upon the institution of the suit. Blackburn v. Bucksport, 7 Cal. App. 649, 653, 95 P. 668. Respondents cannot now escape the consequence of the failure of Moore to record the assignment in due time on the ground that he had no notice of an action subsequently brought by Mrs. Schneider. An assignment of real property for the benefit of creditors is as much subject to the provisions of the Code relating to transfers of real property, and as much within the policy of the statute as any other transfer of such property. Watkins v. Wilhoit, 104 Cal. 395, 399, 38 P. 53.

[11] The particular language of the New York statute, that the holder of an unrecorded title or incumbrance is "bound by the proceedings to the same extent as if he was a party to the action," has led the courts of that state to suggest that the rule might not have the same application in cases where a plaintiff has actual notice of the unrecorded incumbrance at the time of the commencement of the action. Kursheedt v. U. D. S. Institution, supra; Lamont v. Cheshire, 65 N. Y. 30. The California statute has made the rule more stringent in its application than it is in New York, by declaring that a conveyance which is not of record when the lis pendens is filed is "void" as against the judgment affecting the title to the property. The provision was added to section 1214 in 1895, long after section 1217, providing that an unrecorded instrument is valid as between the parties and those who have notice thereof, based on an older enactment (Stats. 1850, p. 249), was incorporated in our present Code. It was enacted by the Legislature, we may assume, to stimulate and bring about the prompt recordation of all conveyances of real property. Its purpose is to prevent fraud through the with-

holding of notice of transactions affecting titles, to the detriment of subsequent purchasers in good faith and for a valuable consideration, and those who may seek to confirm their claims to real property by judgments affecting the title. It constitutes a most salutary rule. Whether or not it should apply in a case in which a prior grantee is not made a party to the action, or in which it appears that a plaintiff has actual knowledge or notice of the unrecorded claim of title at the time of the commencement of the action, we are not prepared to say. Neither situation is presented here. The findings do not support the contention of the respondents that Mrs. Schneider knew of the assignment to respondent Moore when she brought her action to quiet title. There is nothing in the findings to show that she took with notice of his claim. We are satisfied that the contention of the appellant is the correct one, and that the judgment rendered in the quiet-title action is a bar to the present action.

A number of contentions, why the judgment of the lower court should be reversed, are advanced by appellant and answered by the respondents, in addition to those already considered by us. They relate, for the most part, to the findings of the trial court, alleged errors in the admission of evidence, and the form of the judgment made and entered. In view of what has already been said in the opinion, we deem it necessary to notice only one of the questions thus raised. The trial court found that a deed of the property, which is the subject of this litigation, executed by Mrs. Schneider on November 28, 1917, to William Schneider, "was delivered and became effective." The appellant challenges the sufficiency of the evidence to support the finding. It appears from the testimony that Mr. and Mrs. Schneider were not living together. In an effort to reach a compromise agreement concerning their property rights, and in anticipation of that result being accomplished, Mrs. Schneider executed and placed the deed referred to in the hands of the attorney representing her interests at that time, with instructions to deliver it to Mr. Schneider when the parties arrived at a settlement of their troubles. No settlement was reached, and Mrs. Schneider brought the action against her husband to quiet title. Her former counsel was then in New York. When he returned, he ascertained the deed had been removed from his safe, and that it had been filed for record after Mrs. Schneider brought her suit. He testified positively that he did not deliver or authorize delivery of the deed to anybody, and spoke to no one about it. He did not instruct any one to record the deed. The only other witness to testify concerning the deed was William Schneider, who testified that the deed was never in his possession at any time; he never procured it from Mrs. Schneider's attorney, and did not know how it came to be recorded. That, in substance, is all the testimony on the subject. It is uncontradicted. Appellant contends that the testimony was not inherently incredible or improbable, and should have been held sufficient to warrant a finding that the deed was not delivered, or, if delivered, it did not become effective because delivered in disobedience of the grantor's instructions, and not in accord with the purposes for which it was executed. On the other hand, respondents rely on the recordation of the deed as constituting prima facie delivery, which was not overthrown by the evidence. Whether or not the trial court correctly decided the issue of fact as to the delivery of the deed is an immaterial issue in the case. Schneider, the grantee therein, was made a party defendant to the action to quiet title brought by Mrs. Schneider, the grantor. The findings show that the deed was not placed on record until after the action was instituted and the notice of pendency of the action had been recorded. Schneider then filed an answer in which he claimed the property to be his separate property, and that Mrs. Schneider had no title or interest therein. The judgment was that Schneider had no interest in the property, and he was enjoined from asserting any right or claim thereto. The claim and right of action of the respondent plaintiff are barred by that judgment. Furthermore, the respondent acquired no greater right by the assignment from Schneider than Schneider had. Therefore, the question of purported delivery of the deed is wholly immaterial.

The judgment is reversed.

We concur: MYERS, C. J.; SHENK, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.

196 Cal. 401

WEAVER v. FICKETT et al. (L. A. 8236.)

(Supreme Court of California. July 14, 1925.)

1. Appeal and error ⊜526—Findings of referee should have been included in judgment roll as same was made up by clerk of trial court.

The findings of the referee, to which exceptions were taken, should, under Code Civ. Proc. § 670, have been included in the judgment roll as the same was made up by the clerk of the trial court on appeal pursuant to section 953a et seq.

2. Appeal and error ⊜554(3) — Absence in record upon appeal of reporter's transcript or bill of exceptions is not of itself ground for affirmance of judgment.

Absence in record on appeal of reporter's transcript or bill of exceptions is not of itself ground for affirmance of judgment.

3. Appeal and error ⊜544(1)—Transcript of judgment roll, together with notice of appeal, is sufficient record upon appeal, if appellant elects to prosecute appeal upon such record.

Transcript of judgment roll, together with notice of appeal, is sufficient record, if appellant elects to prosecute appeal on such record.

4. Appeal and error ⊜544(3)—No bill of exceptions or reporter's transcript is required, where grounds for appeal appear in judgment roll.

No bill of exceptions or reporter's transcript is required, where grounds for appeal appear in judgment roll.

5. Appeal and error ⊜1127—Motion to affirm judgment denied, where its consideration involves determination of merits of appeal.

A motion to affirm a judgment because no reporter's transcript has been settled, certified, or filed upon appeal (taken pursuant to Code Civ. Proc. § 953a et seq.) will be denied, where its consideration, because of assigned errors reviewable independently of absence of such transcript, involves a determination of the merits, thus effecting an unwarranted advancement of the case.

6. Appeal and error ⊜653(3)—Occasion for application for relief under statute permitting amendments is properly addressable to trial court in first instance.

The matter of settlement and certification of a reporter's transcript for use upon appeal being committed in the first instance to the trial judge, any application for relief under Code Civ. Proc. § 473, should be addressed to the trial court in first instance.

In Bank.

Action by R. D. Weaver against George E. Fickett and others. Judgment for plaintiff, and defendants appeal. On plaintiff's motion to affirm judgment. Motion denied.

Davis & Thorne, of Los Angeles, for appellants.

G. C. De Garmo, and H. B. Cornell, both of Los Angeles, for respondent.

PER CURIAM. [1-5] This is a motion to affirm the judgment upon the ground that no reporter's transcript has been settled, certified, or filed upon this appeal, the appeal having been taken pursuant to the provisions of Code of Civil Procedure, § 953a et seq. The record upon appeal now on file in this court consists of a "clerk's transcript," containing a certified copy of the judgment roll, the notice of appeal, and the notice to the clerk to prepare transcript. There is also a "supplemental clerk's transcript," containing certified copies of a bill of particulars, demand for bill of particulars, order appointing referee, report and finding of referee, exceptions to the report of referee, and of certain other documents on file in the office of the clerk of the trial court. The findings of the referee were not included in the "judgment roll" as the same was made up by the clerk of the trial court. They should have been so included (Code Civ. Proc. § 670), and doubtless may be regarded for the purposes of this appeal as a part of the judgment roll. The absence in the record upon appeal of a reporter's transcript or bill of exceptions is not in and of itself a ground for affirmance of the judgment. The transcript of a judgment roll, together with notice of appeal, is a sufficient record upon appeal, if the appellant elects to prosecute his appeal upon such a record. If the grounds for appeal appear in the judgment roll, no bill of exceptions or reporter's transcript is required. 2 Cal. Juris. p. 527. Appellants' opening brief is on file herein, and it appears therefrom that they urge various points upon this appeal which cannot be considered in the absence of a reporter's transcript, but they also make the points that the judgment appealed from is not supported by the findings, and that the complaint herein does not state a cause of action. These points may be considered and determined upon an inspection of the judgment roll alone. The motion to affirm must therefore be denied, because a consideration and determination of these points at this time would involve in effect a determination of the merits of the appeal, and would effect an unwarranted advancement of this case. Jenks v. Lurie (Cal. Sup.) 234 P. 370; 2 Cal. Juris. p. 771.

[6] Appellants have filed counter affidavits in response to the motion, in which they show that they filed within due time in the court below a notice to the clerk to prepare transcript, which was sufficiently broad in its terms to require the preparation of a reporter's transcript; that they arranged with the reporter for his compensation therefor; that such transcript was duly prepared by the reporter and delivered to counsel for appellants, who examined the same and returned it to the reporter for delivery to the

clerk; that the same was duly delivered by the reporter to the clerk for presentation to the judge who tried the case; that for some unexplained reason no time was ever fixed by the trial judge for the settlement of the transcript, but that counsel for appellants believed, and had some reason to believe, that the reporter's transcript had been settled, certified, and filed in this court, and that appellants prepared and filed their opening brief herein, believing in good faith that the reporter's transcript was in fact on file in this court. Appellants also filed herein an affidavit of merits, evidently intended as part of an application to this court for relief under Code of Civil Procedure, § 473. If there is, under the present circumstances, any occasion for application for relief under this section, it should be addressed to the trial court. Curtin v. Ingle, 155 Cal. 53, 57, 99 P. 480; Morey v. Paladini, 187 Cal. 727, 203 P. 760. The matter of the settlement and certification of a reporter's transcript for use upon appeal is committed, in the first instance, to the trial judge. There is no proceeding now before us under which we would be entitled, if we were so disposed, to control or direct his action in this matter.

The motion to affirm is denied.

All concur.

---

196 Cal. 344

FLEMING v. SUPERIOR COURT OF ORANGE COUNTY et al. (L. A. 8360.)

(Supreme Court of California. July 1, 1925.)

1. Statutes ⟸118(1)—Section of Vehicle Act, rendering "speed trap" evidence incompetent, held to come within title.

Section 155 of Vehicle Act, which renders evidence of traffic violations obtained by operation of "speed traps" incompetent, falls within title of act, and is therefore not invalid under Const. art. 4, § 24, which provides that every act shall embrace one subject which shall be expressed in its title.

2. Constitutional law ⟸48, 70(1)—Courts not concerned with legislative matter; acts on subjects primarily of legislative concern will be upheld, if possible, on rational theory.

With affairs which are primarily of legislative concern courts are not called upon to deal, unless it appears that claimed infringement of Constitution is real, and in considering such question act will be held constitutional if it can be done upon any rational theory.

3. Witnesses ⟸2(2)—Section of Vehicle Act rendering "speed trap" evidence incompetent held not to violate guarantee of process of court to obtain witnesses.

Section 155 of Vehicle Act, rendering evidence of traffic violations incompetent if obtained by operation of "speed traps," is not violative of Const. art. 1, § 13, guaranteeing accused right to have process of court to obtain witnesses.

4. Constitutional law ⟸55—Section of Vehicle Act held not to usurp judicial functions.

Section 155 of Vehicle Act is not invalid as usurpation by legislative branch of functions of judicial branch, in contravention of Const. art. 3, § 1.

5. Statutes ⟸87—Section of Vehicle Act held not special or local legislation regulating practice of courts.

Vehicle Act, § 155, rendering evidence of traffic violations obtained by operation of speed traps incompetent, does not violate Const. art. 4, § 25, subd. 3, inhibiting passage of local or special laws regulating practice of courts.

6. Criminal law ⟸1134(7)—Jurisdiction of inferior court sole question in certiorari proceeding.

Under Code Civ. Proc. §§ 1068, 1074, in proceeding in certiorari to superior court, question of jurisdiction alone is open to review, and errors of law committed in exercise of authority cannot be considered or corrected.

7. Criminal law ⟸321—Superior court's action within appellate jurisdiction presumed regular.

When superior court has acquired appellate jurisdiction, its action within limits of that jurisdiction is entitled to same presumption of regularity that attaches to exercise of original jurisdiction.

8. Criminal law ⟸1134(7)—Lack of evidence to support conviction of Vehicle Act violation not corrected in certiorari proceeding.

In certiorari proceeding to annul conviction of Vehicle Act violation, judgment of superior court will be affirmed where it was regularly made and entered in exercise of court's jurisdiction, though there is no competent evidence to support judgment, since errors of law are not open to review in such proceeding.

In Bank.

Victor Fleming was convicted of a violation of the Vehicle Act, on evidence procured through operation of a speed trap, and he brings certiorari. Judgment affirmed.

David R. Faries, J. Allen Davis, and Louis C. Spiess, Jr., all of Los Angeles, and Richard C. Waltz, of Beverley Hills, for petitioner.

Alex P. Nelson, Dist. Atty., C. N. Mozley and D. G. Wettlin, Deputy Dist. Attys., all of Santa Ana, for respondents.

SHENK, J. By complaint filed in the justices' court of Seal Beach township in the county of Orange, petitioner was charged with the commission of a misdemeanor, in that he did, on or about the 9th day of November, 1923, drive an automobile on a public highway within said county at an excessive and unlawful rate of speed, in excess of 35 miles an hour, in violation of section 113 of the California Vehicle Act. Stats. 1923,

p. 517. He was found guilty, and was subjected to a fine of $25. On appeal duly taken to the superior court, the judgment of conviction was reversed and a new trial granted. On the trial de novo in the respondent court, pursuant to section 1469 of the Penal Code, the petitioner was again found guilty as charged, and a straight fine of $25 was imposed upon him. The present proceeding is in certiorari, commenced in the District Court of Appeal of the Second District, Division 2. The writ was there issued, and after hearing the judgment of the superior court was annulled. On application of respondents, the judgment of the District Court of Appeal was vacated and a hearing ordered in this court.

The cause was submitted to the respondent court for decision on the transcript of the evidence and the proceedings in the justices' court. It was stipulated that the conviction resulted solely on evidence procured by traffic officers through the maintenance and operation of a "speed trap," as defined in and denounced by section 155 of said California Vehicle Act, which reads as follows:

"*Evidence based on use of speed traps not to be admitted.* No evidence as to the speed of a vehicle operated on a highway by any person arrested for a violation of the provisions of this act shall be admitted in any court at the consequent trial of such person when such evidence relates to or is based upon the maintenance or use of a speed trap.

"A speed trap within the meaning of this section is a particular section of, or distance on, any highway the length of which has been or is measured for distance, and marked off or otherwise designated or determined, and the limits of which are within the vision of an officer or officers who calculate the speed of a vehicle passing through such speed trap by using the elapsed time during which such vehicle travels between the entrance and exit of such speed trap.

"Nor shall any testimony in any such case be admitted in any court from any officer or officers arresting or participating or assisting in the arrest of such person if any speed trap was used in such arrest or if such officer or officers or any of them, were not at the time of such arrest dressed in a distinctive uniform and patrolling or upon the highway upon which the arrest was made in plain sight of all persons traveling thereon."

The petitioner contends that, because of the provisions of said section 155, the evidence before the respondent court, and upon which his conviction was based, was incompetent, and that therefore said court was without jurisdiction to render a judgment of conviction against him. The respondents contend that said section 155 contravenes numerous provisions of the state Constitution and is therefore void. With reference to these contentions of respondents we approve the reasoning and adopt the conclusions of the District Court of Appeal in its opinion prepared by Mr. Justice Works as follows:

[1] "We come now to the very interesting question, consisting of several branches, as to the validity of section 155 of the Motor Vehicle Act under the Constitution. One contention of respondents is that the enactment is invalid under section 24 of article 4 of the organic law of the state, which reads, in part: 'Every act shall embrace but one subject, which subject shall be expressed in its title.' The title of the act in which section 155 is contained is of great length, but petitioner points only to certain portions of it as 'expressing' the subject, or the part of the subject, of the act which is comprised within the section that now lies before us as follows: 'An act to regulate the use and operation of vehicles upon the public highways and elsewhere; * * * to provide penalties for violations of provisions of this act; * * * [and] to provide for carrying out the objects of this act. * * * In our view it is necessary only to refer, in dealing with the attack now made upon the section by respondents, to the first member of this quotation from the title of the act and from petitioner's brief; that is to say, 'An act to regulate the use and operation of vehicles upon the public highways and elsewhere.'

[2] "In considering the question now presented, we are to remember that the matter of the regulation of the use and operation of vehicles upon the highways of the state is primarily one of legislative concern. With such affairs the courts are not called upon to deal unless it appears to them that a claimed infringement of any provision of the Constitution by the Legislature is plainly a real infringement. In considering such a question, the courts will inquire whether there is any rational theory upon which the action of the Legislature in passing a law can be sustained. People v. Simonsen, 64 Cal. App. 97, 220 P. 442. If such a theory can be discovered, the questioned act of the Legislature will be held to be constitutional. Does section 155 amount to a regulation of 'the use and operation of vehicles upon the public highways,' in the face of the contention of respondent which is here made that it provides a mere rule of evidence? Petitioner asserts in his brief that the act as a whole 'has for its primary object the safety of all travelers upon the public highways.' He then says: 'The Legislature concluded that the public safety, the obvious purpose of numerous regulations contained in the act, would best be served by requiring traffic officers to spend their hours of duty in patrolling the public highways; that the presence of such officers upon the highways would constitute a far greater deterrent to excessive speed, and would insure a more universal observance of the many rules of the road than would a concealment of said officers in speed traps located off the highway. The Legislature did not expressly prohibit the

maintenance or use of speed traps, but it did render their maintenance and use wholly ineffectual for all purposes, by expressly prohibiting the introduction of speed trap testimony. The legislative purpose is disclosed in that portion of section 155 which prohibits the introduction of any testimony from any officer or officers arresting or participating or assisting in the arrest of such person if any speed trap was used in such arrest, or if such officer or officers, or any of them, were not at the time of such arrest dressed in a distinctive uniform, and patrolling or upon the highway upon which the arrest was made, in plain sight of all persons traveling thereon. The Legislature, in the foregoing provision, clearly expressed its conviction that the presence of traffic officers actually patrolling the highways, dressed in distinctive uniforms, and in plain sight of all travelers on the highways, would have a most salutary effect in securing the observance of each and all of the regulations imposed upon drivers of vehicles upon the public highways. * * * The Legislature knew that a very large percentage of accidents upon public highways occurred at street intersections, that such accidents were caused by failure to observe the right of way rule, by failure to give proper signals, by failure on the part of drivers to turn at intersections in the manner prescribed by law. The Legislature quite evidently believed that many of these accidents would be prevented in the event that officers patrolled the highway and enforced each and all the rules of the road heretofore mentioned.' We quote thus largely from petitioner's brief for the reason that it appears to us that he strikingly presents not only a rational but a commendable basis for the enactment of section 155 as an effective means for accomplishing the main purpose of the act in which it is contained. To quote again from the title of the enactment, why does not section 155 provide a most salutary means 'to regulate use and operation of vehicles upon the public highways?' Is it not logical to suppose that the lawmaking body thought it better to prevent the commission of crime than to punish it after its commission, and that its members saw, in the means employed through section 155, a proper method of effectuating that laudable result? If the lawmaking bodies of the world should hit upon some means to prevent arson, burglary, or murder, thus obviating the necessity of laws to provide for their punishment, should we not hail the achievement as an epoch-making triumph? It is not only possible, but it is extremely probable, as contended by petitioner, that the members of the Legislature had some such idea in mind as is suggested by these questions when they enacted section 155, and, if we can see the possibility of such a thing, it is enough under the rules of law affecting our power to pass upon the constitutionality of the section in question.

"With these reflections in mind, we cannot regard section 155 as an attempt to regulate the procedure of courts or to prescribe a rule of evidence. The necessity or propriety of such a purpose cannot be ascertained upon the highest flight of imagination. Why, as a mere matter of evidence, should 'speed trap evidence' be excluded from a jury? A rational and logical purpose can be discerned, however, as we have attempted to point out, in the enactment of the section as a means to regulate the use and operation of vehicles upon the public highways. To this purpose the interdict against the admissibility of such evidence is merely an adjunct. Suppose the Legislature had made the maintenance of speed traps a penal offense. Would any one question such an enactment on the ground that it did not come within the title of the Motor Vehicle Act? Surely not. That means of stamping out what the Legislature evidently regarded as the speed trap evil would have been entirely proper under the title of the act, and an enactment designed to suppress the same evil by making the maintenance of speed traps utterly useless is, to our minds, equally within the objects of the statute as a whole, and as clearly within its title.

[3] "Respondents further insist that section 155 is unconstitutional under section 13 of article 1 of the organic law. That section reads, in part: 'In criminal prosecutions * * * the party accused shall have the right * * * to have the process of the court to compel the attendance of witnesses in his behalf. * * *' This point is advanced upon the theory that one under prosecution for the violation of provisions of the law forbidding the operation of vehicles on the highways at an excessive speed might desire the testimony in his own behalf of officers operating a speed trap at the time of the commission of his alleged crime, and that section 155 denies him that right. We do not pause to determine whether the point may not be concluded by our disposition of the question last above discussed, upon the theory that section 155 in its essential purpose has not to do with a question of evidence, but was enacted for the purpose of preventing the maintenance of speed traps, thus, in the exercise of the judgment of the Legislature, placing such devices, or means of procuring evidence, outside the public policy of the state. Considering section 155 from the viewpoint of respondent, it cannot operate to deny a defendant process under which to procure the attendance of witnesses in his behalf, or to prevent the examination of competent witnesses, granting that the constitutional guaranty as to process includes a guaranty of the right to examine witnesses produced. The section merely

provides that officers operating speed traps cannot be witnesses as to knowledge derived by them while so acting. As well might it be contended that section 13 of article 1 is violated by section 1881 of the Code of Civil Procedure, which provides that husband and wife may not testify against each other, that an attorney may not testify against his client, that a priest may not as a witness betray the secrets of the confessional, that a physician may not testify against his patient, and that a public officer may not be examined as to communications made to him in official confidence, for a prohibition against all such persons testifying against certain parties includes, necessarily, a prohibition against their testifying in favor of those opposed to such parties. The same might be said as to other enactments which make various kinds of 'natural' evidence incompetent. Practically all rules of evidence are exclusionary (Jones Ev. § 1), and it has never been doubted that the Legislature has power to declare certain 'natural' evidence inadmissible, or to declare certain persons incompetent as witnesses, either on grounds of public policy, or for the purpose of conducing to the dispatch of business in the courts.

[4] "Respondents inveigh against the constitutionality of section 155 because, as they contend, it infringes the provisions of section 1 of article 3 of the Constitution. This section provides, in effect, that the powers of government are divided into three branches, the executive, the legislative, and the judicial, and that 'no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others.' It is said that the Legislature, in enacting section 155, has usurped the functions of the judicial branch. This point has been sufficiently covered by what we have already said as to the two other constitutional questions of which we have made disposition. We think the point now presented is without merit.

[5] "It is said that section 155 violates that provision of the Constitution to the effect that the Legislature shall not pass local or special laws regulating the practice of courts of justice. Subdivision 3, § 25, art. 4. This question is answered by what we have said in discussing the claim that the subject-matter of section 155 is not covered by the title of the act of which it is a part. It may be remarked, in addition, that the section is neither special nor local legislation. This fact is so obvious to us that we conclude the particular question upon a mere mention of it."

[6] Since it is determined that said section 155 does not contravene any of the said provisions of the Constitution, it necessarily follows that the evidence admitted by the respondent court in support of the allegations of the complaint and as a foundation for the judgment of conviction was incompetent. It is the position of petitioner that with naught but incompetent evidence to support its judgment the respondent court was acting without jurisdiction. The respondents contend that the respondent court, as a court of general jurisdiction, had the power to determine the guilt or innocence of the petitioner who was properly before it charged with a public offense, and that, assuming the evidence to be erroneously admitted, its determination based thereon was not void for want of jurisdiction, but was merely error in the exercise of jurisdiction. In support of their contention the respondents rely on Roberts v. Police Court, 185 Cal. 65, 195 P. 1053, and earlier decisions to the same effect. It is well settled that on every question except the mere question of power the action of the superior court is final and conclusive when brought in question in a proceeding in certiorari. As stated in the Matter of Hughes, 159 Cal. 360, 113 P. 684:

"The Supreme Court has jurisdiction in certiorari to review a judgment of the superior court only in a case where that court has exceeded its jurisdiction (Code Civ. Proc. § 1068), and in such cases only for the purpose of inquiring whether or not the judgment sought to be reviewed was in excess of jurisdiction, or as the Code expresses it, 'the review upon this writ cannot be extended further than to determine whether the inferior tribunal, board, or officer has regularly pursued the authority of such tribunal, board, or officer.' Code Civ. Proc. § 1074. If such tribunal has regularly pursued its authority, our inquiry stops. We cannot consider or correct errors of law committed by the inferior court in the exercise of its authority on the merits of the cause it has jurisdiction to entertain and decide. No matter how erroneous that decision may be, even on the face of the record, we have no power to change, annul, or reverse it in this proceeding, if that court had jurisdiction to act in the matter before it. This has been repeatedly stated in former decisions of this court."

[7] When the respondent court had acquired its appellate jurisdiction, its action within the limits of that jurisdiction was entitled to the same presumptions of regularity that attached to the exercise of its original jurisdiction. Sherer v. Superior Court, 94 Cal. 354, 29 P. 716. In Roberts v. Police Court, supra, it was held, with reference to the power of the superior court, on an appeal from a police court:

"The statute gives to such court the power, upon such appeal, to reverse the judgment of the police court and to grant a new trial, or to affirm the judgment of the police court. It must determine the appeal, reversing or affirming the judgment of the police court as it deems one or the other course proper in view of the matters shown by the statement of the case. Whichever it does it is acting in the exercise of its lawful jurisdiction, and not in

excess of such jurisdiction. It has the same power to affirm in any case that it has to reverse, and the mere fact that its conclusion is wrong does not make its action an excess of its jurisdiction. In such case we have simply error in the exercise of jurisdiction. * * * Where a court is invested with jurisdiction to determine the question of the guilt or innocence of one charged with a public offense, * * * by the filing of the complaint and by acquiring jurisdiction over the person of the defendant, its determination of the question of guilt or innocence, whether based on sufficient evidence or not, is a determination arrived at in the exercise of its jurisdiction, and however erroneous it may be, it is not void for want of power in the court to render the decision."

[8] The substance of petitioner's contention is that the respondent court should have found him not guilty of the charge because of lack of competent evidence to convict him. To put it another way, he is insisting that he was wrongly convicted because of evidence before the court which was erroneously admitted. But in such a case the claim of insufficiency of evidence to show the guilt of the accused does not go to the jurisdiction. The determination of the court is no more than error in the exercise of its lawful power. Having acquired its appellate jurisdiction, its judgment within the limits of said jurisdiction was a final judgment, and errors within such jurisdiction "must be submitted to as part of the sacrifice that every individual is compelled to yield to the infirmities of human government." Sherer v. Superior Court, supra. In support of his contention that the respondent court was acting without jurisdiction, the petitioner cites McClatchy v. Superior Court, 119 Cal. 413, 51 P. 696, 39 L. R. A. 691; Estate of Paulsen, 35 Cal. App. 654, 170 P. 855; Great Western Power Co. v. Pillsbury, 170 Cal. 180, 149 P. 35; Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; and Hotaling v. Superior Court, 191 Cal. 501, 217 P. 73, 29 A. L. R. 127. In considering the applicability of those cases to the question in hand, it must be borne in mind that an exception to the rule that the sufficiency of the evidence will not be reviewed on certiorari is made when the question is whether jurisdictional facts were or were not proved; that is, whether facts upon which jurisdiction depends were or were not proved. Stumpf v. Board of Supervisors, 131 Cal. 364, 63 P. 663, 82 Am. St. Rep. 350, 4 Cal. Jur. 1111, and cases cited. The cases relied upon by petitioner are cases wherein the exception has been applied, and have no controlling significance in the application of the general rule to the case at bar.

For the reason that the judgment of the respondent court was regularly made and entered in the exercise of its jurisdiction, and was a final judgment on appeal from the justices' court, it is beyond the legitimate power of this court to disturb it.

The proceedings in the respondent court are therefore affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; LAWLOR, J.

---

72 Cal. App. 711

WHITE v. SUPERIOR COURT IN AND FOR TULARE COUNTY et al. (Civ. 5113.)

(District Court of Appeal, Second District, Division 1, California. May 20, 1925.)

Criminal law ⟸260(11)—Certiorari not granted to review affirmance in superior court of conviction of misdemeanor in justice's court.

In view of Code Civ. Proc. § 1068, and Pen. Code, § 1470, certiorari will not be granted to review judgment of superior court, where such judgment is merely an affirmance of judgment of justice's court, convicting petitioner of violation of Vehicle Act.

E. C. White was convicted of a violation of the Vehicle Act, and he applies for certiorari. Writ denied.

Walter C. Maloy and John W. Maloy, both of Madera, for petitioner.

CONREY, P. J. Petitioner was convicted, in a justice's court, upon a charge of misdemeanor, in that he did willfully and unlawfully operate and drive an automobile upon a public highway of the county of Tulare at a rate of speed in excess of 35 miles an hour. From the judgment entered therein, he appealed to the superior court. The appeal was presented to that court on a statement of the case prepared and settled as provided by section 1468, Penal Code. After due hearing by the court upon that record, the judgment of the justice's court was affirmed.

Petitioner, who insists that the complaint did not charge the commission by him of any crime, relies upon Fleming v. Superior Court, 45 Cal. App. Dec. 143[1] as authority in support of his contention that a writ of review will lie in this case, notwithstanding that the right to a writ of review is limited to cases in which there is no appeal. Code Civ. Proc. § 1068. In the Fleming Case a rehearing was granted by the Supreme Court, where the matter now awaits decision. Moreover, that was a case where the judgment of the superior court was rendered upon a trial in that court after an order granting a new trial. The Penal Code provides that in such cases, "if a new trial is granted upon appeal, it must be had in the superior court." Pen. Code, § 1469. Without venturing to express our opinion upon the question concerning the right to a writ of review, as presented in the Fleming Case, we are well satisfied that such right does

---

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] For opinion on hearing by Supreme Court, see 238 P. 88.

not exist where the judgment of the superior court is merely a judgment of affirmance of the judgment of the justice's court. For it is required that such judgment of affirmance be "remitted to the court below, which may proceed to enforce its sentence." Pen. Code, § 1470.

The petition for writ of review is denied.

We concur: HOUSER, J.; CURTIS, J.

---

72 Cal. App. 654

BACIGALUPI v. BACIGALUPI. (Civ. 5103.)

(District Court of Appeal, First District, Division 2, California. May 13, 1925. Hearing Denied by Supreme Court July 7, 1925.)

1. Divorce ⟹254 — Interlocutory decree becomes conclusive as to property rights, if not legally vacated.

An interlocutory decree of divorce becomes a conclusive decree as to property rights of parties, if not vacated in mode prescribed.

2. Divorce ⟹254—Interlocutory decree, affecting property rights, must be attacked within six months.

Under Code Civ. Proc. § 473, time to attack an interlocutory decree, in so far as it relates to property rights of parties, is fixed at six months after entry thereof.

3. Divorce ⟹245(3)—Order, modifying decree to conform to decision, can be made only on proper motion and showing.

Order, modifying decree of divorce with respect to alimony to conform to court's decision, can be made only on proper motion and proper showing of facts relied on.

4. Divorce ⟹243—Interlocutory decree controls over clerk's notation in minutes; "alimony."

Interlocutory decree, making award for support of minor children only, and no award for alimony or support of wife, controls over clerk's entry in minutes that defendant was ordered to pay $40 a month alimony, especially as there was no fatal inconsistency; "alimony," in strict legal sense, meaning support for wife, but being commonly used as covering award to wife for support of children whose custody is awarded her.

[Ed. Note.—For other definitions see Words and Phrases, First and Second Series, Alimony.]

5. Divorce ⟹286—Presumed that trial court found adversely to wife's claim for individual alimony.

Where interlocutory decree of divorce made award for support of minor children only, it must be presumed that court found adversely to wife on her claim for individual support.

6. Divorce ⟹245(1)—Trial court held without jurisdiction to add provision for wife's alimony by modification of decree.

When interlocutory decree of divorce made no provision for alimony for wife's support, trial court was without jurisdiction to add such provision by modification of decree.

7. Courts ⟹23—Parties cannot by stipulation confer jurisdiction.

Where trial court was without jurisdiction to modify interlocutory decree of divorce, stipulation authorizing court to make such modification could not confer such jurisdiction.

8. Appeal and error ⟹82(3)—Order, denying motion to modify interlocutory decree, held appealable order.

Order, denying defendant's motion to annul order modifying interlocutory decree, was an order made after final judgment, within Code Civ. Proc. § 963, and was an appealable order.

Appeal from Superior Court, Alameda County; Joseph S. Koford, Judge.

Action by Elsie Bacigalupi against Frank Bacigalupi. From an order refusing to modify an interlocutory decree of divorce, defendant appeals. Reversed.

E. E. Gehring, of Oakland, for appellant.

M. J. Rutherford, of Oakland, for respondent.

NOURSE, J. On the 21st day of September, 1921, the plaintiff commenced an action against the defendant for divorce upon the grounds of desertion. In her complaint she asked for the custody of her three minor children, and prayed for the sum of "$100 per month as alimony for the support and maintenance of herself and said minor children." On the 20th of October, 1921, a divorce was granted to the plaintiff as prayed, and findings were duly waived. The clerk entered upon his minutes a notation that it was further ordered that the defendant "pay to the plaintiff $40 a month alimony." On the 27th of October, 1921, the court duly signed an interlocutory judgment and decree of divorce in which the defendant was ordered to pay to the plaintiff "as and for the support of the minor children the sum of $40 per month." This judgment was duly entered on October 29, 1921, and no appeal was taken therefrom, and no motion for a new trial was made. On October 3, 1922, prior to the entry of a final decree therein, the attorneys, who had appeared for the respective parties at the time of the trial, filed their written stipulation purporting to authorize the trial court to modify the interlocutory decree as so entered by inserting the words "said plaintiff" so that the judgment should require the defendant to pay to the plaintiff "as and for the support of said plaintiff and the minor children" the sum of $40 per month. Acting upon this stipulation alone, the trial court on the 3d day of October, 1922, entered its order purporting to modify said interlocutory decree by inserting the words "plaintiff and" before the words "minor children." On January 2, 1923, final judgment of divorce was entered in which no mention was made of the provision for payment of alimony or the sup-

port of the children. On May 7, 1923, the defendant, acting through an attorney who had been substituted for him, moved the trial court to modify the interlocutory decree as modified by the order of October 3, 1922, so as to relieve the defendant of paying to the plaintiff the alimony and maintenance money covered by the order of October 3, 1922.

This motion was supported by the affidavit of the defendant, in which it was shown that one of said children had passed the age of majority, and that all three were living with the mother, who received a large part of their earnings; that they were employed in positions from which they earned good salaries and did not need any support from the defendant. It was also alleged that the stipulation of October 3, 1922, was signed by an attorney who was not at that time employed by defendant as his counsel, and that the stipulation was made without the defendant's knowledge or consent. The facts alleged in this affidavit were not denied, and the motion came on for hearing on the affidavit and upon oral testimony taken at the time. The facts, developed from the oral testimony, related solely to the amount of income which the respective parties and the three sons were receiving. As a result of the hearing, the trial court, on October 22, 1923, entered an order purporting to grant the motion of defendant to modify the decree, so that the said $40 per month be paid to the plaintiff for her own maintenance and none for said minor children. At the same time the court ordered all other matters contained in the motion denied.

As we read this order it purports to modify the interlocutory decree to the extent of vacating and setting aside the award of support and maintenance for the three sons, and at the same time to modify that decree so as to order the payment of $40 a month exclusively for the support of the plaintiff. As to the latter feature, the order purports to grant a motion which the record does not disclose to have been made. The order further denies the motion made by the defendant to annul or modify the order of October 3, 1922, including the words "plaintiff and" in the paragraph awarding support from the defendant, though this order of October 22, 1923, states that the motion, which was denied, was one for a modification of the final decree of divorce which inserted the word "alimony" in the decree. This order was filed on January 26, 1924, and within due time thereafter the defendant appealed from the order and has prepared a record under section 953a, Code of Civil Procedure.

The foregoing statement of facts has been taken from the transcript which has been certified to us by the trial court. The only attempt, made by the respondent to support the order of the trial court, is based upon a statement of facts which in every particular is unsupported by the record. The issue which presents itself upon the record is the simple question whether the trial court had jurisdiction to modify the interlocutory decree in the manner complained of more than six months after its entry.

[1, 2] In the consideration of this question, we are confronted with certain fixed principles which are sustained by numerous authorities. The interlocutory decree of divorce becomes a conclusive decree as to the property rights of the parties, if not vacated in the mode prescribed by law. Gould v. Superior Court, 47 Cal. App. 197, 200, 191 P. 56; Abbott v. Superior Court (Cal. App.) 232 P. 154. The time to attack an interlocutory decree, in so far as it relates to the property rights of the parties, is fixed at six months after the entry thereof by the provisions of section 473, Code of Civil Procedure. Bancroft v. Bancroft, 178 Cal. 367, 173 P. 582.

[3-5] If, as claimed by the respondent, the modification of October 3, 1922, was made to conform to a decision of the trial court (which, however, is not included in the record), that order could be made only upon a proper motion and a proper showing of the facts relied on. As we are required to take the record as we find it, we must rest upon the interlocutory decree or judgment signed by the trial court, rather than the notation made in the minutes of the clerk, and, turning to that judgment, we find that the trial court ordered an award for the support of the minor children only and made no award for "alimony" or support of the wife. The clerk's entry contained the notation that the defendant was ordered to pay "$40 a month alimony" without any mention of the wife or the minor children. Though in a strict legal sense the word "alimony" means support for the wife it is commonly used as covering an award made to the wife for the support of the minor children whose custody is awarded to her. There is therefore no fatal inconsistency between the clerk's notation and the decree signed by the trial court. We must therefore treat the decree as the decision of the court, and from the award which was there made it must be presumed that the trial court found adversely to the respondent upon her claim for individual support.

[6, 7] The case then comes to this: That when the interlocutory decree of divorce was granted to the wife no provision was made for alimony for her own support. This being so, the trial court was without jurisdiction to add such a provision by a modification of the decree. Howell v. Howell, 104 Cal. 45, 37 P. 770, 43 Am. St. Rep. 70; O'Brien v. O'Brien, 130 Cal. 409, 62 P. 598; McCaleb v. McCaleb, 177 Cal. 147, 169 P. 1023. If therefore the trial court was without jurisdiction to modify the interlocutory decree at the time and in the manner referred to,

the stipulation of counsel purporting to authorize the court to make such a modification is of no importance, as the parties could not by stipulation confer upon the court a jurisdiction which the law has denied it. Furthermore, the time for appeal from, or modification of, the interlocutory decree having passed, and the appellant's counsel having been employed solely for the purpose of representing him in the trial of the action and the entry of that decree, his employment had ceased long before he entered into the stipulation of October 3, 1922. And this is particularly true as the stipulation which purported to authorize the court to impose upon the appellant a burden to pay alimony to his wife in addition to the burden imposed by the interlocutory decree was undoubtedly a stipulation to the prejudice of the appellant. Knowlton v. Mackenzie, 110 Cal. 183, 42 P. 580.

[8] We are satisfied, for the reasons given, that the trial court was without jurisdiction to modify the interlocutory decree by the order of October 3, 1922. The motion of the appellant to annul this order was properly made, as the want of jurisdiction of the trial court was apparent upon the face of the order. The order denying this motion was an order made after final judgment within the meaning of section 963, Code of Civil Procedure, and is an appealable order. It was not necessary therefore to appeal from the order of October 3, 1922, as respondent contends. That order having been made without jurisdiction, the appellant could treat it as a nullity; having moved to modify it, however, the motion should have been granted.

Order reversed.

We concur: LANGDON, P. J.; PRESTON, Justice pro tem.

---

72 Cal. App. 698

DAVIS et al. v. STANISLAUS COUNTY FARMERS' UNION. (Civ. 2850.)

(District Court of Appeal, Third District, California. May 19, 1925. Hearing Denied by Supreme Court July 16, 1925.)

1. Evidence ⟹417(1)—Oral testimony, to supply missing item in incomplete writing, only admissible when it does not contradict writing.

Oral testimony is admissible to supply a missing item in a written instrument only when such instrument in and of itself is not complete, and such testimony does not contradict any part of the writing.

2. Evidence ⟹417(9)—Proffered oral testimony held properly excluded as being inconsistent with written agreement.

In action for alleged breach of contract to market grapes grown on plaintiffs' land, parol evidence that the grapes were to be sold f. o. b. point of origin, which was inconsistent with other provisions, *held* properly excluded as contravening the written instrument.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by Elliott B. Davis and another against Stanislaus County Farmers' Union. From a judgment of nonsuit, plaintiffs appeal. Affirmed.

Hearing denied by Supreme Court; RICHARDS, J., dissenting.

George F. Snyder and E. B. Davis, both of San Francisco (Loring Davis of counsel), for appellants.

Griffin, Boone & Boone, of Modesto, for respondent.

PLUMMER, J. Appeal by plaintiffs from a judgment of nonsuit. The complaint alleges that between the 17th day of August and the 17th day of September, 1923, plaintiffs delivered to defendant, at its special instance and request at the city of Modesto, county of Stanislaus, state of California, 26 tons of Thompson seedless grapes owned by plaintiffs, to be sold by said defendant for said plaintiffs in accordance with an express understanding and agreement entered into between the plaintiffs and defendant that said grapes should be sold by the defendant f. o. b. at the city of Modesto, and not otherwise, and at a price specified by the plaintiffs, and that the proceeds from the sale of said grapes would be promptly paid to the plaintiffs; that the defendant sold said grapes contrary thereto, and the plaintiffs thereby suffered the damages alleged.

In support of this contention, the plaintiffs offered in evidence a certain marketing contract, in the words and figures following, to wit:

"Marketing Contract.

"Modesto, California, 8/17/1923.

"This agreement, made by Ed. Roe, first party, and Stanislaus County Farmers' Union, Inc., second party Witnesseth:

"That first party does hereby agree to market through second party all of the first party's crop of grapes grown on the ranch of first party located in the county of Stanislaus, state of California, and described as follows: 1½ miles on California ave. and Panama, for the season of 1923.

"First party agrees to pick and deliver all said crops to the packing house of second party, or to such packing house as second party directs, and second party shall pack all merchantable fruit in such commercial packages as second party believes to be most salable. First party shall pay second party for packing the regular commercial rate therefor, and second party shall be paid the current market price for all shook, loading, bracing, or other material so used. If first party desires, he may pack said fruit and deliver same to second party on board cars, and second party will, if desired, furnish shook and other packing and loading material therefor.

But second party shall not be under obligation to furnish any shook, bracing, loading or other material unless there is obtainable at said time at the packing house of second party sufficient shook and material to take care of the crops of first party. Second party shall be relieved from its obligation to handle said crop in case of car shortage, strikes, embargoes, or any other condition reasonably beyond the control of second party which prevents second party in due course from handling and marketing said crop.

"First party authorizes second party to sell said crop in its own name, collect the proceeds therefor, and deposit the same to its account, and make remittances by check as rapidly as returns are received from sales. Second party shall use due diligence in receiving, packing, and marketing all fruit of merchantable quality.

"First party agrees that second party shall deduct from proceeds of sale all packing and loading charges, freight and refrigeration charges, and all other expenses reasonably incurred in the marketing of said fruit, and second party shall also deduct any sums from said proceeds which first party may then be owing to second party.

Variety	Tonnage	Acres
Thompsons	60	1

"Signed in triplicate this 17 day of Aug. 1923. Ed. Roe, First Party. Stanislaus County Farmers' Union, Inc., by Allen Talbot, Second Party."

And, in addition, the plaintiffs sought to introduce in evidence testimony of a previous or contemporaneous oral agreement that the grapes referred to in said contract should be sold only f. o. b. at the city of Modesto, and that said grapes should not be shipped on consignment. This testimony, upon objection of counsel for the defendant, was excluded, and judgment for nonsuit followed, and this appeal rests simply upon the alleged error of the court in excluding such oral testimony.

[1] On the part of the appellants several sections of the Civil Code are referred to relating to the authority of factors, the duties of factors, and under what circumstances directions to factors might be given as to the place of sale, and how instructions given might be subsequently changed. These sections of the code and also the cases cited set forth the law as we understand it in relation to factors, but, for the reasons hereinafter stated, seem inapplicable to this case. Oral testimony, as hereafter shown, is admissible to supply a missing item in a written instrument only when the written agreement, in and of itself, is not complete, and such testimony does not contravene any part of the writing.

The contract in question provides first, that the first party agrees to market through the second party the grapes in question, to pick and deliver the same, and that the second party shall pack all merchantable fruit in commercial packages. The second paragraph then sets forth that the first party shall pay the second party, for packing, the regular commercial rate therefor, and the said second party shall be paid the current market price for all shook, etc. Provision is then made for packing by the first party, the second party furnishing the shook. This paragraph then sets forth that the second party shall be relieved from its obligation to handle said crop in case of car shortages, strikes, embargoes, and other conditions reasonably beyond the control of the second party which prevent the second party in due course from handling and marketing said crop. This paragraph providing for the second party marketing said crop, and also specifying that is shall be relieved, under certain conditions, plainly imports that the grapes are to be shipped for the purpose of marketing, else there would have been no reason for the introduction of a clause relieving the defendant from liability in the event of a car shortage. The third paragraph authorizes the second party to sell the grapes in its own name, collect the proceeds therefrom, and deposit the same to defendant's account, and make remittances by check as rapidly as returns are received from sales, the said party of the second part to use due diligence in receiving, packing, and marketing all fruit of merchantable quality, and then, lastly, it is agreed that the second party shall deduct from the proceeds of sales packing and loading charges, freight and refrigeration charges, and all other expenses reasonably incurred in the marketing of said fruit, and said second party shall also deduct any sums from said proceeds which first party may then be owing second party. This paragraph is certainly in direct conflict with the idea that the grapes were to be sold for cash f. o. b., in the city of Modesto. Under such circumstances, there would be no freight and refrigeration charges, nor would there be any marketing charges or expenses, as evidently contemplated by the agreement, which we have set forth.

[2] As we read the writing, it is a complete legal agreement, in and of itself, and any oral testimony changing the terms of this agreement, as set forth, would certainly contravene the rule that parol testimony is not admissible to contradict or vary the terms of a written instrument. Being complete in itself, the theory that the proffered testimony is supplementary is likewise subject to the rule excluding such testimony, for the simple reason that the alleged omitted item, to wit that the grapes were to be sold f. o. b., at Modesto, directly contravenes the last paragraph of the agreement, which contemplates the shipping of the grapes, and authorizes the payment of freight and refrigeration charges, etc.

As to the writing itself, and as to the authority of the court to construe the same, we quote from 6 California Jurisprudence, page 267, as follows:

"The question whether a writing is upon its face a complete expression of the agreement of the parties is one of law for the court, and the rule which governs the court in its determination has been well stated as follows: 'If it imports on its face to be a complete expression of the whole agreement—that is, contains such language as imports a complete legal obligation—it is to be presumed that the parties have introduced into it every material item and term; and parol evidence cannot be admitted to add another term to the agreement, although the writing contains nothing on the particular one to which the parol evidence is directed.'"

The principle there relied upon for this statement of the law is the case of Harrison v. McCormick, 89 Cal. 327-330, 26 P. 830, 23 Am. St. Rep. 469. In that case, the contract or agreement called for the delivery of 50 tons of coal upon an order in the following words:

"San Francisco, January 12, 1882.

"Messrs. McCormick & Lewis: Ordered from J. W. Harrison 50 tons Montana Lode lump Lehigh hand-picked coal, early lading in New York. Ship to be named, original cost, etc. To be paid on receipt of bills of lading, etc., and the freight to be paid on receipt of coal here, at $13.50 per ton per 2,240 pounds, gold coin, payable as above, delivered from ship's side when landed. Any shortage in excess of 2 per cent. to be paid by the seller."

It was contended that there was an oral agreement that the coal should be according to a certain sample, and oral testimony was sought to be introduced as to the sample, and that the coal delivered was not of the same quality, etc. This oral testimony was excluded, and, after quoting what we have here set forth, the court in that case further said:

"Tested by this consideration, it is clear that the agreement here is to be deemed complete, as it imports a clear legal obligation, and without any uncertainty as to what the parties thereto undertook to perform. It states an agreement for the sale and delivery of fifty tons of coal of a particular name, and it contains either expressly or by implication everything necessary to make the mutual obligations of the parties, arising out of a contract of sale, complete. This is therefore to be deemed a written contract, and other terms and conditions which might have been introduced into it by the parties, but were not, cannot be added by parol."

Also, if the contract is in legal effect complete, such testimony is not admissible to add to or vary the written instrument. This court, speaking through Justice Chipman, in Standard Box Co. v. Mutual Biscuit Co., 10 Cal. App. 746, 103 P. 938, said:

"The rule that prior or contemporaneous negotiations cannot be used to contradict, add to or vary a written contract, applies not only to the letter of the written document, but also to its legal effect; and when no time for performance is fixed, the law implies that a reasonable time is given, and evidence that a specific time had been agreed upon is inadmissible."

A number of cases are considered in the opinion, and the rule is adhered to which we have herein stated. In that case, it was sought to prove by parol an oral agreement that the defendant should have one year from a certain date in which to accept an option upon which the action was based, and it was held that such testimony was inadmissible, the law supplying the legal intendment that the option should be accepted within a reasonable length of time. In German Fruit Co. v. Armsby Co., 153 Cal. 585, 96 P. 319, the case of Harrison v. McCormick, supra, was approved, and the rule again announced, that, where the writing is complete in itself, parol evidence cannot be admitted to add to the writing a term upon which it is silent, as well as to vary one upon which it speaks.

Appellant relies upon the case of Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 P. 661, as, in effect, changing the rule set forth in the case which we have cited and permitting the introducing of such testimony. However, when the facts of that case are considered, it is found to be readily distinguishable from the instant case, and also from the cases which we think apply to the one at bar. In the Blahnik Case, supra, the seller referred to therein was transferring certain parcels of real estate, and the agreement contained the following:

"The seller agrees that it will have the roads in said division R constructed during the fall of 1913 after the rains or when the ground is able to be worked. And construct the necessary bridges."

The map or plat according to which the sales were made had delineated thereupon lines indicating roads to be constructed. There was absolutely nothing in the agreement as to the materials of which the roads should be constructed, or the kind of roads to be constructed, and the courts said:

"The contract itself is silent with respect to the kind of roads and the character of the work to be done thereon. Evidently that was the subject of some other agreement between the parties, either express or implied. * * * For the purpose of showing the real agreement in that respect the defendant offered evidence of conversations between its agents and plaintiff Joseph, who made the deal for his wife, before and at the time of the execution of the contract. This evidence was excluded by the court on the ground that the subject was covered by the terms of the written contract and that the admission thereof would violate the rule that a written contract cannot be varied or contradicted by parol evidence of conversations between the parties prior to or at the time of its execution."

This ruling was held to be erroneous, and it was further held that such an agreement would be collateral and supplemental to the

contract contained in the writing, and, as parol evidence thereof would not be inconsistent with the contract, and would not alter it in any respect, evidence thereof would be admissible if material to the issues.

In the case at bar the parol evidence that the grapes were to be sold f. o. b. Modesto is inconsistent with the provisions for shipping, paying the freight, refrigeration, etc. When the agreement in the case at bar is considered and all its provisions read together, the reasoning of the court in the case of Blahnik v. Small Farms Improvement Co., supra, is found to be an authority supporting the rule that the proffered parol evidence was properly excluded, as being inconsistent and in contravention of the writing, or agreement, which is complete in itself.

We think the proffered testimony properly excluded. It therefore follows that the judgment of the trial court should be and the same is hereby affirmed.

We concur: FINCH, P. J.; SHIELDS, Justice pro tem.

---

72 Cal. App. 671

WAXMAN et ux. v. JENNINGS. (Civ. 2742.)

(District Court of Appeal, Third District, California. May 14, 1925.)

1. Appeal and error ⟹989—Evidence of party, against whom verdict was had, is immaterial on appeal, where evidence in case would support verdict for either party.

In action for injuries received in automobile collision at street intersection, defended on ground that defendant had right of way, under Motor Vehicle Act, § 20, subd. f, as amended by St. 1919, p. 215, § 12, where plaintiff's testimony including physical facts of the collision was sufficient to support verdict for plaintiff, fact that defendant's testimony would also have supported verdict in his favor is immaterial on appeal.

2. Trial ⟹251(8)—Instructions on contributory negligence unnecessary, if not pleaded.

Ordinarily, contributory negligence to be available must be specially pleaded, and, if not so pleaded, instructions thereon need not be given.

3. Negligence ⟹119(6)—Defense of contributory negligence available, if it appears from complaint or from plaintiff's evidence.

Defense of contributory negligence may be available, although not set up by defendant, if contributory negligence appears from the complaint or from plaintiff's evidence.

4. Municipal corporations ⟹705(2) — Motor Vehicle Act requires vehicles shall cross intersection on right-hand half of street.

Motor Vehicle Act, § 20, subds. a, l, as amended by St. 1919, pp. 215, 216, § 12, providing that driver shall travel on right half of highway while crossing intersecting highway, and that operator of slowly moving vehicle shall keep it as close as practicable to right-hand boundary, does not direct that vehicle shall be operated as closely as practicable to right-hand boundary when crossing intersection, but simply directs that intersection shall be crossed on right-hand half of street.

5. Trial ⟹252(8)—Court cannot fix practical line for driving automobile, where there was no evidence as to practicability.

In action for injuries in automobile collision at street intersection, where defendant contended that plaintiff was violating Motor Vehicle Act, in not driving as close as practicable to right-hand boundary, court, as a matter of law, cannot fix exact practical line for driving automobile, where there was no evidence as to either practicability or impracticability of driving it closer to right-hand boundary of street.

6. Municipal corporations ⟹705(2) — "As closely as practicable," as used in Motor Vehicle Act, does not mean "as closely as possible."

Phrase "as closely as practicable," as used in Motor Vehicle Act, § 20, subd. l, as amended by St. 1919, p. 216, § 12, providing that operator of slowly moving vehicle shall keep vehicle "as closely as practicable" to right-hand of highway, does not mean "as closely as possible," and practical path for driving automobile would be a sufficient distance from curb line to enable driver to see automobiles approaching on intersecting street.

7. Municipal corporations ⟹705(2) — Motor Vehicle Act held, in view of evidence, not to apply to automobile crossing at intersections.

In action for injuries received in automobile collision at street intersection, that part of section 20 of Motor Vehicle Act, as amended by St. 1919, p. 214, § 12, relating to right of way of automobiles passing in same direction, has no application, where there is no evidence as to what was practical path for automobile to travel in crossing intersection.

8. Trial ⟹295(7)—Instruction, in action for injuries in automobile collision, held not erroneous, when viewed with testimony, and construed with other instructions.

In action for injury in automobile collision involving question of right of way at street intersection, instruction *held* not subject to objection that it told jury that plaintiff had right to travel on right half of street, when viewed with testimony, and construed with other instructions.

Appeal from Superior Court, Stanislaus County; J. C. Needham, Judge.

Action by A. W. Waxman and wife against J. B. Jennings. From the judgment for plaintiffs, defendant appeals. Affirmed.

L. J. Maddux, of Modesto, for appellant.

Thos. M. Anaya, of Modesto, for respondents.

PLUMMER, J. Action by plaintiffs to recover damages for personal injuries sustain-

ed by the plaintiff Jessie Waxman in an automobile collision alleged to have occurred as the result of the negligent driving of an automobile by the defendant. Plaintiffs had judgment in the sum of $850. From said judgment, the defendant appeals.

It appears from the transcript that on the evening of January 30, 1921, the plaintiffs were driving in a northerly direction on Tenth street in the city of Modesto, and that, at the same time, the defendant was being driven in an automobile owned by him, by his son, in a westerly direction on G street in said city. The collision, constituting the basis of this action, occurred at the intersection of said streets. No question is made as to the extent of the personal injuries sustained by the plaintiff Jessie Waxman, or that the judgment is in any wise excessive.

The complaint alleges, in the ordinary terms, that the collision occurred by reason of the negligence of the defendant. The defendant, in his answer, denies the negligent operation of the automobile, which was being driven by his direction and control, and, by way of separate defense, alleges that the collision was due solely to the negligence of the plaintiff A. W. Waxman.

[1] It is contended on the part of the appellant that the testimony is insufficient to support the verdict, in that it does not show any negligence on the part of the defendant, and further that it does show negligence on the part of the plaintiff A. W. Waxman. The determination of who is responsible for the collision involved the question as to who had the right of way at the intersection. The injury, having been suffered on January 30, 1921, the provisions of the Motor Vehicle Law of 1919 apply. Section 20 of that act reads as follows:

"(f) * * * The operator of a vehicle shall yield the right of way at the intersection of their paths to a vehicle approaching from the right unless such vehicle approaching from the right is further from the point of the intersection of their paths than such first named vehicle." St. 1919, p. 215, § 12.

To support his contention that the automobile being driven by his son, and in which the defendant was riding, was nearer the intersection of the paths of the two automobiles, the appellant sets forth at length the testimony supporting his contention. To contravene this contention, the respondent likewise sets forth the evidence in detail, which goes to show that the automobile being driven by the plaintiff A. W. Waxman was nearer to the point of intersection of the paths of the two automobiles, and therefore, although the defendant's car was approaching from the right, the plaintiffs had the right of way. It is not necessary to set forth the testimony relied upon by the respective parties, because it simply shows a conflict upon this controverted point. It is sufficient to say that the testimony introduced by the plaintiffs, including the physical facts of the collision presented to the jury, is amply sufficient to support the verdict, and, this being true, the mere fact that the testimony introduced by the defendant would likewise have supported a verdict in his favor becomes immaterial on appeal.

[2, 3] The appellant, in his argument, confuses the defenses of negligence and contributory negligence, and insists that the plaintiff Waxman was guilty of both. The pleadings, however, do not present the question of contributory negligence. Ordinarily, to be availed of as a defense, contributory negligence must be specially pleaded. If it is not so pleaded, instructions need not be given upon the question. "If it appears from the allegations of the plaintiff's complaint, or from the evidence introduced by him, that he has been guilty of contributory negligence, the defense may be availed of, even though not set up by defendant." 19 Cal. Jur. p. 681, § 104.

No instructions were requested of the court to be given to the jury on the subject of contributory negligence. Our attention has not been called to any of the testimony introduced on the part of the plaintiff, upon which any such defense could be predicated. The negligence alleged on the part of the plaintiffs, and also called contributory negligence on their part, consists in the alleged fact that at the time of the impact of the two automobiles the car in which the plaintiffs were riding was nearer the center line of Tenth street than the east line thereof, and that the law required the plaintiff A. W. Waxman at that time to be driving his automobile as closely as practicable to the right-hand boundary line of Tenth street. As a basis for this contention and to support his allegation that the driver of the plaintiffs' car was negligent, the defendant relies upon two sections of the Motor Vehicle Act, as it then read, to wit:

"On all occasions the driver or operator of any vehicle in or upon any public highway shall travel upon the right half of such highway unless the road ahead on the left-hand side is clear and unobstructed for at least one hundred yards ahead and in all cases while crossing an intersecting highway," found in section 20 of said act, and

"The person in control of any vehicle moving slowly along and upon any public highway shall keep such vehicle as closely as practicable to the right-hand boundary of the highway, allowing more swiftly moving vehicles reasonably free passage to the left." St. 1919, pp. 215, 216, § 12, subds. a, l.

It is contended that the car in which the plaintiffs were riding was being operated and driven upon the right-hand half of Tenth street; that it was upon such portion of Tenth street while crossing the intersection of G street. The testimony would also indi-

cate that the plaintiffs' car was a few feet nearer the center line than it was to the right-hand boundary line of Tenth street. If the plaintiffs' car had been a few feet nearer the right-hand boundary line, the intersecting paths would have shortened the distance traveled by the defendant's car before reaching the point of impact. In thus shortening the distance, it is claimed by the appellant that the right of way would have shifted from the plaintiffs to the defendant. There is plenty of testimony in the record, however, to support the findings of the jury that the defendant's car was considerably further away from the intersecting lines of the two automobiles at the time the right of way became fixed, irrespective of this contention on the part of the defendant.

[4] The sections of the Motor Vehicle Act which we have quoted as to where an operator of a vehicle shall drive his car does not direct that the car shall be operated as closely as practicable to the right-hand boundary when crossing an intersection. It simply provides, and did provide at that time, that the intersection should be crossed on the right-hand half. In applying the sections which we have quoted, the purposes must be kept in mind. The excerpt taken from section 20 deals with automobiles passing each other when being driven in the same direction. Its purpose is to require the operator of the more slowly moving vehicle to keep to the right in order to allow the more swiftly moving vehicle unobstructed passage. That question is not involved in this case.

[5-7] It may be further remarked that there is not a word of testimony called to our attention indicating either the practicability or impracticability of the plaintiff driving his car at the time in question more closely to the easterly boundary of Tenth street than he was doing at the time he approached the intersection of G street. When there is no testimony upon the question, we do not think that the court, as a matter of law, can fix the exact practicable line. "As closely as practicable" has a different meaning as used in this section from "as closely as possible."

[8] It is a matter of common knowledge that buildings in cities and trees upon or adjacent the curb line of streets obscure the view of persons approaching on intersecting streets, and the practicable path for driving an automobile would be a sufficient distance from the curb line to enable the driver to most readily catch sight of an automobile approaching on an intersecting street, in order that, if necessary, he might bring his own machine to a stop, or slacken its speed, so as to avoid collision with or injury to another. In the absence of any such testimony, it becomes apparent that the section in reference to yielding the right of way to automobiles passing in the same direction has no application whatever to the questions presented by this action. In this particular, the appellant insists that the court, in giving instruction No. 9, at the request of the plaintiffs, misstated the law, in that it told the jury that the plaintiffs had a right to travel upon the right half of Tenth street. The court gave, in its instructions, the two sections of the Motor Vehicle Act which we have quoted, gave an instruction defining a public highway, and then gave instruction No. 9, of which the appellant strenuously complains. That instruction is as follows:

"If you find from the evidence in this case that Tenth street in the city of Modesto is a public highway, and that on said January 30, 1921, the plaintiff Jessie Waxman was riding in an automobile driven by plaintiff A. W. Waxman, on said Tenth street, in said city of Modesto, and that said automobile was proceeding in a northerly direction along said Tenth street and on the right-hand side of the center line of said Tenth street and on the right half of said Tenth street, and if you further find that the said automobile driven by said A. W. Waxman was at said time being so driven at the rate of about 12 miles an hour, and that said automobile was nearer to the center line of the intersection of their paths as herein explained at G street and Tenth street, in said city of Modesto, and if you further find that at said time and place, defendant, or his agent, was driving and operating an automobile, and was proceeding in a westerly direction along said G street, and that the car of defendant was further from the center line of intersection of their paths as herein explained at G street and Tenth street, and that the defendant, or his agent, negligently and carelessly drove the automobile driven by the defendant, or his agent, so that said automobile, at the time and place above mentioned, struck with force and violence the automobile in which the plaintiffs Jessie Waxman and A. W. Waxman were riding as aforesaid, and if you further find that, by reason thereof, the plaintiff Jessie Waxman was caused to suffer the injuries complained of, and that the proximate cause of the injuries to the plaintiff Jessie Waxman arose from the fact that the defendant, or his agent, was so driving and operating the automobile driven by defendant, or his agent, negligently and carelessly, and if you further find that neither said Jessie Waxman nor A. W. Waxman was guilty of negligence in the driving and operation of the automobile in which the plaintiff Jessie Waxman was then riding, then I charge that your verdict should be in favor of the plaintiffs for such amount as will compensate plaintiffs for all the detriment proximately caused thereby, not exceeding the amount claimed in the complaint, to wit, $1034.50."

In view of the testimony, and lack of testimony to which we have referred, we think the appellant's contention that the court erroneously instructed the jury wholly without merit. The court further instructed the jury, at the request of the defendant, that the defendant, in approaching the intersection of Tenth and G streets, being to the right of the plaintiff, would have the right of way, unless the defendant's automobile was further away from the point where the

paths of the two approaching automobiles would intersect. It also instructed the jury that the burden of proof was upon the plaintiffs to prove their case. The appellant in this case calls attention to the language of this court, speaking through Justice Hart, in the case of Weaver v. Carter, 28 Cal. App. 241, 152 P. 323, and quotes from the opinion in that case a portion of a paragraph indicating that instructions similar to those given in the instant case were subject to criticism, but the quotation made by appellant is not complete. We add the remainder of the paragraph which we think is particularly applicable here:

"And we think it becomes very clear, when viewing the above-quoted instruction as a whole and by the light of the entire charge, rather than considering a detached excerpt therefrom only, that the objections of counsel to said instruction will be found to be groundless."

That is true of the instant case. All the instructions, taken together, clearly presented to the jury the law applicable to the case, and it does not appear that the defendant asked or requested any or further instructions covering points alleged to have been omitted, or not covered by the court.

Finding no error in the record justifying any interference with the verdict in this case, it is hereby ordered that the judgment of the trial court be, and the same is hereby, affirmed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

72 Cal. App. 601

MAZZERA v. RAMSEY et al. (Civ. 2828.)

(District Court of Appeal, Third District, California. May 11, 1925. Hearing Denied by Supreme Court July 7, 1925.)

1. Mechanics' liens ⊂=317—Complaint in action against contractor's sureties held to state cause of action.

Complaint, in owner's action against building contractor's sureties for amount paid to discharge claims for labor and materials in excess of amount due under contract, *held* to state a cause of action.

2. Mechanics' liens ⊂=164(1)—Not limited to amount due from owner to contractor, where contractor's bond not conditioned as provided in statute.

Where building contractor's bond was not conditioned as provided in Code Civ. Proc. § 1183, liens for labor and material were not limited to amount due from owner to contractor.

3. Mechanics' liens ⊂=315—Right of mechanic to lien during time within which he may file claim of lien, constitutes cloud on owner's title.

In view of Code Civ. Proc. § 1186, right of mechanic or materialman to a lien during time in which he may file, but has not filed, a claim of lien, constitutes a cloud on owner's title.

4. Mechanics' liens ⊂=315—Sureties on building contractor's bond, undertaking to complete building, required to deliver building to owner free of liens.

Sureties on building contractor's bond, undertaking to complete building under their contract of suretyship, were under legal obligations to pay mechanics and materialmen and to deliver building to owner, free of liens.

5. Mechanics' liens ⊂=315—Sureties liable for amount paid at their request to discharge claim.

If owner paid claims of mechanics and materialmen, with knowledge and consent, and at instance and request, of building contractor's sureties, he was entitled to recover amount so paid from them, even if not so entitled in absence of such consent and request.

6. Mechanics' liens ⊂=317—Evidence held to sustain finding that owner paid mechanics and materialmen with knowledge and consent of sureties on building contractor's bond.

Evidence *held* to show that owner made payments to mechanics and materialmen with knowledge and consent of sureties on building contractor's bond, and at their instance and request.

7. Mechanics' liens ⊂=313—Omission of word "owner" in building contractor's bond held mere clerical error, not affecting sureties' liability.

Where sureties on building contractor's bond expressly bound themselves to owner in amount of penalty of bond, omission of word "owner" or owner's name from clause providing to whom amount was to be paid *held* a mere clerical error, not affecting liability of sureties.

8. Mechanics' liens ⊂=315—Sureties on building contractor's bond undertaking completion of contract became subject to all of contractor's liabilities.

Sureties on building contractor's bond who, on abandonment of work by contractor, undertook completion of contract, thereby assumed performance of principal's contract, and being subrogated to rights of principal thereunder, necessarily became subject to all of his liabilities.

9. Mechanics' liens ⊂=315—Sureties on building contractor's bond undertaking to complete contract cannot thereafter assert invalidity of bond.

Where sureties on building contractor's bond undertook to complete contract, and received progress payments as they became due, they cannot thereafter assert invalidity of bond.

10. Principal and surety ⊂=75—Owner's refusal to pay installment to building contractor held not to release sureties who completed contract and received subsequent payments.

Sureties on contractor's bond, who completed contract on default of contractor and received progress payments as they became due, *held* not discharged by owner's refusal to pay a prior installment to contractor.

---

11. Principal and surety ⇐117—Owner's premature payment of installment to building contractor held not to have released sureties who completed contract and received all subsequent installments.

Owner's premature payment of installment to building contractor, who afterwards became entitled to payments from which premature payment was deducted, did not release sureties on contractor's bond, who on contractor's default completed contract and received all subsequent installments.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by John L. Mazzera against W. C. Ramsey and another. Judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Carpenter, of Stockton, and Frank W. Sawyer, of San Francisco, for appellants.

Gumpert & Mazzera, of Stockton, for respondent.

FINCH, P. J. The plaintiff, as owner, and George Balliet, as contractor, entered into a building contract containing the following provisions material to the determination of this appeal:

"Whereas, the said owner is desirous that the hereinafter mentioned one-story bungalow building No. 841 be built, erected, and fully completed for the sum of * * * $7,516.50, free and clear from all liens and claims of liens, and of any and every other claim and demand; * * * and whereas, the said contractor, with knowledge of the premises, is ready, able, and willing to furnish all labor and materials and to do and fully perform all work essential and proper in such complete performance and completion of the said building for the sum of * * * $7,516.50, subject to the covenants and conditions hereinafter contained and in consideration of the premises.

"Now it is hereby agreed: (1) That the contractor will at his own charge and cost, and within five days from the date hereof, begin and continuously prosecute and perform the said work in a thorough and workmanlike manner and fully complete the same, all according to the intent and meaning of the plans, drawings, and specifications referred to in this contract * * * for the sum of * * * $7,516.50. * * * (5) * * * The sixth payment to be made in the sum of $1,879 when building is accepted by architect and owner, and all vouchers are presented by contractor pertaining to the payment of all labor and materials for said building, otherwise the owner reserves the right to wait for thirty-five days after acceptance of said building before making the final payment to contractor. (7) * * * Should the contractor at any time during the progress of the work refuse, fail, or neglect without the fault of the owner to supply a sufficiency of materials or workmen to complete this contract expeditiously or any lawful extension thereof for a period of more than three days after having been notified by the said owner, the owner shall have power to furnish at market rates, material or workmen to finish the said work, and the cost thereof shall be deducted from the amount of such contract price, and, if such costs exceed such price, said excess shall within two days be paid to the said owner."

The contract provided for partial payments as the work progressed, to be made upon presentation of the architect's certificates. A bond for the faithful performance of the work by the contractor was given in the following form:

"Know all men by these presents, that we, the undersigned, W. C. Ramsey and T. F. Emerson, * * * are as sureties and guarantors held and firmly bound jointly and severally by these presents unto John Mazzera as owner; his executors, administrators, and assigns, in the sum of three thousand seven hundred and fifty-eight dollars and twenty-five cents * * * to be paid his executors, administrators, and assigns jointly and severally by these presents. * * * The condition of the above obligation is such that [here follow recitals to the effect that the contract was executed; that a copy thereof is attached to the bond; that the "contract was entered into upon the express consideration that the full and specific performance thereof should be secured and insured by this bond"; that it "is a bond of indemnity"; and that the contract and the plans and specifications are made a part of the bond]. Now therefore, if the above George Balliet shall well, faithfully, and specifically perform the said contract, and hand over to the said owner said work therein mentioned, within the time therein specified, full, completed, and in a clean condition and free and clear of liens as thereby required, and in entire accordance with all of the terms thereof, then this obligation to become null and void, otherwise to remain in full force and virtue."

The contract, plans, and specifications and the bond were recorded the same day that the contract was executed. A few days later the contractor entered upon the performance of the work and continued therein until the architect's certificate was issued showing that the second payment was due, at which stage he abandoned the contract. The sureties then undertook the completion of the building. A few days before it was finally completed, the work remaining to be done not appearing from the record, the men employed by the sureties in the construction of the building quit work. The plaintiff induced the men to return and complete the building by promising them to "see they got their money." It was stipulated at the trial that the building was finally "completed according to the plans and specifications."

The final payment of $1,879 was not made to the contractor or to the sureties, but the plaintiff paid the amount thereof and the sum of $1,879.02 additional, in the discharge of claims for labor and material in the construction of the building which the contractor and the sureties failed and refused to pay. No claims of lien were ever filed against the building, and such payments for

labor and material were made by the plaintiff before the expiration of the time within which liens might have been filed. The complaint alleges, and the court found, that the plaintiff made such payments "with the knowledge and consent of defendants W. C. Ramsey and said T. F. Emerson, and at their instance and request." Emerson died after the payments had been made by plaintiff, and the executrix of his estate is made a party defendant. A claim against his estate for the amount of such payments was duly presented to the executrix and disallowed. The plaintiff was given judgment for the amount of all claims paid by him and defendants have appealed.

[1] Appellants contend that their demurrer to the complaint should have been sustained. The foregoing facts, together with much evidentiary and unnecessary matter, are alleged in the complaint. That such facts constitute a cause of action is so apparent that no discussion of the question is deemed necessary.

[2] The most serious contention of appellants is that the payments made by plaintiff for labor and materials were voluntary. Section 1183 of the Code of Civil Procedure, among other things, provides:

"The liens in this chapter provided for shall be direct liens, and shall not in the case of any claimants, other than the contractor be limited, as to amount, by any contract price agreed upon between the contractor and the owner except as hereinafter provided. * * * In case said original contract shall, before the work is commenced, be so filed [in the office of the county recorder], together with a bond of the contractor with good and sufficient sureties in an amount not less than fifty (50) per cent. of the contract price named in said contract, which bond shall in addition to any conditions for the performance of the contract, be also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in such work, and shall also by its terms be made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in said contract so as to give such persons a right of action to recover upon said bond in any suit brought to foreclose the liens provided for in this chapter or in a separate suit brought on said bond, then the court must, where it would be equitable so to do, restrict the recovery under such liens to an aggregate amount equal to the amount found to be due from the owner to the contractor."

The bond herein considered was not so conditioned, and it follows that liens for labor and materials were not limited to the amount due from the owner to the contractor. In People v. Moxley, 17 Cal. App. 466, 468, 120 P. 43, it is said:

"The lien of a mechanic or materialman is a constitutional right and attaches to the structure as the material is furnished or labor performed. The statutory procedure enacted for the enforcement of such right has reference only to the remedy. It is true that if notices of lien be not recorded within the specified time, the lien is not enforceable. The lien, however, created by the Constitution, cannot be made subordinate to or dependent upon any legislative act. It exists with all of its force at all times between the furnishing of the material or the performing of the labor, and the expiration of the time within which such notices of lien may be filed."

[3] In Siegel v. Hechler, 181 Cal. 187, 192, 183 P. 664, 666, where a claim for which a lien might have been filed was paid without its having been so filed, the court referred to the claim as "a potential lien upon the building." Section 1186 of the Code of Civil Procedure provides:

"The liens provided for in this chapter are preferred to any lien, mortgage, or other encumbrance which may have attached subsequent to the time when the building, improvement, or structure was commenced, work done, or materials were commenced to be furnished."

[4, 5] Whether the right of a mechanic or materialman to a lien, during the time within which he may file, but has not filed, a claim of lien, be treated as a lien, a potential lien, or merely a right to a lien, it is clear that it constitutes a cloud on the owner's title. The sureties in this case, having undertaken the completion of the building under their contract of suretyship, were under legal obligation to pay mechanics and materialmen and to deliver the building to the owner free of liens. Under such circumstances, if the plaintiff paid such mechanics and materialmen, with the knowledge and consent and at the instance and request of the sureties, as found by the court, then the plaintiff is entitled to recover the amount so paid from the sureties, whether he would have had the right to so recover the same in the absence of such consent and request or not.

[6] After the contractor abandoned the work, Ramsey said "he did not know anything about the job; Emerson was taking care of that; whatever he did was all right." The evidence shows without conflict that Emerson acted for the sureties in the completion of the building. Emerson said that the sureties and the owner would "work along together and get it (the building) finished as soon as we could." About the time the building was completed, the mechanics and materialmen were demanding payment of their claims, and several of them were threatening to file liens therefor. The attorney for plaintiff made a demand upon Emerson that the sureties pay these claims. About the same time Emerson demanded payment of the last installment of the contract price, but plaintiff refused to make the payment without the production of receipts, as provided in the contract, "showing that all labor done and all material furnished"

had "been fully paid for." The attorney for plaintiff testified as follows:

"I further told Mr. Emerson, * * * 'Of course we will insist upon your liability and Mr. Ramsey on the bond, and we are not going to dismiss you from liability on the bond. Now you know more about that job than I do. Now we will have to work along together on this proposition and see if we can't straighten it out.' And he said, 'All right.' Then * * * I said, 'Now, Mr. Emerson, you state that you paid out certain moneys, and that there are certain receipts outstanding. Will you bring up whatever receipts and vouchers that you have in your possession, so that we will at least know the status of the job?' He said he would. * * * He did not bring them up. Porter Roberts brought them up. * * *

"Q. State whether or not all the checks which are shown on the bill of particulars of the complaint in this action were O. K'd by T. F. Emerson prior to the time they were paid. A. They were all O. K'd. * * * Before the checks were drawn out, or before they were signed and transferred, released, I made out an O. K. for Mr. Emerson. * * *

"Q. Now, he O. K'd them in writing on the stubs with his initials? A. Most of them, yes. * * *

"Q. And those he did not O. K. with his initials, he O. K'd verbally? A. He did. * * *

"Q. At the conversation which has been referred to, * * * was there anything said at that time relative to a deficiency? A. I told Mr. Emerson, * * * 'Now, you understand that we will hold you liable on your bond if there is any deficiency, you and Mr. Ramsey, as sureties, will (have) to pay it.' He says, 'Yes; I know that, but I don't know what the deficiency is.' * * * Mr. Emerson said, 'We do not want to quarrel about this thing; we will settle this thing up without any difficulty.'"

The witness further testified that, before paying any of the claims, he said, in a conversation with Emerson and one of the claimants, "Now, we are not going to admit any responsibility of paying these without we have Emerson's O. K." It fairly appears from the foregoing evidence that plaintiff made the payments in question pursuant to an understanding between the parties that he should pay them, and that the sureties would be liable to him for the amount thereof. It is therefore sufficient to support the finding of the court to the effect that the payments were made with the knowledge and consent of the sureties and at their instance and request. Since the claims were all approved by Emerson, as the representative of the sureties, no question can arise as to their validity or the reasonableness thereof.

[7-9] Appellants contend that the penalty of the bond is not made payable to the plaintiff but to his executors, administrators, and assigns. It is true that the bond, after providing that the sureties are bound to the owner, his executors, administrators, and assigns in the sum of $3,758.25, continues as follows: "to be paid his executors, administrators, and assigns." It is patent that the omission of the word "owner," or the owner's name, in the clause quoted, is a mere clerical error which in no manner affects the liability of the sureties. That clause might be omitted altogether without affecting their liability. By the preceding parts of the bond, the sureties expressly bound themselves to the owner in the amount of the penalty of the bond. It is not apparent in what manner the subsequent clerical omission referred to can be given the effect of unbinding them. All the terms of the contract are expressly made parts of the bond. On the abandonment of the work by the contractor, the sureties undertook the completion of the contract. Emerson said that "he was going to handle the financial affairs; that Mr. Balliet and he agreed upon that;" that Balliet had left, and "I am going to get the profit; Balliet will get none." The sureties, therefore, were "in the situation of a surety on a contractor's bond, who undertakes to finish the contract work for his principal. 'When a surety, either corporate or individual, in pursuance of the terms of an undertaking, assumes the performance of the principal's contract, such surety, by being subrogated to the rights of the principal thereunder, must necessarily become subject to all of his liabilities.' Ausplund v. Ætna Indem. Co., 47 Or. 10, 81 P. 577 [82 P. 12]; Hughes v. Gibson, 15 Colo. App. 318, 62 P. 1037." Watterson v. Owens River Canal Co., 25 Cal. App. 247, 253, 143 P. 90, 93. By undertaking the completion of the building, the sureties recognized the validity of their bond and prevented the owner from finishing the work. It does not appear whether the owner could have completed the building at less cost than that incurred by the sureties but, since they did the work in pursuance of their rights under the bond and received the progress payments as they became due, they cannot now be heard to assert its invalidity. They are in the same position as if they had been the original contractors.

[10] Appellants contend that the sureties were discharged by reason of the refusal to make the second payment to the contractor on his demand. The contractor testified that the plaintiff refused to make the payment to him, but that, the former had agreed that "Emerson was to attend to the finances." that later he received a check for the amount of the payment, which he indorsed to Emerson, and that Emerson cashed it, and that he did not abandon the contract because of plaintiff's refusal to make the payment to the witness. The sureties took complete charge of the work after the contractor abandoned it, and they were paid the third, fourth and fifth installments according to the terms of the contract. They were not released by plaintiff's refusal to pay the second installment to the contractor under the circumstances stated.

[11] The plaintiff paid the contractor $400 five days before the first payment was due. It is urged that this released the sureties. Emerson was present when the payment was made, and he said "it was all right." The $400 was used to pay for labor and material furnished during the first week's work under the contract. The contractor continued the work until the first and second payments provided for in the contract became due, and the amount thereof, less the payment of $400, was duly paid. Thereafter the sureties continued the work, and, as stated, the third, fourth, and fifth payments were made to them. The defendants did not plead that any payments were prematurely made, but their answer alleges "that the said Ramsey and Emerson properly distributed and paid all the preceding five installments that were paid by plaintiff under said contract toward the payment of the bills that had accrued up to the time of the payment of the said five several installments." Even if the premature payment had been pleaded, it would not be a defense, because, under the circumstances stated, the sureties were not prejudiced thereby. Bateman Brothers v. Mapel, 145 Cal. 241, 244, 78 P. 734; Dunne Inv. Co. v. Empire State S. Co., 27 Cal. App. 208, 150 P. 405, 411. The other grounds urged for a reversal are covered by the foregoing discussion.

The judgment is affirmed.

We concur: McDANIEL, Justice pro tem.; HART, J.

---

72 Cal. App. 802

Henry SANGUINETTI, Plaintiff and Respondent, v. W. C. RAMSEY and Mary M. Emerson, as the Executrix of the Last Will and Testament of T. F. Emerson, Deceased, Defendants and Appellants. (Civ. 2880.)

(District Court of Appeal, Third District, California. May 11, 1925. Hearing Denied by Supreme Court July 7, 1925.)

Appeals by defendants from a judgment of the Superior Court of San Joaquin County, C. W. Miller, Judge, in an action to recover money paid for labor and materials. Affirmed.

A. H. Carpenter, of Stockton, and Frank W. Sawyer, of San Francisco, for appellants.

Gumpert & Mazzera, of Stockton, for respondent.

PER CURIAM. The defendants have appealed from the judgment herein in favor of the plaintiff.

This cause and that of Mazzera v. Ramsey et al. (Civ. No. 2828) 238 P. 101, were on the calendar for oral argument at the same time. In lieu of oral argument, each party has filed a single brief, covering both cases. In appellant's brief it is said: "The appeals in both cases are from judgments in favor of the respective owners against sureties upon a faithful performance builders' bond and practically involve the same points, any material differences will be pointed out herein." No material differences have been pointed out, and it would serve no useful purpose to repeat what is said in the opinion filed in the Mazzera Case.

The judgment is affirmed.

---

72 Cal. App. 682

AMERICAN FRUIT GROWERS, Inc., OF CALIFORNIA v. PACIFIC ELECTRIC RY. CO. (Civ. 4412.)

(District Court of Appeal, Second District, Division 1, California. May 18, 1925.)

1. Appeal and error ⟸1011(1)—Trial court's finding of fact on conflicting evidence not disturbed.

Trial court's finding on conflicting evidence as to cause of, or responsibility for, deterioration of lettuce, shipped for plaintiff by defendant carrier and its connecting lines, will not be disturbed.

2. Carriers ⟸134—Finding for shipper as to cause of decay of lettuce held supported by evidence.

Evidence *held* sufficient to support court's finding for plaintiff that rot and decay of lettuce was due to improper refrigeration by defendant and connecting carriers.

3. Carriers ⟸135—Measure of damages to shipment of perishable merchandise stated.

Where mode of ascertaining damages to shipment of perishable merchandise is not limited or determined by contract, basis of computation is difference between market value of commodity in good condition at point of destination, and market value of deteriorated product at same point at the time of arrival.

4. Carriers ⟸175—Connecting carrier's disposition of perishable merchandise, rejected by consignee, binding on initial carrier.

Disposition of decayed perishable merchandise by connecting carrier at point of destination, on consignee's rejection of shipment, is binding on initial carrier.

5. Appeal and error ⟸909(1)—Carriers ⟸175—Judgment against initial carrier, for loss on sale of damaged lettuce, sold elsewhere than at point of destination by terminal carrier on rejection by consignee, affirmed despite lack of evidence or findings of market value at such point.

Where terminal carrier, on receiving consignee's letter directing it to "make proper disposal" of carload of lettuce, rejected because of damaged condition, immediately proceeded to do so, agency was created requiring it to use all reasonable efforts and its best judgment in disposing of shipment, and, in absence of evidence to rebut presumption that its agent concluded that city to which it immediately shipped car from point of destination furnished better market, or that it did not exercise all reasonable efforts and judgment in making sale with least possible loss to consignor, to whom it credited amount received on freight charges, judgment

for consignor against initial carrier for loss sustained must be affirmed, though there was no evidence or finding as to market value of deteriorated lettuce at point of destination.

6. Carriers ⟸177(4)—Terminal carrier held implied agent or trustee, required to use all reasonable efforts to protect consignor from loss on consignee's rejection of damaged shipment.

Consignee's refusal to accept shipment of lettuce because of damaged condition *held* to create implied agency or trust, charging terminal carrier with duty to use all reasonable efforts to protect consignor from loss.

7. Carriers ⟸185(1)—Presumed that sum derived from sale of damaged lettuce by terminal carrier on rejection by consignee was result of its reasonable efforts and exercise of judgment.

In absence of evidence to contrary, it will be presumed that sum derived from sale of damaged lettuce by terminal carrier on rejection by consignee was result of such carrier's reasonable efforts and exercise of judgment, and fairly establishes reasonable market value of damaged lettuce, whether consignee's direction to dispose of car created express agency, or there was only an implied agency or trust for consignor in such carrier.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

Action by the American Fruit Growers, Inc., of California, against the Pacific Electric Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Frank Karr, R. C. Gortner, and C. W. Cornell, all of Los Angeles, for appellant.

Howard L. Grace, of Los Angeles, for respondent.

HAHN, Justice pro tem. This action is based upon a claim for damages alleged to have been suffered to a carload of lettuce delivered by the plaintiff at San Fernando, California, for shipment to Des Moines, Iowa, by the defendant and its connecting lines. Judgment was rendered in favor of the plaintiff for the sum of $425.04, and from which judgment the defendant appeals.

Two propositions are urged by appellant in support of its appeal: First, that the damage suffered was not due in any manner to the fault or negligence of the defendant, but due wholly and solely to the action of the plaintiff in causing the carload of lettuce to remain at Des Moines, Iowa, for a period of 7 days. Secondly, that the evidence does not support the findings and judgment of the court in respect to the amount of damages suffered, and, particularly, that there is no evidence in the record showing the reasonable market value of the damaged lettuce at Milwaukee, to which the shipment was reconsigned by the plaintiff.

[1] The record discloses that the evidence bearing upon the question as to the cause of, or responsibility for, the deterioration of the lettuce is in marked conflict, and therefore, under the well-established rule, the finding of the trial court upon that issue will not be disturbed.

[2] Much of the evidence in the case was presented to the court by way of stipulations, the following material matters being included in the stipulations: First, that the shipment of lettuce, when loaded into the car at San Fernando, Cal., on May 11, 1920, was in good condition; second, that the shipment arrived at Des Moines, Iowa, on May 20th, where it remained in the car, awaiting instructions from the plaintiff, until May 27th, on which date plaintiff directed the connecting carrier to reship to Milwaukee, Wis., the consignee being J. O. Franklin & Sons; third, that the car arrived at Milwaukee on the afternoon of May 30th, and on May 31st J. O. Franklin & Sons, the consignees, were notified of its arrival; that on June 1st and 2d the lettuce was inspected by a government food inspector, and was found by him to be affected with rot and decay; that on the morning of June 2d, immediately after the report of the inspector, the consignees by telephone notified the Chicago, Milwaukee & St. Paul Railway Company, which was the connecting carrier then having the car in custody, that they would not accept the lettuce because of its condition, and on the afternoon of June 2d confirmed this rejection by a written letter to the same effect; fourth, that upon refusal to accept the lettuce by the consignees at Milwaukee, the carrier, without notifying the consignor, diverted the carload of lettuce to Chicago, where, on June 8th, the lettuce was sold by the carrier for the sum of $201.23, which sum was credited to the account of the consignor on account of the freight charges; fifth, that the car of lettuce while en route was iced at the regular icing stations of the connecting lines, the stipulation setting forth the dates of icing and the amount of ice put into the bunkers at the various stations.

In addition to the foregoing stipulated matters, the plaintiff and defendant each produced an expert witness who gave evidence as to the reasons or causes for the decay in the lettuce. Plaintiff produced as such expert witness one Goulder, who, after stating that he had had an extended experience over a period of years in connection with the shipment of lettuce, having observed and examined over 100 carloads of lettuce shipped, and, basing his opinion upon his experiences and the stipulated matters and records, gave it as his opinion that the decaying and rotting of the lettuce was due to improper and insufficient refrigeration of the car. He testified that lettuce shipped in the condition as stipulated in this case, under proper refrigeration, would remain in good

condition for a period of from 21 to 28 days. He further gave it as his opinion, based upon the stipulated record of the amounts of ice put into the car at the icing stations, and also the stipulated record showing the temperature of the car when it arrived in Milwaukee, that there had evidently been a marked variation in the degrees of temperature in the car during transit, and that this fact caused the decay and rot, which would not have resulted if an even temperature had been maintained, and which would have been the condition had the car been properly iced.

On behalf of the defendant, one Richardson testified as an expert. He stated that he had never had any experience with lettuce shipments, but had had experience in connection with the shipment of other perishable commodities. He gave it as his opinion that the decay and rot was due to heating of the lettuce, which could not be avoided even by proper refrigeration, and that the delay of the car for 7 days at Des Moines, in his opinion, accounted for the heating which caused the decay.

Taking into consideration the relative experience of the expert witnesses, it may be fairly urged that there was an abundance and even a preponderance of evidence to support the finding of the court in favor of the plaintiff on the question as to the cause of the rot and decay.

The second point urged by the appellant presents a more difficult question. The plaintiff, as it is conceded it had a right to do, diverted the car from Des Moines to Milwaukee, where it arrived on the afternoon of May 30th. The connecting carrier, the Chicago, Milwaukee & St. Paul Railway Company, on the morning of May 31st, notified J. O. Franklin & Sons, the consignees at Milwaukee, of the arrival of the car. On June 1st and 2d, a government food inspector inspected the lettuce and made his written report, showing the lettuce to be in a decaying and rotting condition; whereupon, on the morning of June 2d, the consignee, over the telephone, notified the carrier that they would not accept the shipment of lettuce because of its deteriorated condition, and on the afternoon of June 2d confirmed this rejection with the following writing:

"Milwaukee, Wis., June 2d, 1920.

"W. G. Miller, Agt., C., M. & St. P. Ry., City —Dear Sir: Confirming telephone conversation of this p. m. with your Mr. Kosky, we have abandoned to the C., M. & St. P. car PFE 6099 shipped from San Fernando, Calif., May 11, 1920, containing 320 crates head lettuce. This car arrived at Milwaukee May 31st, and on account of poor condition we are unable to realize freight charges. You will therefore make proper disposal of this car.

"Yours very truly, J. O. Franklin & Sons."

Thereupon, without any further notice to the consignor, the carrier shipped the carload of lettuce to Chicago, and there, on June 8th, sold the lettuce for $201.23, which amount was credited to the plaintiff on account of the claim for freight charges.

It was stipulated by the parties that the market value of the lettuce, if it had arrived in good condition at Milwaukee, on May 31st, was from $2 to $2.25 per crate. But there was no stipulation, or, in fact, any evidence, as to the market value of the lettuce in its deteriorated condition at Milwaukee on the date of its arrival; nor was there any evidence as to the market value of lettuce in good condition, or in the deteriorated condition, in Chicago at the date of the sale, or at any time, unless the fact that the lettuce sold at Chicago on July 8th for $201.23 could be construed as evidence of the market value of the deteriorated lettuce. Under this second point appellant points out that there is no finding on the question of market value of the deteriorated lettuce at Milwaukee. This lack of evidence as to the market value of deteriorated lettuce, together with the fact that there is no finding on that question, is urged by the appellant as fatal to the judgment.

[3] It is well settled that where the issue is one of damages to a shipment of perishable merchandise, as in this case, and the mode of ascertaining or fixing the damages is not limited or determined by contract between the parties, the basis of computing such damages is the difference between the market value of the commodity in good condition at the point of destination, and the market value of the deteriorated product at the same point and at the time of arrival. It must also be conceded that the findings are inadequate and lacking in several respects. In view of the fact that we believe the judgment should be affirmed by reason of other considerations, the defects above referred to as urged by the appellant become immaterial.

[4, 5] The position and conduct of the Chicago, Milwaukee & St. Paul Railroad, the connecting carrier at Milwaukee having in charge the carload of lettuce, and whose conduct in the matter is, of course, binding upon the defendant here, may be viewed from two standpoints, either one of which leads us to the conclusion that the judgment of the trial court was proper. Franklin & Sons, the consignees of the lettuce at Milwaukee, in their letter to the carrier refusing to accept the shipment of lettuce because of its damaged condition, closed their letter with the following instruction: "You will, therefore, make proper disposal of this car."

Assuming that Franklin & Sons were the agents of the plaintiff for the purpose of directing disposal of the lettuce—and under the evidence as appears from the record the defendant would hardly be in a position to controvert this assumption—it appears that

upon receipt of this letter the carrier proceeded at once to comply with the instruction. An agency was thus created under which the law imposed upon the carrier the duty of using all reasonable efforts and its own best judgment in disposing of the shipment of lettuce. The carrier proceeded promptly to make disposition of the lettuce, and immediately after receiving the letter from Franklin & Sons, shipped the car of lettuce to Chicago and there sold it. It may be fairly presumed, and there is absolutely no evidence in the record to thwart this presumption, that the agent of the carrier concluded that Milwaukee did not offer an opportunity for "proper disposal of the car," and, believing that Chicago furnished a better market, shipped the car at once to Chicago. There is no evidence in the record to show that the defendant did not exercise all reasonable efforts and judgment in accomplishing the sale of the lettuce, with a view to the consignor suffering the least possible loss; and upon the sale of the lettuce the carrier credited the amount of the sale to the account of the plaintiff on its freight charges. The conduct of the carrier, from the time of receiving the letter rejecting the lettuce up to the point of crediting the proceeds from the sale to the plaintiff, was consistently that of an agent, and in good conscience the defendant will not now be heard to deny such a relation in disposing of the carload of lettuce.

[6, 7] If, on the other hand, it could be successfully controverted that an express agency had been created, by reason of the lack of authority on the part of Franklin & Sons to create such a relation as between the plaintiff and the carrier, there was unquestionably an implied agency or trust created in the carrier when the consignees refused to accept the shipment. In the case of Merchants' & Miners' Transp. Co. v. Branch (C. C. A.) 282 F. 497, the court, in dealing with a similar question arising out of damages suffered to a cargo of potatoes, said: "When goods cannot be delivered as directed, the carrier becomes a trustee for the owner, charged with the duty to use all reasonable efforts to protect him from loss." This rule seems to be well established by the authorities, and unquestionably the carrier proceeded to deal with the carload of lettuce on that theory, if not upon the theory of express agency. Upon either theory, the result is the same, that, in the absence of any evidence to the contrary, it will be presumed that the sum derived from the sale of the lettuce was the result of the reasonable efforts and exercise of judgment on the part of the carrier, and fairly establishes, for the purpose of computing the damage, the reasonable market value of the damaged lettuce.

The points that we have considered are the only ones urged by appellant, and we feel that the other points suggested do not require consideration. It suffices to say that, in view of the considerations upon which we base our conclusion, they are not material.

Judgment affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 136

KING v. CALIFORNIA BANK. (Civ. 4343.)

(District Court of Appeal, Second District, Division 1. California. June 4, 1925.)

1. Appeal and error ⟸1010(1)—Trial court's findings, supported by substantial evidence, conclusive on appeal.

Trial court's findings of fact are binding upon appellate court, except where there is no substantial evidence to support them, notwithstanding satisfactory character of evidence to contrary.

2. Banks and banking ⟸154(8)—Findings in favor of alleged depositor held supported by evidence, and therefore conclusive.

In action in which bank depositor claimed two deposits of $400, and bank admitted only one, findings in favor of alleged depositor *held* supported by evidence.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Suit by Mrs. W. A. King against the California Bank. Judgment for plaintiff, and defendant appeals. Affirmed.

Goudge, Robinson & Hughes, of Los Angeles, for appellant.

W. I. Gilbert, of Los Angeles, for respondent.

CURTIS, J. Action brought to recover of defendant and appellant the sum of $452.78, claimed by plaintiff and respondent to have been deposited by her with the Home Savings Bank of Los Angeles, predecessor of appellant. Appellant admits a balance of $52.78 to be due respondent, leaving $400 as the actual amount in controversy. Plaintiff maintained both a commercial and a savings account with the Home Savings Bank, and claims that her husband, W. A. King, on November 8, 1919, deposited to the credit of her savings account in said bank the sum of $400, and that on November 10, 1919, he deposited to her commercial account in said bank a like sum of $400. Appellant admits that a deposit of $400 was made by the said W. A. King to the credit of plaintiff on November 8th, but denies that any other deposit of $400 was made by plaintiff, or by any one in her behalf on November 10, 1919, or at any other time.

[1] The testimony on behalf of appellant,

as given by its officers and employees, and fortified by the books and records of the bank, if accepted as true, would present a strong case in appellant's favor. It is, of course, elementary that the determination reached by the trial court upon all matters of fact is binding upon an appellate court, except only in the single instance where there is no substantial evidence to support its findings. Therefore the only action within the power of this court is to inquire and determine whether there is any substantial evidence to support the findings of the trial court, and, if such evidence is found in the record, then the findings must stand, notwithstanding the satisfactory character of appellant's evidence.

The appellant's evidence tended to show that only one deposit was made by Mr. King to the credit of respondent, and that that deposit was made on November 8, 1919, and consisted of two checks for $15 and $265, respectively, and $120 in currency; that Mr. Schneider, the assistant manager of the bank, who received the deposit, made out an original deposit slip and a duplicate thereof; that the original slip showed the two checks with their respective amounts and $120 in currency; that the duplicate slip simply showed the amount of the deposit—$400. It was stamped "Duplicate" and bore the initials of Mr. Schneider, and was given to Mr. King at the time he made the deposit, for the reason he did not have Mrs. King's bank book with him at the time. Some time thereafter, Mr. King brought to the bank his duplicate deposit slip and Mrs. King's bank book and handed them to Mr. Mercer, who was then a teller in the bank, and the latter entered the deposit of $400 in Mrs. King's bank book and retained the duplicate deposit slip. This slip was then placed in the proper file in the bank's records, as had also been done with the original deposit slip. These slips were produced at the trial and the bank officials and employees testified that they were the only deposit slips to be found in the files or records of the bank showing a deposit of $400 made by Mrs. King on November 8th, or on November 10, 1919, or at any other time. These two deposit slips were admitted in evidence, and the original marked Exhibit A and the duplicate Exhibit 4. The bank books and records were introduced and they showed only one deposit of $400 made to the credit of the respondent. The evidence of appellant as a whole was to the effect that a deposit of $400 was made in behalf of respondent on November 8th, and that no other deposit of that amount had been made to her credit on that date or upon November 10th, or at any other time, and that the original and duplicate deposit slips admitted in evidence and marked Exhibits A and 4, respectively, were the only deposit slips in the possession of the bank showing a deposit of $400 made by or on behalf of respondent at any time.

Turning from the evidence in behalf of appellant to that produced by respondent, we have in the first place the testimony of W. A. King, the husband of respondent, who testified that he made two deposits of $400 each on behalf of his wife; that he deposited four $100 bills on November 8th to the credit of her savings account in said bank, and two checks for $15 and $265, respectively, and $120 in currency, amounting in the aggregate to $400, on November 10th to the credit of her commercial account. He further testified that the four $100 bills deposited by him on November 8th were taken by him from his safe at his home on the day he made the deposit, and that Mr. Schneider, who received the deposit, gave him a duplicate deposit slip with the words "Currency $400.00" written across the face of the slip, as he did not have Mrs. King's bank book with him at the time he made the deposit; that he took this slip home and placed it in his safe on the same day, and a few days thereafter he took this slip with Mrs. King's bank book to the bank and one of the tellers took up the deposit slip and entered the deposit in the bank book and returned the bank book to him, retaining the deposit slip; that some time thereafter, and after a dispute had arisen between the bank and himself regarding this second deposit, he went with Mr. Carroll Allen, an attorney at law, to the bank and that on that occasion the bank officials produced this deposit slip with the words "Currency $400.00" written across its face, and that he and Mr. Allen examined the same in the presence of the officers and employees of the bank. Mrs. King testified that she saw the slip with the words "Currency $400.00" written across its face, the day her husband brought it home and put it away in the safe. Mr. Carroll Allen also testified that he went with Mr. King to the bank, after the dispute had arisen between Mrs. King and the bank regarding this $400 deposit, and on that occasion the officers of the bank produced a deposit slip with the words "Currency $400.00" written across its face, and that it bore the name of Mrs. King, the date, and a stamp "Duplicate," with a signature or initials under the stamp, and that this deposit slip with the words "Currency $400.00" written across its face was neither Exhibit A nor Exhibit 4 admitted in evidence in this case.

[2] However impressed we may be with the testimony on appellant's behalf, we cannot say that the evidence of respondent does not substantially support the findings. With such a conflict in the evidence as is here presented, this court can only follow the conclusion reached by the trial court.

Judgment is therefore affirmed.

We concur: CONREY, P. J.; HOUSER, J.

72 Cal. App. 736

MALONE v. LOS ANGELES RY. CORPORATION. (Civ. 4348.)

(District Court of Appeal, Second District, Division 1, California. May 23, 1925.)

1. Appeal and error ⊜692(3)—Exclusion of testimony as to presence of governor on plaintiff's truck at times of purchase and accident held not prejudicial to plaintiff.

Where record shows no offer to prove, at time of objection to question asked plaintiff on rebuttal as to date of purchase of truck damaged in collision with defendant's street car, that governor, which his counsel offered to show was on truck at times of purchase and accident limited speed to that provided by law, and plaintiff did not claim such fact in his brief on appeal, appellate court cannot say that plaintiff was prejudiced by exclusion of such testimony.

2. Trial ⊜63(1)—Testimony in rebuttal as to matter not testified to in chief held properly excluded.

Where plaintiff, without objection, offered testimony in chief as to speed of truck struck by defendant's street car, thus anticipating charge of contributory negligence, court properly excluded his testimony, first offered on rebuttal, as to presence of governor on truck when purchased and at time of accident.

3. Negligence ⊜83—"Last clear chance doctrine" stated.

"Last clear chance doctrine" involves propositions whether defendant actually saw plaintiff in dangerous position or position that any reasonable person would infer was likely to be dangerous, and if so that it was his duty to exercise every reasonable endeavor to avoid collision, failing in which plaintiff could recover, though contributorily negligent.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Last Clear Chance.]

4. Trial ⊜260(7)—Instruction on last clear chance doctrine held sufficient, though not so clear as refused instruction requested by plaintiff.

Instruction, in action for damages to truck struck by defendant's street car, *held* sufficient statement of last clear chance doctrine though in somewhat involved and negative form, much less clear than refused instruction requested by plaintiff.

5. Appeal and error ⊜1068(5)—Refusal of instruction on last clear chance doctrine held not prejudicial error.

Refusal of plaintiff's instruction on last clear chance doctrine *held* not prejudicial error, if not sufficiently covered by instructions given, in view of abundant evidence justifying finding by jury that motorman of defendant's street car exercised every reasonable effort to stop it before collision with plaintiff's truck.

Appeal from Superior Court, Los Angeles County; Charles Monroe, Judge.

Action by Walter F. Malone against the Los Angeles Railway Corporation. Judgment for defendant, and plaintiff appeals. Affirmed.

Harry K. Sargent and F. L. Anderson, both of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and J. Karl Lobdell, all of Los Angeles, for respondent.

HAHN, Justice pro tem. The action is one to recover damages alleged to have been suffered by the plaintiff to his truck, arising out of a collision between his truck and the defendant's street car. The complaint charges that the defendant's car was at the time of the collision being "driven and operated at an excessive, dangerous, and unlawful rate of speed, and without any regard whatever for the safety of others using the said highways." The answer denies the charge of negligence, and in addition sets up the defense of contributory negligence on the part of the driver of the truck, who was the agent of the plaintiff. The case was tried before a jury, and, upon a verdict for the defendant, judgment was entered by the court accordingly. The plaintiff appeals from the judgment.

The appellant, seeking to reverse the judgment of the lower court, urges two grounds: First, that the court erred in sustaining defendant's objection to plaintiff's offer to show, on rebuttal, that at the time of the collision there was a governor on plaintiff's truck which controlled and limited its speed; second, error committed by the court in refusing to give certain instructions requested by the appellant.

The accident occurred at the intersection of First and Townsend streets in the city of Los Angeles. First street, along which the defendant's car operated, runs east and west; while Townsend street runs north and south. It appears from the testimony that plaintiff's truck was moving in a northerly direction on Townsend street and approaching First street. The defendant's car was moving in an easterly direction, approaching Townsend street. The driver of the truck testified that when the street car was distant about 250 feet from the Townsend street crossing he observed the street car coming toward him, but he concluded that he had sufficient time within which to cross the tracks before the street car reached the crossing. Apparently in this conclusion he was mistaken, for the street car struck the rear end of his truck, causing the alleged damage.

[1, 2] The driver of the truck, as also other witnesses for the plaintiff, while on the stand in their direct examination, testified as to the rate of speed of the truck at the time it approached and crossed First street, and also testified as to what, in their opinion, was the speed of the street car as it approached Townsend street. A reading

of the testimony covering plaintiff's case would indicate that the attorney for the plaintiff, in eliciting testimony from his witnesses, had in mind presenting to the jury the question of the speed of the truck as well as the speed of the street car. The witnesses for the defense, testifying as to the speed of the truck at the time it crossed the car tracks, estimated the speed in excess of that given by the truck driver and other witnesses for the plaintiff. The defense having rested, plaintiff was recalled to the witness stand by his counsel, and, when asked as to the date of the purchase of the truck in question, defendant's counsel objected, and the objection was sustained by the court. The record shows then the following colloquy:

"Mr. Sargent: If your honor please, the object of this examination is this: We propose to show that Mr. Malone purchased this truck about four months prior to the accident from the White Auto Company—a new truck; that at the time it was purchased there was a governor on the truck, it was sealed, and that that seal was not broken at the time of the accident.

"Mr. Lobdell: Now, if the court please, that opens an entirely new field of inquiry here.

"The Court: Objection sustained. That is not rebuttal."

Appellant in his brief argues that the testimony as to the governor on the truck should have been allowed on the theory that it operated in some manner to control the speed of the truck. It does not appear from the record that at the time the objection was made to his question he offered to prove that the governor did operate to limit the speed of the truck to less than 10 miles; 10 miles per hour being the limit provided by law for trucks traveling over a crossing. Nor does appellant in his brief at any point claim that the governor in question did or would prevent the truck from making more than 10 miles per hour. Hence we are not able to say that, even had the plaintiff been permitted to testify about the governor, or what it would show, the evidence would have tended to overcome the testimony of the defendant's witnesses.

Respondent in answer contends that, inasmuch as plaintiff in his case in chief offered testimony as to the speed of the truck, thus anticipating the charge of contributory negligence, it became his duty to offer all of the testimony he desired upon that question in his case in chief, and that any testimony on that issue was not proper rebuttal; that, in effect, the plaintiff occupied the position of offering, after the defendant had closed its case, matter on his case in chief, the allowance of which was entirely within the discretion of the court. This view has been sustained in the case of Casey v. Le Roy, 38 Cal. 697. Reason would support this rule. Plaintiff evidently went on the theory, in the presentation of his case, that the burden was upon him to show, not only the speed of the street car, but also the speed of the truck, and, having had the opportunity in his case in chief, without objection or hindrance from the defense, to present testimony which in effect was anticipating the evidence of the defendant on the charge of contributory negligence, he should not be allowed to occupy the time of the court by covering the same ground in rebuttal. Upon the authority of the case above cited, as well as the considerations enumerated, we are of the opinion that the ruling of the court was proper.

[3, 4] The second point urged on behalf of a reversal is that the court erred in refusing to give to the jury the following instruction:

"It is the duty of a motorman in charge of a street car to exercise reasonable care and diligence to discover any person or vehicle upon or near to the track in front of the car which he is operating, and, if he discovers any vehicle in charge of a person upon said track, or so near as to be likely to be struck by said car, and he has reason to believe that said person is unable to avoid his danger, it is the duty of said motorman to use every reasonable effort to stop the car, and if in such case he causes or permits his car to run with uninterrupted speed, and without effort to check or stop the same, until it runs into and strikes said vehicle, destroying it, the defendant would be guilty of negligence."

The purpose of the instruction was manifestly to instruct the jury on the doctrine of the "last clear chance." The refusal of the court to give this instruction was based upon the assertion that the substance of it was included in other instructions given to the jury.

From a careful examination of the instructions given to the jury, it appears that the only instruction which might be interpreted as covering the doctrine of the "last clear chance" reads as follows:

"If the motorman was keeping a reasonable lookout ahead, and if you further believe that, because of the conditions existing on the southwest corner of First and Townsend streets, it was impossible for the motorman to see or know of the approach of the truck until it came into view from behind the buildings, and that he became aware of its approach as soon as any other reasonable or prudent motorman, situated as he was, would have, and that he then immediately did all he could to bring his car to a stop, using the appliances he had at hand, and made every reasonable effort to avoid a collision, then the plaintiff cannot recover, and your verdict must be against him and in favor of the defendant."

If the instruction actually given by the court as above quoted contains the essential provisions of the rule applicable to the doctrine of the "last clear chance," then no error was committed by the court in refusing plaintiff's offered instruction. The doctrine of

the "last clear chance" involves: First, the proposition as to whether or not the defendant actually saw the plaintiff in a position of danger, or in a position that any reasonable person would infer was likely to be dangerous; and, second, if he did so see the plaintiff, that it was his duty to exercise every reasonable endeavor to avoid the collision, and, failing in so doing, the plaintiff would be entitled to recover, although he was guilty of contributory negligence. While it must be conceded that the instruction requested by the plaintiff contains in much clearer form the law of the doctrine of the "last clear chance," we cannot say that the instruction given by the court did not contain a sufficient statement of the law on this subject. The court in effect, although in somewhat involved and negative form, declares to the jury the legal conclusion which would follow if the jury should find that the motorman perceived the plaintiff, as soon as a man under such conditions could reasonably have done so, and that if the jury so finds, and that he immediately did all in his power to avoid a collision, the plaintiff would not be entitled to recover. Upon careful study of these instructions, it seems to us that there was called to the jury's attention the essential elements involved in the doctrine of the "last clear chance," and while, as above suggested, the clear enunciation of those principles, as set forth in the refused instruction, would probably have been more helpful to the jury in having clearly in mind this rule, we are satisfied that sufficient information on the subject was given to the jury to enable them to make application thereof, if the facts warranted it.

[5] Furthermore, from a careful examination of the testimony in the case, we feel that there was abundant evidence to justify the jury in believing that the motorman of the street car exercised every reasonable effort to stop the car before the collision, and that the verdict of the jury from the evidence could not in any sense be said to be a miscarriage of justice.

For the foregoing reasons the judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 78

PEOPLE v. MAGONI. (Cr. 830.)

(District Court of Appeal, Third District, California. June 1, 1925. Rehearing Denied July 1, 1925.)

1. Criminal law ⊂⊃1159(3)—Finding of jury on contradictory evidence conclusive on appeal.

Where the evidence of a witness affirmed, and that of the defendant denied, the sales of intoxicating liquor charged, implied findings of the jury are conclusive on appeal.

2. Fines ⊂⊃11—Judgment of the superior court may provide imprisonment, in default of payment of fines for violating liquor law.

In a prosecution for violating the liquor law, imposition of imprisonment, in default of payment of fines imposed by the court, *held* authorized.

3. Criminal law ⊂⊃1213—Trial court, in assessing fines upon defendant, may have inferred she was not a novice.

In a prosecution for two unlawful sales of intoxicating liquor, imposition of a fine of $1,000 upon each count was not excessive, and violation of Const. U. S. Amend. 8, and Const. art. 1, § 6, where the evidence showed that the defendant instructed purchasers how to avoid detection, the trial court may have inferred, in fixing the amount, that the defendant was not a novice in the unlawful sale of liquor.

4. Criminal law ⊂⊃1214—Rule applicable where contended that the fine imposed is excessive.

In order to justify the appellate court in interfering and setting aside a judgment of fine authorized by statute, the fine must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances.

5. Criminal law ⊂⊃1044—Testimony admitted without objection below cannot be complained of on appeal.

Appellant cannot complain regarding testimony of district attorney admitted without objection below, and where the court was not asked to strike out the testimony or to instruct the jury to disregard same.

6. Criminal law ⊂⊃995(4)—Judgment providing for a fine or for imprisonment in default of payment not fatally uncertain.

In a prosecution for violating the liquor law, judgment providing for imprisonment, in default of payment of fine alternatively imposed, *held* not fatally uncertain because "no provision made for defendant in case a part of the fine is paid," although in such a case the judgment would be in more appropriate form if such provision were made.

Appeal from Superior Court, Lassen County; H. D. Burroughs, Judge.

Mrs. Floyd Magoni (true name Rose Magoni) was convicted of the unlawful sale of intoxicating liquor, and she appeals. Modified as to sentence and affirmed.

William Klein, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. By separate counts in the information the defendant was charged with two unlawful sales of intoxicating liquor, alleged to have been made on different days.

She was convicted on both counts. Her motion for a new trial was denied. This appeal is from the judgment of conviction.

[1] One witness testified in detail that the defendant made the sales as alleged. The liquor described in the first count contained 10 per cent. of alcohol by volume, and that in the second count 47 per cent. The defendant testified that she did not make either sale. Under such state of the evidence the implied findings of the jury are conclusive on appeal.

The judgment provides that the defendant "be punished by a fine of $1,000 on the first count contained in the information, and that in default of payment thereof that she be imprisoned in the county jail of Lassen county, state of California, for the term of six months," and that she "be punished by a fine of $1,000 on the second count contained in the information, and that in default of payment thereof that she be imprisoned in the county jail of the county of Lassen, state of California, for the term of six months."

[2] Appellant contends that the provisions in the judgment for imprisonment in default of payment of the fines imposed by the court are unauthorized. The question may be considered as settled in this state contrary to appellant's contention. Ex parte Garrison, 193 Cal. 37, 223 P. 64; In re Kennerly, 190 Cal. 774, 214 P. 857.

[3, 4] Appellant contends that "the fine is excessive and is a violation of the eighth amendment to the Constitution of the United States, and of section 6, art. 1, Constitution of California." The question is not whether this court would have imposed the fines under consideration, but whether, as a matter of law, the sentence imposed by the trial court is violative of the constitutional provisions cited. In People v. Oppenheimer, 156 Cal. 733, 737, 106 P. 74, 77, the court said:

"Whatever may be our views as to the policy of this section of the Penal Code [246], we are not warranted in saying as matter of law that the punishment of death for an assault with a deadly weapon with malice aforethought by one undergoing a life sentence in a state prison is either 'cruel' or 'unusual' within the meaning of those terms as used in our Constitution. The infliction of the death penalty by any of the methods ordinarily adopted by civilized people, such as hanging, shooting, or electricity, is neither a cruel nor unusual punishment (see In Re Kemmler, 136 U. S. 447, 10 S. Ct. 930 [34 L. Ed. 519]), unless perhaps it be so disproportionate to the offense for which it is inflicted as to meet the disapproval and condemnation of the conscience and reason of men generally, 'as to shock the moral sense of the people' (People v. Morris, 80 Mich. 634, 8 L. R. A. 685, 45 N. W. 591)."

The same rule is applicable where it in contended that the fine imposed is excessive.

"In order to justify the court in interfering and setting aside a judgment for a fine authorized by statute, the fine imposed must be so excessive and unusual, and so disproportionate to the offense committed, as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances. A statute does not violate the constitutional provision prohibiting excessive fines or the imposition of cruel and unusual punishments, because it authorizes a fine to be imposed for each sale of liquor without a license, for each act of extortion in charging excessive freight rates, for each animal one unlawfully may have in his possession, or for each day the statute is violated, or because it makes the deposit of each letter in a scheme to defraud a separate offense, even though the fine in the aggregate amounts to a large sum, since the punishment thus imposed is not the fault of the law but of the one who violates it.' 16 C. J. 1358.

Whatever view may be entertained as to the wisdom of the liquor laws or the gravity of the offense of selling liquors in violation thereof, it is not to be forgotten that such a sale is violative of both the federal and the state statutes, and is expressly forbidden by the national Constitution. A witness for the prosecution testified:

"Accompanied by Haacke we visited defendant's residence and had several drinks of jackass brandy served by the defendant, and for which Haacke paid 50 cents per drink. Mr. Haacke asked the defendant for a pint bottle of jackass. Defendant stated that she had to be awful careful. Afterwards Mrs. Magoni brought in a pint bottle, for which Haacke paid $3. A pint bottle of jackass, for which Haacke paid $3. * * * He proceeded to put it in his bib overalls, when Mrs. Magoni said, 'Don't put it there; if they catch you they will see it.' Mr. Haacke handed the bottle back to Mrs. Magoni, and she wrapped it up in a paper sack. She says, 'If you meet anybody in the road, * * * dash it to the ground and break it.'"

The trial court, in fixing the amount of punishment, may have inferred from this evidence that the defendant was not a novice in the unlawful sale of liquors.

[5] During the trial there seems to have been a "little bottle on the table" in the courtroom. Counsel for defendant, in arguing an objection to a question put to a witness for the prosecution relative to another bottle of liquor, said: "There are three counts in the original complaint and two counts in the information." The district attorney replied: "The defendant was held on this one (apparently referring to the bottle concerning which he was questioning the witness), and not on that little bottle on the table there." The district attorney testified, relative to three exhibits, "I delivered these three articles, and I believe that other bottle over there was with them, to the clerk." The other bottle referred to was probably the little bottle first mentioned, and which was not offered in evidence. It is contended that it was error for the district attorney to refer to this little bottle under the circumstances mentioned. Counsel for defendant made no objection to

the testimony, or to the first remark of the district attorney relative to the bottle on the table, or to the presence of the bottle in the courtroom. Neither was the court asked to strike out the testimony nor to instruct the jury to disregard it or the previous remark by the district attorney. Under such circumstances the appellant is not in a position to complain.

[6] Appellant urges that the judgment is fatally uncertain because "no provision is made for defendant in case a part of the fine is paid." Judgments in substantially the same form as that in question here have been upheld. Ex parte Riley, 142 Cal. 124, 75 P. 665; Ex parte Chin Yan, 60 Cal. 78; Ex parte Ellis, 54 Cal. 204; Matter of Application of Robbins, 27 Cal. App. 677, 151 P. 14. It is proper to suggest that in such a case the judgment would be in more appropriate form if, after imposing a fine, it should provide "that in default of payment thereof the defendant be imprisoned in the county jail of the county of ——— at the rate of one day for every $——— of said fine remaining unpaid until said fine is satisfied, not exceeding ——— months." In order to avoid any possible uncertainty in the judgment, it is modified by adding to the part thereof herein quoted the following:

"Provided that upon part payment of the amount of said fines said imprisonment shall be reduced in the proportion of such part payment to said amount."

As so modified, the judgment is affirmed.

We concur: PLUMMER, J.; ANDERSON, Justice pro tem.

---

73 Cal. App. 105

PURCELL v. CITY OF SAN GABRIEL. (Civ. 4578.)

(District Court of Appeal, Second District, Division 1, California. June 2, 1925.)

1. Municipal corporations ⟸217(1)—Engineer's contract held to require submission of plans for water system before bond election.

Engineer's contract to prepare and submit plans for municipal water system construed as requiring submission thereof as part of report to city trustees before calling of bond election by them.

2. Municipal corporations ⟸220(1)—Engineer, not submitting plans of water system before bond election, as required by contract, could not recover damages for breach by city, or reasonable value of services rendered.

Civil engineer, failing to submit plans and designs for proposed water system before bond election, as required by contract with city, *held* not entitled to recover damages for alleged breach of contract by city, or reasonable value of services rendered thereunder.

3. Municipal corporations ⟸220(1)—Civil engineer, failing to submit adequate plans of water system, as required by contract, not entitled to compensation.

Civil engineer, whose report to city trustees, as required by contract to submit plans for proposed water system, was not accompanied by plans, designs, or details sufficient to make it intelligible, made provision for pipe in less than half of city streets, incorrectly stated estimated length of many streets and area of city, etc., could recover no compensation, even if contract did not require submission of plans before bond election, which trustees failed to call.

4. Contracts ⟸321(1)—Incomplete performance bars recovery of damages for breach by other party, unless latter prevented further performance.

One failing to complete performance of contract cannot recover damages for breach by other party, unless he performed so far as able, and such other party prevented further performance.

Appeal from Superior Court, Los Angeles County; J. L. Fleming, Judge pro tem.

Action by Gervaise Purcell against the City of San Gabriel. Judgment for defendant, and plaintiff appeals. Affirmed.

Hickcox & Crenshaw, of Los Angeles, for appellant.

Haas & Dunnigan, of Los Angeles, and H. S. Farrell, City Atty., of San Gabriel, for respondent.

CURTIS, J. The defendant, the city of San Gabriel, was contemplating the installation of a municipal water system, and entered into the following contract with plaintiff, a civil engineer:

"Contract of Employment.

"This agreement, made and entered into this 8th day of February, 1921, witness:

"That, whereas, the city of San Gabriel, Cal., being desirous of owning and operating a water system and of acquiring the same by purchase, condemnation, or new construction, by means of a bond issue for the purpose of procuring funds therefor, and it being impossible for either the board of trustees of said city or the people of the city to intelligently determine how to proceed in such acquisition unless estimates of the value of the present plants in private operation and ownership, and comprehensive plans and designs, are prepared and submitted as to the proposed installation of a new system or extension of the present system now located in said city, in the event of purchase and cost of new construction, is made by a competent engineer.

"Therefore, the city of San Gabriel does hereby employ Gervaise Purcell to make such estimates, prepare and submit such plans and designs, and to report thereon to the city trustees within a reasonable time, and said Gervaise Purcell does hereby agree to use his best skill in making such estimates, preparing and

submitting such plans and designs, and to report the same to said trustees within a reasonable time, and to co-operate with them and with any water committee that may be appointed by them or the chamber of commerce of said city, for the purpose of informing the voters of said city as to the merits of said municipal ownership.

"That said engineer shall be paid as compensation for such service as follows: Ten per centum (10%) of the total costs of such works, payable as payments are made on the said water systems, or parts of said system or systems.

"Provided, however, that said city shall compensate said engineer for any expense or cost he incurs in making excavations and surveys prior to the bond election held hereunder, and in the event said bond issue shall not be carried at said election, no further charge than herein set out shall be made by said engineer.

"Provided, also, that said board of trustees shall appoint, or cause to be appointed, by the chamber of commerce of said city, a water committee to act with the parties hereto for the purpose of informing the voters of the necessity and benefits of city ownership, to the end that said bond election may be carried by a large majority.

"Said board of trustees agree to submit the question of municipal ownership of water works, and a bond issue to pay for same, to the voters of said city within a reasonable time upon receipt of a favorable report from said engineer.

"Said Gervaise Purcell agrees that in the event bonds are voted by the city for a water works system, that he will perform all engineering services necessary in the design and construction of said waterworks, furnish valuations and conduct negotiations looking to the purchase of the existing plants and systems now operating in said city; that said services will be performed in a skillful and scientific manner and according to the best principles and theories of engineering in use in this locality, and said work on behalf of said engineer shall commence promptly hereafter, and shall be faithfully and diligently performed until the services and work herein described have been fully and completely furnished and performed, and that all of said services above mentioned and described shall be for the compensation herein mentioned.

"Time shall be the essence of this contract.

"This agreement made in duplicate, pursuant to resolution No. 51 of said city, adopted February 8, 1921, which is hereby made a part of this agreement.

"Witness our hands this 8th day of February, 1921. City of San Gabriel, by Geo. D. Dake, President of Board of Trustees. Gervaise Purcell, Engineer. Attest: Ira H. Stouffer, City Clerk of the City of San Gabriel."

After the execution of the contract the plaintiff made certain investigations as to the most feasible means, in his judgment, of obtaining a water supply for said city, obtained for said city certain options on water bearing lands, situated in or near said city, on which there was situated a well producing a supply of water; made an examination of the two private water systems that were then furnishing water to the inhabitants of said city, and made a physical valuation of their property, designed a circulating distributing system for conducting water to various sections of said city with a list of the streets of said city, and the class and length of pipe for each street, and made an estimate of the cost of the proposed system. These facts, with the exception of the valuation placed upon the two private systems already referred to, he embodied in a written report which he submitted to the board of trustees of the defendant within a reasonable time after his employment. He did not, however, at that time, or ever, prepare or present to the board of trustees any plans or designs of said proposed system other than what were contained in said written report. The city refused to call an election for the purpose of submitting to the electors the question of said bond issue, and thereupon plaintiff instituted this action. The complaint contains two counts, one based upon the contract of employment, wherein plaintiff claims there is due him the sum of $20,000, being 10 per cent. of the estimated cost of the proposed system; the second count is based upon the reasonable value of plaintiff's services, in which he asks for the same amount as is claimed by him in the first count. The court found in favor of the defendant, and the plaintiff has appealed.

[1] Appellant concedes that the evidence is sufficient to support the findings, but contends that the trial court erred in its construction of the contract of employment between the parties. The trial court held that by the terms of the contract the appellant was to prepare and submit to the board of trustees the plans and designs prior to the submission of the question of a bonded indebtedness to the electors of said city. Appellant contends that he was under no obligation to prepare or submit such plans and designs until after said electors had declared in favor of said bond issue, and said board of trustees required the plans and designs for the purpose of installing the water system. Appellant concedes that the plans and designs contemplated by the contract were never submitted by him to the board of trustees of the respondent.

We think a reasonable construction to be given the contract is that the parties intended that the plans and designs were to be used not only for the purpose of advising the board of trustees in its acquisition of a municipal water system for the city, but also for the purpose of enabling the people of said city to intelligently determine whether they would favor the city incurring a bonded indebtedness for such a system. This intention clearly appears from the preamble immediately preceding the formal parts of the contract in the use of the following words, "it being impossible for either the board of

trustees of said city or the people of the city to intelligently determine how to proceed in such acquisition unless estimates of the value * * * and comprehensive plans and designs are prepared and submitted as to the proposed installation, * * * is made by a competent engineer." Then follows the paragraph of the contract whereby the appellant is employed to make such estimates, to prepare and submit such plans and designs, and to report thereon to said city trustees within a reasonable time. We think this paragraph indicates that it was in the contemplation of the parties that the plans and designs were to accompany the report of the engineer, and were to be submitted to the board of trustees with said report as a part thereof.

[2] The contract further proceeds with the appellant's agreement to use his best skill in making such estimates, preparing and submitting such plans and designs, and to report to said trustees within a reasonable time. This language of the contract also indicates that the parties contemplated that the plans and designs, and the report itself, were practically inseparable, and were to be submitted to the board at one and the same time. In a further paragraph of the contract the board of trustees of said city agreed to submit to the voters the question of municipal ownership of waterworks and a bond issue to pay for the same, within a reasonable time, upon receipt of a favorable report from the engineer. While it is not entirely clear, yet, construing the contract as a whole, we are of the opinion that the report mentioned in this paragraph of the contract refers back to the report already mentioned in the preceding paragraphs, and which was to be submitted along with the plans and designs, and as a part thereof. This being so, the neglect of the appellant to submit as a part of his report any plans and designs of the proposed water system was a failure on his part to perform the terms of his contract of employment. The board of trustees was under no obligation to call the bond election until such plans and designs had been filed as a part of the report. Having failed to perform the terms of the contract on his part to be performed, he had no standing in an action for damages for an alleged breach thereof on the part of respondent. Neither can he recover the reasonable value of his services rendered, for the reason that said services were rendered under the contract which provided that the only compensation to be paid appellant (except for certain expenses and costs incurred in making excavations and surveys prior to the bond election, which are not involved in this action) was to be paid him only when an election had been held, and the electors of said city had voted to incur said bonded indebtedness. We are, therefore, of the opinion that the trial court gave the correct construction to the contract.

[3] The court further found "that the said report was incomplete in many particulars, that the same was not accompanied by any plans, drawings, designs, or details, which were sufficient to make said report intelligible or otherwise, or at all; that the data contained in said report was incorrect and was insufficient." The findings then specify wherein said report was incorrect and insufficient. Among these specifications were the following: There were 48 streets in said city, and said report made provision for laying pipe in only 21 of said streets; the estimated length of many of said streets was incorrectly stated in said report, the area of said city, as stated in said report, and to which said water system was to supply water, was 1,400 acres, while the true area was 1,850 acres, and there was a failure to provide for certain main pipe lines and conduits necessary to complete the water system which appellant had planned and reported to said board of trustees. The court further found that said report provided for a supply of only 140 inches of water, which was wholly inadequate to meet either the present or future needs of said city. This finding of the court would preclude any recovery on the part of appellant, even if the court had given the contract the construction claimed for it by him. The court, in effect, found that appellant had not submitted any adequate report as called for by his contract of employment. Until appellant had submitted such a report to the board of trustees, he was not entitled to any compensation under the contract, nor was said board of trustees, or said respondent, under any obligation to take any further action thereunder.

The appellant makes the further point that any departure on his part from the terms of the contract were acquiesced in and waived by the respondent. There is nothing in the evidence to justify this claim, and the findings of the court are directly to the contrary.

[4] Finally appellant contends that having performed the contract in so far as he was able, and the respondent having prevented its further and complete performance, appellant is entitled to recover damages for its breach. If the facts of the case or the findings of the court would support such a contention, we would readily agree with appellant, but it is apparent from what we have already said that this claim finds no support from any source.

The judgment is affirmed.

We concur: CONREY, P. J.; HOUSER, J.

73 Cal. App. 90

LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. et al. v. SUPERIOR COURT, IN AND FOR ORANGE COUNTY, et al. (Civ. 5117.)

(District Court of Appeal, Second District, Division 1, California. June 1, 1925.)

1. Statutes ⟸64(5)—Jurisdiction in condemnation proceedings by city, so as to authorize alternative writ of prohibition, not affected by unconstitutionality of clause in act making ordinance exclusive evidence of existence of conditions necessary.

Even if clause of Code Civ. Proc. § 1241, declaring city ordinances conclusive evidence of existence of conditions necessary to condemn property, be unconstitutional as local or special legislation, jurisdiction of superior court in condemnation proceedings by city would not be affected so as to authorize alternative writ of prohibition.

2. Prohibition ⟸5(3)—Does not lie to prevent trial of proceedings by city to condemn land outside corporate limits.

Prohibition does not lie to prevent trial of proceedings by city to condemn property outside its corporate limits, on ground that court is without jurisdiction, whether city can or cannot condemn such property.

Application by the La Mesa, Lemon Grove & Spring Valley Irrigation District and another for an alternate writ of prohibition to the Superior Court in and for Orange County and the Judges thereof. Petition denied.

Sweet, Stearns & Forward, of San Diego, for petitioner La Mesa, Lemon Grove & Spring Valley Irr. Dist.

Crouch & Sanders, of San Diego, and Flint & MacKay, of Los Angeles, for petitioner Cuyamaca Water Co.

CONREY, P. J. Application for alternative writ of prohibition.

By the petition, it appears that there is pending an action commenced by the city of San Diego against petitioners in the superior court of San Diego county, which action on change of venue was transferred to respondent superior court of the county of Orange. Said action is to be tried on June 15, 1925, and, unless prevented by the issuance of an alternative writ of prohibition herein, respondent will proceed with the trial thereof. Petitioners have stated several grounds upon which they claim that respondent court is without jurisdiction to hear or determine said action.

Concerning the claim that there is such want of jurisdiction because the city of San Diego is not following the constitutional or statutory procedure for eminent domain, the specifications relating to those defects or errors of precedure raise questions relating to the sufficiency of the complaint in the action. We think, however, that they do not affect the jurisdiction of respondent court to determine the questions thus presented.

[1] Petitioners say that there is a want of jurisdiction because the provisions of section 1241 of the Code of Civil Procedure, authorizing a city by ordinance to determine certain jurisdictional facts in eminent domain, are unconstitutional. Said section 1241 provides that, where the legislative body of the city shall have found and determined by resolution or ordinance that certain facts exist, such resolution or ordinance shall be conclusive evidence of the existence of certain conditions which are necessary in the exercise of the power of eminent domain. The point suggested by petitioners is that said section violates the constitutional provisions that all laws of a general nature shall have a uniform operation, and that the Legislature shall not pass local or special laws in cases where a general law can be made applicable, because said section provides for the determination of certain facts by the legislative body of "a county, city and county, or an incorporated city or town," but does not give like authority to irrigation districts and other public bodies vested with the right to maintain proceedings in eminent domain. Even if it should be held that, for the reasons suggested by petitioners, the conclusive evidence clause of said section is unconstitutional, such conclusion would not affect the jurisdiction of the court in the action.

[2] Petitioners further contend that respondent court is without jurisdiction of said action because the property sought to be condemned is outside the corporate limits of the city of San Diego, and that the city of San Diego has no right by condemnation proceedings to acquire property outside the corporate limits. Citation is made of sundry authorities, which state the proposition that a municipal corporation can exercise the power of eminent domain only when expressly authorized by the Legislature. Therefore, notwithstanding the fact that the statutes do give to cities the right to acquire property for public use, and conceding that the use of property for the waterworks of a city is a public use, yet it is contended that without express authority this cannot include the right to acquire such property outside the corporate limits of the city. So it is contended that respondent court is without jurisdiction to authorize the condemnation of such property at the instance of the city and for the stated use. Counsel in presenting their application conceded that on sundry occasions cities in this state have been permitted to condemn lands and water rights and rights of way for sewers outside of city limits. But they say that they have not found any California decision directly upon the point which they now urge. It would seem that, if there had been merit in the proposition, it would have been urged

upon the attention of the trial court, or of the Supreme Court, in some of those cases which were more seriously litigated, such as City of Los Angeles v. Pomeroy, 124 Cal. 597, 57 P. 585, and City of Pasadena v. Stimson, 91 Cal. 238, 27 P. 604. In City of Pasadena v. Stimson, at page 255 (27 P. 608), the court said:

"In short, the plaintiff, being a city with sewage to dispose of, and having a sewer farm to which it has apparently a right to conduct it, has necessarily the right to construct such a sewer as the statute, section 1238 of the Code of Civil Procedure, contemplates. * * *"

McBean v. City of Fresno, 112 Cal. 159, 44 P. 358, 31 L. R. A. 794, 53 Am. St. Rep. 191, was a case wherein the defendant city challenged the validity of a contract which it had made for the disposition of sewage by conveying it some distance from the city limits. The Supreme Court, holding that there was no force in this objection, said:

"Proper sewers are in this day so essential to the hygiene and sanitation of a municipality, that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether by possibility the power had been expressly denied. * * * Disposition of the outfall is an essential part of the maintenance of a sewer system, and it must often be necessary for inland cities to arrange for that disposition without their corporate limits."

Counsel for petitioners have stated in their brief that the right of prohibition in eminent domain proceedings has not been questioned in this state so far as they are aware. They therefore rely upon authorities taken from other states, and particularly upon the decision of the Supreme Court of Montana in State ex rel. McLeod v. District Court, 67 Mont. 164, 215 P. 240. That is a case wherein it was held that upon the facts there presented the city of Livingston had no right to condemn and take for a public highway a strip of land outside the city limits, in order to connect the city with a park owned by it. And the court further held that the writ of prohibition should issue to prevent the court from proceeding in the action.

We find, however, that there is direct authority in this state indicating that prohibition does not lie in this action, even if the objections of petitioners to the validity of the proceedings in the court below could be successfully maintained. In Western Union Telegraph Co. v. Superior Court, in the Third appellate district (15 Cal. App. 679, 115 P. 1091, 1100), the petitioners applied for a writ of prohibition to prevent the superior court from proceeding in an action brought by the Postal Telegraph-Cable Company, a New York corporation, to condemn certain property for use as a part of plaintiff's telegraph line. It was contended by petitioners that foreign telegraph corporations are not authorized by the laws of California to exercise the right of eminent domain, and that therefore the superior court was without jurisdiction in said action. The District Court of Appeal decided the case on its merits and discharged the alternative writ which had been issued. A petition having been presented for a rehearing of said cause in the Supreme Court, the court denied that petition without regard to the merits of the controversy, and upon the sole ground that the remedy by writ of prohibition was not available to the petitioners. The court said (page 701 [115 P. 1100]):

"It is sought by this proceeding to prohibit the superior court from hearing an application by a foreign corporation to condemn private property for a public use upon the ground that the superior court has no jurisdiction to listen to such an application by such a party. It is true that the capacity of a foreign corporation to exercise the power of eminent domain in this state is purely a question of law, but it is a question as much within the jurisdiction of the superior court as other questions of law arising in similar cases which are held to be reviewable here only on appeal."

An interesting Missouri decision, based on the same principle, is found in State ex rel. Union Depot R. Co. v. Southern R. Co., 100 Mo. 59, 13 S. W. 398.

Apparently, the situation here is essentially like that which was considered by the Supreme Court in Western Union Telegraph Co. v. Superior Court, supra. The contention of the petitioner there was, and the contention of petitioners here is, that the superior court is without jurisdiction to hear and determine an action in eminent domain, if the case presented by the plaintiff in the action shows on its face that the plaintiff has not been authorized and is without authority to maintain any action to condemn the property sought to be taken.

The petition is denied.

We concur: HOUSER, J.; CURTIS, J.

72 Cal. App. 722

YOLLAND ICE & FUEL CO. v. MULCAHY.
(Civ. 2840.)

(District Court of Appeal, Third District, California. May 22, 1925. Hearing Denied by Supreme Court July 20, 1925.)

1. Payment ⟸63(1)—Evidence held admissible to show payment of debts other than those sued on, although not set out in pleadings.

In action on open book account for goods sold and delivered, wherein defense was payment, evidence by plaintiff that payment was in satisfaction of debt other than one sued on *held* admissible over objection that indebtedness testified to as being paid was not alleged in complaint, or set out in bill of particulars.

2. Appeal and error ⟸938(4)—It is presumed that if ledger contained evidence favorable to appellant, he would have included it in record.

In action on open book account for goods sold and delivered, where portion of plaintiff's ledger showing application of appellant's payments was omitted from the record, it will be presumed that appellant would have included that portion of ledger which was admitted in evidence in record if it contained any evidence in his favor.

3. Appeal and error ⟸695(1)—Appellant cannot complain that evidence did not support findings, where he failed to include evidence in record.

Appellant cannot complain that evidence, which record shows was admitted and which he failed to include therein, does not support findings.

Appeal from Superior Court, San Joaquin County; D. M. Young, Judge.

Action by the Yolland Ice & Fuel Company against James Mulcahy. From a judgment for plaintiff, defendant appeals. Affirmed.

A. H. Carpenter, of Stockton, for appellant.

Nutter, Hancock & Rutherford, of Stockton (A. P. Hayne, of Stockton, of counsel), for respondent.

FINCH, P. J. The defendant has appealed from the judgment herein in favor of the plaintiff.

The complaint alleges, and the court found, that the defendant is indebted to plaintiff on an open book account for goods, wares, and merchandise, sold and delivered to defendant by plaintiff at his special instance and request, in the sum of $939.09, which was the reasonable value thereof, and which defendant agreed to pay. A bill of particulars was furnished defendant, and it is not claimed by appellant that he did not purchase and receive the merchandise therein set forth, or that the charges therefor are unreasonable. His claim is that he paid plaintiff in full for such merchandise before the action was commenced.

The defendant was a contractor at the time the indebtedness was incurred, and, according to the bill of particulars, the merchandise, which consisted of gravel, sand, rock, cement, lime, and plaster, was purchased for use on several jobs which the defendant had under construction. The dates of these purchases ranged from February 8 to December 26, 1918. The defendant testified that he paid this indebtedness June 9, 1918, by giving the plaintiff a check for $1,100 in full settlement thereof. Witnesses for the plaintiff testified that this check was given in payment of other sums which the defendant owed the plaintiff at that time, and the court found accordingly.

[1] Appellant contends that evidence of this other indebtedness was improperly admitted because not alleged in the complaint or set out in the bill of particulars. There is no merit in the contention. It was not the indebtedness for which the suit was brought, and evidence thereof was properly admitted to show that the payment of $1,100 was made in liquidation thereof, and not in satisfaction of the indebtedness for which the suit was brought.

The case was tried November 26, 1920, and when the parties rested the court announced that the plaintiff was entitled to judgment. At some subsequent time, not disclosed by the record, the court set aside the order for judgment in favor of the plaintiff for the reason stated by the trial judge at a hearing had December 3, 1923, as follows:

"I set aside the order for judgment, not upon the theory I did not think that the case was proven that the plaintiff was entitled to recover as the evidence was put before me, but I felt that the defendant had not a proper opportunity to examine the account that was proven in court."

Counsel for defendant said:

"We are satisfied to let the matter stand as it now stands. * * * We are fully satisfied with the evidence adduced on the part of the defendant."

After further colloquy between the court and counsel for the respective parties, the court ordered judgment for plaintiff. Appellant seems to contend that his rights were in some manner prejudiced by the delay in the disposition of the case, but in what respect does not appear.

[2] Appellant contends that there is no evidence to support the finding that the plaintiff kept books of account. That portion of the plaintiff's ledger "relating to the account of James Mulcahy, * * * showing the application of the payment of that $1,100 to the various accounts as testified to by Mr. Louttit." the plaintiff's bookkeeper, was admitted in evidence, but is not included in the record on appeal. Louttit testified that the payment was applied to

an old balance in the sum of $206.86, "to the Naylor job, $674.49, and the United States Hotel job, $224.65." If there is anything in the ledger account so admitted in evidence which is favorable to appellant, it is fair to presume that he would have had it included in the record.

[3] Appellant urges that there is no evidence to support the finding that, "in addition to the goods, wares, and merchandise amounting to said sum of $939.09, plaintiff furnished to defendant other goods, wares and merchandise, on certain jobs," to the payment of which the said $1,100 was applied, and that the said $1,100 paid "no part or portion of the $939.09 set forth in finding IV hereof, and the account thereof was kept separate and apart in the books of plaintiff herein from the said items of wares, goods, and merchandise making up and amounting to the said sum of $939.05." The appellant cannot be heard to complain that evidence, the plaintiff's ledger which the record shows was admitted, but which he has failed to have included therein, does not support the findings. 2 Cal. Jur. 689.

The judgment is affirmed.

We concur: ANDERSON, Justice pro tem.; PLUMMER, J.

---

73 Cal. App. 9

STERLING LUMBER CO. v. KINSEY.

(Civ. 2826.)

(District Court of Appeal, Third District, California. May 28, 1925.)

Appeal and error ⟹704(2)—Failure to prove other indebtedness, upon which payments received for lumber were said to have been applied, precludes recovery of debt.

Where, in an action on lumber accounts, evidence by plaintiff's manager showed that part of defendant's payments were applied to "other indebtedness" not shown in the bill of particulars, but the record fails to disclose any evidence proving such indebtedness, a finding that plaintiff was not entitled to recover balance alleged due was justified for failure to show that proper application had been made of defendant's payments.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by the Sterling Lumber Company against W. T. Kinsey, in which defendant filed cross-complaint. From a judgment denying recovery to either party, plaintiff appeals. Affirmed.

E. S. Page, of Oakland, for appellant.

E. J. Dole and F. A. Cromwell, both of Petaluma, for respondent.

HART, J. This is an action to recover from defendant the total sum of $634.65, alleged to be due plaintiff on two different accounts.

The plaintiff is engaged in the lumber business, its principal place of business being in the city and county of San Francisco. One K. Benneche was, at the time that some of the transactions involved herein took place, the owner of a lumber business at Penn Grove, Sonoma county. During the time that said Benneche was engaged in conducting said lumber business, the defendant, Kinsey, a building contractor, dealt with and purchased lumber from Benneche for the purposes of his (defendant's) business. While these relations existed between Benneche and Kinsey, the former sold and transferred his lumber business to the plaintiff, but remained at Penn Grove as manager for plaintiff of said lumber business. After this transfer of said lumber business and the properties connected therewith, Kinsey continued to buy lumber at said lumber yards as so conducted by the plaintiff.

The complaint sets up two causes of action, both in the form of common counts. The first is for the sum of $243.90, and is based on an account accruing after plaintiff became the owner of the lumber business mentioned, and the other for the sum of $390.75, and founded on an account with said Benneche, and incurred prior to the time of his transfer of the business to plaintiff. The complaint alleges that the last-mentioned account was by Benneche assigned to plaintiff.

The answer consists of specific denials of all of the material averments of each count of the complaint. Defendant filed a cross-complaint, in two different counts, alleging, in the first, that plaintiff was indebted to him in the sum of $40 for services and labor rendered by him for plaintiff, and, in the second, for the sum of $164.60, for money had and received. The plaintiff met the cross-complaint by specific denials of its averments.

The cause was tried by the court, sitting without a jury. The judgment is that neither the plaintiff nor defendant is entitled to recover anything from the other by reason of their respective affirmative pleadings.

The plaintiff prosecutes this appeal from the judgment.

The defendant, as stated, during the period covering the transactions involved herein, was a building contractor, and had contracts for the erection of different buildings or structures. He purchased building materials at the plaintiff's lumber yards in Penn Grove from time to time, or as the exigencies of his several building contracts required, during said period of time, and, as to each contract, maintained an account with the plaintiff and its predecessor, Benneche. Both the plaintiff and the defendant filed in the action a bill of particulars, specifically showing the

numerous debit and credit items constituting the several accounts. Notwithstanding these bills of particulars, the accounts, as they were introduced in evidence, present, on their face, a veritable labyrinth of figures, the signification of which, as basic essentials of the issues tendered, cannot properly be understood without first subjecting the accounts thus constituted to the usual processes of an accountant, or some person having the ability, the time, and the patience to essay a task of such magnitude. An accounting should have been ordered and had. The court found specifically, however, that the defendant was not indebted to plaintiff in the sum of $243.90, as alleged in the first count of the complaint, or in any sum, nor was he indebted to plaintiff in the sum of $390.75, as alleged in the second count, or in any sum; that the materials set forth in plaintiff's bill of particulars as to the first count or cause of action set forth in the complaint, "excepting that but 13,000 instead of 35,000 cedar shingles were delivered to defendant; that said materials were used on different jobs or contracts, some not the subject of this litigation, and that defendant has paid on the purchase of said materials the sum of $4,321; that during a period of about two years last past that the defendant has had numerous transactions with the plaintiff, or with plaintiff's assignor K. Benneche; that the determination of a correct balance between plaintiff and defendant involves the examination of numerous accounts outside of others pleaded in plaintiff's amended complaint, or in defendant's cross-complaint, or as shown by plaintiff's bill of particulars filed herein; that as to said accounts not included in the issues herein there is a dispute between plaintiff and defendant; that because of said facts, this court finds that it is impossible to establish a true balance between plaintiff and defendant; that plaintiff has failed to sustain his case by preponderance of evidence."

If the trial court found itself unable, from the evidence before it, "to establish a true balance between plaintiff and defendant," certainly this court cannot be expected to do so. But the case presents a situation which does not necessitate a minute examination and a reconciliation of the numerous items making up the general account to justify approval of the finding that the plaintiff failed to establish his case by a preponderance of the evidence. To substantiate this conclusion, it is necessary only to refer briefly to the testimony of the plaintiff's manager, K. Benneche, also assignor of the claim constituting the basis of the second count of the complaint. He stated that the defendant had made payments on the account which amounted, in the aggregate, to the sum of $4,321, but that he had applied all of said amount, save and except the sum of $1,971, to the extinguishment of other indebtedness of the defendant to plaintiff, and which was not included in the plaintiff's bill of particulars. Plaintiff, however, failed to prove the "other indebtedness" to the satisfaction of which the payments made by defendant were applied. We have searched the record in vain for any such evidence. While it was not necessary for plaintiff to include in its bill of particulars such other indebtedness, it was incumbent upon it to prove it so that it might be made to appear that it had made a proper application of the moneys paid plaintiff by defendant. It follows, of course, that plaintiff was not entitled to recover.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

72 Cal. App. 742

AMERICAN FACTORS, Limited, v. GOSS et al. (Civ. 4868.)

(District Court of Appeal, First District, Division 1, California. May 25, 1925. Rehearing Denied June 24, 1925. Hearing Denied by Supreme Court July 23, 1925.)

1. Sales ⟹218½—Finding that hay was not so segregated for delivery to buyer as to pass title to latter before destruction by fire held warranted.

Evidence *held* to support finding that hay destroyed by fire while in sellers' warehouse had not been so segregated for delivery to buyer as to pass title to latter, irrespective of whether seller had agreed to pay storage charges and insurance, and whether delivery f. o. b. certain docks was necessary to pass title under contract.

2. Sales ⟹211—Appropriation to buyer's contract must be manifested by acts and assented to by buyer to pass title.

Appropriation by sellers to buyer's contract cannot rest on mere intent of sellers, but must be manifested by acts and assented to by buyer to pass title to latter before destruction by fire while in sellers' possession.

3. Sales ⟹212—That hay was compressed and put in bins by seller without notice to buyer before destruction by fire held not to vest title in buyer.

That hay was double compressed and put into bins by sellers without notice to buyer before destruction by fire did not vest title in buyer, where sellers retained control, and could and did use such hay in filling orders of other parties.

4. Sales ⟹209—Title to hay sold out of larger lot does not vest in buyer while anything remains to be done by sellers before delivery.

Where quantity of hay is sold out of larger lot, title does not vest in buyer while anything remains to be done by sellers in preparing goods for delivery.

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Sales ⟸201(1)—Title to hay held not intended to vest in buyer until delivery at place named in contract.

Title to hay destroyed by fire while in sellers' possession, after being compressed preparatory to delivery, *held* not intended to vest in buyer until delivery free of charge at named dock pursuant to contract of sale.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by the American Factors, Limited, a corporation, against Charles Ebenezer Goss and others, a copartnership doing business as Chas. E. Goss & Son, and said copartnership. Judgment for plaintiff, and defendants appeal. Affirmed.

Hankins & Hankins, of San Francisco, for appellants.

Knight, Boland, Hutchinson & Christin, of San Francisco, for respondent.

TYLER, P. J. Action for the return of the purchase price paid for certain hay which was destroyed by fire prior to actual delivery. The facts are as follows:

Hackfeld & Co., Limited, a corporation, engaged in the export business (predecessor of plaintiff herein), and defendants Chas. E. Goss & Son, a corporation, hay dealers of San Francisco, entered into a contract for the sale and purchase of some 800 tons of double compressed No. 1 wheat hay at the price of $31 per ton.

Defendants owned a warehouse in San Francisco, and bought hay from the growers, and resold the same to local buyers and also to wholesalers and exporters. As a part of their export business in handling hay they owned certain high-power presses, which were used for the rebaling or double compressing of hay, the process being to unbale and brake up the ordinary size bales as received from the growers, and then recompress or rebale the same under high compression, thereby reducing the size of each bale about one-half.

The object of this change was to permit of the export shipment of a greater quantity in a given size space for the purpose of economy in shipment. Other than the decreasing of the size of the bales, nothing else was done to the hay. The plaintiff, American Factors, Limited (at the time of the transaction known as Hackfeld & Co.), were exporters, and in the conduct of their business purchased hay in San Francisco for sale in the Hawaiian Islands. About July 25, 1918, at San Francisco, plaintiff's predecessor, Hackfeld & Co., made the purchase in question. The hay was paid for in full according to the terms of the agreement of sale. The price included delivery f. o. b. at Matson Navigation Company's docks, when and as ordered by direction of plaintiff. The time of delivery was limited by the agreement to June 1, 1919, but at the expiration thereof, plaintiff not having ordered all of the hay purchased, the time for the delivery of the balance was extended by mutual consent. When partial deliveries aggregating some 500 tons had been made, the warehouse of defendants was destroyed by fire.

At this time there was approximately some 302 tons of hay not called for or delivered. Demand for delivery of said balance was thereupon made by plaintiff upon defendants, who refused to comply therewith, claiming that 189½ tons of the hay had been double compressed and set aside for plaintiff and so entered in defendants' books. The balance of 112½ tons, so defendants claimed, had been likewise compressed and was in defendants' warehouse at the time of the fire, but had not actually and physically been set aside for plaintiff, and was more or less mixed with other hay.

On this 112½ tons defendants collected insurance, and so notified plaintiff, and prior to the commencement of this action they offered to pay the amount of this insurance money to plaintiff or to replace the hay. Plaintiff demanded delivery of the entire remaining 302 tons or the return of its purchase price, which demand was refused, and this action followed. At the trial defendants contended that the intent of the parties was to make an actual sale of the hay, and not an agreement of sale, and that, as they had prepared the same so as to have it ready for delivery upon the orders of plaintiff, title passed and the risk of loss or damage was upon plaintiff. In other words, defendants claimed a constructive delivery by reason of a segregation. Plaintiff denied that any segregation had ever been made in its favor of the whole or any part of the undelivered portion of the hay so as to distinguish it from other hay in defendants' warehouse, and further denied that any notice of segregation or indemnification was ever asserted by defendants until after the fire. It also claimed that defendants had agreed to assume all carrying charges, including storage and insurance, pending actual delivery, which was to be made f. o. b. at the Matson dock, and in consequence of which defendants must suffer the loss. The trial court found that defendants had agreed to assume the payment of the carrying charges including insurance. It further found that of the 302 tons of hay so undelivered no part was ever segregated by defendants in their warehouse or anywhere else to the order of plaintiff with its knowledge or consent or at all. It accordingly further found that no delivery had ever been made.

[1] Judgment was thereupon rendered in favor of plaintiff for the sum of $11,610.17. If there is any evidence in the record to sustain the finding that no segregation had ever

been made all questions concerning the effect of the agreement with reference to storage charges and insurance become unimportant, as does also the further contention of appellant that no title passed until there was a delivery f. o. b. Matson Dock under the rule laid down in Lewis v. Farmers' Grain, etc., Co., 52 Cal. App. 211, 198 P. 426. Upon this subject defendants offered testimony to show that the hay had been segregated in certain bins. It further appeared, however, that some of this hay had been withdrawn by defendants to fill an order of the Hakalau Plantation Company, and that other hay was placed in the bins for the account of such company of the same character called for by the contract; and also that other hay had been withdrawn from the bins by defendants, which would indicate that the hay was deposited in the bins for the convenience of the defendants in the conduct of their export business, and that it was of a fluctuating character and under the control of defendants. This evidence, in our opinion, was sufficient to support the finding that there was no such segregation as passed title in plaintiff. The case thus presents the situation where the vendor of personal property was to put the article purchased into a deliverable state as a condition precedent to the passing of title and the vesting of the property in the vendee.

[2] The learned trial judge, in ordering judgment for plaintiff, expressed his views in writing upon the law relating to this subject. As we are of the opinion that his conclusion is correct, we hereby adopt it as part of our opinion. It is as follows:

"The defendants claim that they so segregated the hay and appropriated it to the plaintiff's contract, that at the time of the fire the title was in the plaintiff, and the hay was at plaintiff's risk. Appropriation cannot rest, however, upon the mere intent of one party. Appropriation must be manifested by acts, and must have the assent of the buyer as well as the seller. I do not think that the evidence here indicates an actual appropriation of the property to the buyer with the buyer's assent.

[3] "The mere fact that the hay was double compressed and put into bins, without notification to the buyer, did not of itself vest title in the plaintiff. The defendants still had such control of the hay that, even after it was put into bins, they were at liberty to use it in filling orders of other parties, while, if the hay really belonged to the plaintiff, the application of it to other orders would have amounted to conversion by the defendants. The record shows that the defendants did in fact deliver to the Hakalau Plantation Company certain double-compressed hay from bins claimed to have contained hay appropriated exclusively to the plaintiff. The very fact that before the fire the defendants did so act indicates that they did not regard the hay as the actual property of the plaintiff.

[4] "I am of the opinion that in reality the defendants merely agreed to sell plaintiff hay to be supplied as needed out of defendants' fluctuating stock. And in general, where a quantity of hay is sold out of a larger lot, the title does not vest in the buyer while anything remains to be done by the seller in preparing the goods for delivery. This principle of law is treated at some length, with a review of the earlier English and American authorities in Messer v. Woodman, 22 N. H. 172, 53 Am. Dec. 241.

"See, also, Davis v. Hill, 3 N. H. 382, 14 Am. Dec. 373; Lawry v. Ellis, 85 Me. 500, 27 A. 518.

[5] "After having been compressed, the hay had to be delivered free of charge at the dock of the Matson Navigation Company; and until it was so delivered by defendants it is my view that title was not intended to vest, and that the hay was at the risk of the defendants.

"In Smith v. Sparkman, 55 Miss. 649, 30 Am. Rep. 537, there was a sale of five bales of cotton which at the time was in bulk in the seller's warehouse, and which he was to haul to a certain gin for packing, then from the gin to the town of Canton. Full payment was made in advance, as was done in the case at bar. A creditor of the seller levied an attachment on the cotton, when part of it was at the gin and the rest still in the seller's warehouse. It was held that the title was still in the seller and the cotton subject to attachment by his creditor.

"So in Davis v. Hill, 3 N. H. 382, 14 Am. Dec. 373, a quantity of hay was sold from a lot in the seller's barn, to be weighed out of a certain mow whenever the buyer saw fit to call for it. In this case also the hay was fully paid for in advance. Before any delivery occurred, the seller died and his administrator refused to make delivery; whereupon the buyer brought an action in trover, claiming title in himself. The court held, however, that the title had not passed, and judgment therefore went in favor of the administrator.

"In Andrews v. Cheney, 62 N. H. 404, we find a case closely parallel to the case at bar. There plaintiff had bought goods of the defendant and had paid for them in full. The plaintiff had selected the goods from samples, and defendant agreed to have the goods in stock in about two weeks. Within the stipulated time the goods were received by the defendant, and he then not only set them apart, but marked them with the plaintiff's name. The goods were, however, burned before the plaintiff called for them, and the question was whether the loss fell on the buyer or the seller. The court held that the goods were still the goods of the seller, saying:

" 'The defendant was not concluded by his selection. He might have sold or otherwise disposed of the particular article set apart by him, and substituted others in their place. A contract of sale is not complete until the specific goods on which it is to operate are agreed upon. Until that is done, the contract is not a sale, but an agreement to sell goods of a particular description. It is performed on the part of the vendor by furnishing the goods which answer the description. If, as in the case of a sale by samples, the specific goods are not ascertained by the agreement, the property does not pass until an appropriation of the specific goods to the contract is made with the assent of both parties. If the plaintiff authorized the defendant to make the selection, the property immediately on the selec-

tion vested in the plaintiff. It not appearing that the plaintiff gave such authority, the goods at the time of the fire were the property of the defendant and their destruction was his loss.'

"This reasoning I believe to be sound and to justify judgment in the case at bar for the return of plaintiff's money, with interest."

See, also, Turner, Kuhn & Fraser, Inc., v. Jones, 61 Cal. App. 732, 215 P. 1033.

We do not consider it necessary to add anything to what the learned trial judge has said.

From the views expressed it follows that the judgment herein should be and it is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

72 Cal. App. 622

Ex parte EISEMAN. (Cr. 1265.)

(District Court of Appeal, First District, Division 1, California. May 12, 1925.)

1. Bail ⟸63—Trial judge held to have properly made order of arrest and recommitment on receipt of information that bail furnished insufficient.

Under Pen. Code, § 1310, subdiv. 2, *held*, that trial judge, on receipt of letters informing him that bail furnished by convicted defendant was insufficient, was authorized summarily to order defendant's arrest and recommitment.

2. Bail ⟸63—Notice not prerequisite to order of arrest and recommitment for insufficient bail.

Under Pen. Code, § 1310, subdiv. 2, notice to convicted person is not prerequisite to trial judge's making order of arrest and recommitment when it "satisfactorily appears" to him that bail is insufficient.

3. Bail ⟸63—Refusal, on order of arrest and recommitment, to hear evidence relative to sufficiency of bail, erroneous but not prejudicial, where right to give bail pending appeal not denied.

Trial judge, in ordering arrest and recommitment of convicted person under Pen. Code, § 1310, subdiv. 2, because of insufficient bail, erred in refusing to hear evidence relative to sufficiency of bail; but such error was not prejudicial, where court stated that when new bond is presented it will consider qualifications of bondsmen.

Application by J. J. Eiseman for writ of habeas corpus to be directed to the Sheriff of City and County of San Francisco to secure release from custody on ground of illegal commitment after having been released on bail pending appeal. Writ discharged and petitioner remanded.

See, also, 230 P. 669.

Edward A. Cunha, R. P. Henshall, and Robt. R. Moody, all of San Francisco, for petitioner.

Matthew Brady, Dist. Atty., and Wm. M. Murphy, Deputy Dist. Atty., both of San Francisco, for respondent.

R. M. J. Armstrong, of San Francisco, for Sheriff.

KNIGHT, J. Habeas Corpus. Petitioner seeks to be released from the custody of the sheriff of the city and county of San Francisco, upon the ground that he was illegally recommitted after having been released on bail pending an appeal from a judgment of conviction.

The minute order upon which the recommitment is founded is in the following form:

"In this matter it satisfactorily appearing to the court, that the bail of the defendant J. J. Eiseman is insufficient. It is hereby ordered by the court that the sheriff of the city and county of San Francisco arrest the defendant and detain him in custody until legally discharged. Thereupon the bail was fixed in the sum of fifty thousand ($50,000) dollars."

The facts leading up to the making of said order, briefly stated, are as follows: Following petitioner's conviction on eight counts of an indictment charging violation of the Corporate Securities Act, an order was made admitting him to bail in the sum of $50,000, pending appeal A personal bond was furnished for that amount, which was approved by the trial judge, and petitioner was released from custody. Subsequently the trial judge received information from officials of those counties wherein the sureties claimed to be the owners of property of sufficient value to justify their qualifying for the amounts specified in said bond, to the effect that the bail was insufficient. This information was conveyed to the judge through letters written by said officials in response to inquiries made by one of petitioner's attorneys at the request of the judge. Upon receipt of those letters petitioner's attorneys were informally notified by the judge to appear in court, with the petitioner on January 17, 1925. At the time appointed, in open court and in the presence of petitioner and his attorneys, the judge produced said letters, read the material portions thereof into the record, and pointed out that from the facts stated therein the bail was wholly insufficient, in that the sureties were not the owners of property of sufficient value to support the statements made by them in their affidavits of qualification. After briefly commenting upon the situation, the judge, addressing counsel for petitioner, said:

"Now, gentlemen, do you desire to make any explanation of that matter before I make an order?"

In response, the attorney by whom the inquiries had been made stated that he had met

the bondsmen only once, but that if the bail was insufficient petitioner "would be willing to strengthen the bond," or "add to it," so that the same would meet the requirements of the court. Said attorney then requested that the court defer making its proposed order in the premises until the following Monday, at which time, he said, counsel would present certain telegrams and other communications received by them in support of the financial ability of the bondsmen to respond in the amounts for which they had become sureties. This request was denied, the judge stating that the bail was clearly insufficient. Thereupon the arrest of petitioner was ordered, and he was recommitted to the custody of the sheriff. The court then suggested to the district attorney that the matter of the attempted qualification of the sureties, under oath, be investigated, and such action be taken as the ascertained facts warranted. Before the hearing concluded, counsel for petitioner stated that said sureties, all of whom were nonresidents of the city and county of San Francisco, would be in San Francisco the following Monday, and would like to be heard; but the judge replied that no testimony would be taken, except in a proceeding before a committing magistrate or the grand jury; that he "did not want to see them." Counsel then inquired "Well, if I am able to present bondsmen who will qualify for the amount of the bond set by your honor, you will hear testimony?" and the judge replied, "You present the bond and then we will see about the bondsmen's qualifications." Petitioner was then taken into custody and has since been detained by the sheriff in pursuance of said order.

The contention of petitioner is that having been once duly admitted to bail, and having been released upon a bond which was accepted and approved by the court, it was beyond the jurisdiction of the court, thereafter, to order the petitioner recommitted unless the matter of the sufficiency of the bail was heard and determined at a formal hearing, after due notice to petitioner, and an opportunity afforded petitioner to produce evidence in support of the sufficiency of the bail, which, in the instant case, was not done.

[1] We are of the opinion that the court's action, under the circumstances, in making the order of arrest and recommitment, upon the strength of the statements contained in said letters was justified, and finds full support in subdivision 2 of section 1310 of the Penal Code, which reads as follows:

"The court * * * to which an indictment, information, or appeal is pending, * * * may, by an order entered upon its minutes, direct the arrest of the defendant and his commitment to the officer to whose custody he was committed at the time of giving bail, and his detention until legally discharged, in the following cases: * * * (2) When it *satisfactorily appears to the court* that his bail, or either of them, are dead *or insufficient*, or have removed from the state. * * *" (Italics ours.)

[2] It is apparent, we think, that the Code provision just quoted does not contemplate, as a prerequisite to the making of the order of arrest, notice to the convicted person, but allows the court to act summarily in the premises "when it satisfactorily appears" that the bail is insufficient. Necessarily such must be the law, if the order of arrest and recommitment shall in all cases be made effective, because if, after learning that the bail was insufficient, the court were powerless to cause the arrest of the convicted person until an order to show cause was issued and served, and an investigation was conducted in a formal manner, the convicted person might, if he were so inclined, become a fugitive and thereby render useless any order the court might make at the conclusion of such formal hearing. The very nature of the proceeding, it would seem, demands that the court act promptly in making the order of arrest.

[3] After making said order for the arrest and recommitment of petitioner in the instant case, however, the court erred, we believe, in refusing to hear evidence in his behalf, including the testimony of the bondsmen, relative to the sufficiency of the bail. While, as above indicated, the information conveyed by said letters was sufficient to warrant the court in exercising its power under section 1310 in causing the arrest of petitioner, we think that following the making of such order petitioner should have been permitted to produce the testimony of the bondsmen, and such additional evidence as he deemed necessary, for the purpose of disproving, if possible, the statements made in said letters. The question of the sufficiency of the bail could then have been determined in the light of all the evidence produced, and the bondsmen again accepted if it developed from said evidence that the statements in said letters were not well founded. It will be noted, however, that the order made by the court does not deprive the petitioner of the right to give bail pending appeal; and moreover the court has stated according to the record that when a new bond is presented it will consider the qualifications of the bondsmen, which, we assume, will include any of those bondsmen who attempted to qualify on the bond in question; therefore the error of the court, in previously refusing to hear petitioner's evidence has not been prejudicial—petitioner may still be released from custody whenever sufficient bail is given in the original sum of $50,000.

For the reasons stated the writ is discharged and petitioner is remanded to the custody of the sheriff of the city and county of San Francisco.

We concur: TYLER, P. J.; CASHIN, J.

73 Cal. App. 124

KANE et al. v. OTT et al. (Civ. 5172.)

(District Court of Appeal, First District, Division 2, California. June 3, 1925.)

1. Vendor and purchaser ⟸123—Judgment rescinding contract for fraud may rest upon any one material false representation.

Judgment rescinding contract for fraud may rest upon any one material false representation.

2. Vendor and purchaser ⟸36(2)—Representations as to productive quality of soil basis for rescission, where they furnished inducement to vendees to enter into contract, when their falsity established.

Representations as to productive quality of soil afford basis for rescission, where they furnished inducement to vendees to enter into contract, when their falsity is established.

3. Vendor and purchaser ⟸34 — Representation as to quantity of land sufficient to warrant rescission.

Material representation as to quantity of land may be sufficient to warrant rescission.

4. Vendor and purchaser ⟸33 — Purchaser to rescind contract need not show that property purchased was worth less than purchase price.

To rescind a contract for fraud, the purchaser need not be able to show that property purchased was worth less than the purchase price, it being sufficient if he was induced by false representations to buy property which, if representations had been true, would have been worth more than it actually was.

5. Vendor and purchaser ⟸123—On rescission of contract vendor is entitled to finding of value of purchaser's use and occupation of trial court.

In action by purchaser to rescind contract, vendor is entitled to finding as to value of plaintiff's use and occupation, but appellate court cannot supply such finding.

6. Vendor and purchaser ⟸341(5)—Plaintiff entitled to rescission of contract for fraud entitled to recover interest on amount paid under contract.

Where plaintiff is entitled to rescind a contract for fraud, he is entitled to recover interest upon the amount paid under the contract.

Appeal from Superior Court, Imperial County; M. W. Conkling, Judge.

Action by Elvira Kane and J. J. Kane against J. W. Ott and others. Judgment for plaintiffs, and defendants appeal. Reversed, with directions.

J. Stewart Ross and R. B. Whitelaw, both of El Centro, for appellants.

Hickcox, Crensbaw & Trude, of El Centro, for respondents.

LANGDON, P. J. This is an appeal by the defendants from a judgment against them in an action in which plaintiffs asked for a rescission of a contract by which they purchased certain land in the Imperial Valley from the defendants. Plaintiffs alleged that the contract had been induced by false and fraudulent representations, which allegations were denied by the defendants. In response to evidence offered by the plaintiffs, the court found that the parties had entered into the contract for the purchase and sale of the land in question, and that the plaintiffs had paid $1,000 upon the purchase price thereof and given their promissory note for $6,000, the balance of the purchase price, secured by first mortgage upon the property; that plaintiffs performed all the terms of their contract; that plaintiff Elvira Kane, who negotiated the purchase for the plaintiffs, had come to the county of Imperial and the state of California only shortly before entering into said contract; that she was entirely unfamiliar with conditions and land in said county and state, and knew nothing of business transactions, nor of farming; that she made the purchase without the aid and advice of her husband, the other plaintiff in the action, who was ill and living in Arizona; that, at the time of the purchase of said land by Elvira Kane, she informed defendant J. W. Ott that she was purchasing said land for the purpose of raising alfalfa and as good land for that purpose; that the defendant J. W. Ott is a business man with many years of experience in farming, who was familiar with land and soil in Imperial county, and especially with the land involved here; that said land was poor land, heavily impregnated with alkali and unsuited for growing alfalfa; that said land was not leveled nor bordered, and that it was necessary to do such work before planting; that such leveling and bordering would cost about $1,000; that the area of said land was not more than 26 acres; that said defendant at the time of the purchase, falsely and fraudulently represented to plaintiff Elvira Kane, with intent to deceive her by said representations, and with knowledge of their falsity and to induce her to make the contract for the purchase of the land, that the tract of land in question contained more than 29 acres, and was suitable for growing alfalfa, and would produce abundant crops of alfalfa; that said land was free from alkali; that all of said land was ready for planting, except that it had to be bordered, which would cost about $100.

[1-3] As we have stated, these findings are supported by the record. Also, the trial judge viewed the premises before making his findings with reference to the condition of the land. Appellants contend that some of the representations therein set forth are mere matters of opinion, and do not permit of a rescission of the contract. We shall not take time to discuss each representation separately. It has been held that a judgment such as this may rest upon any one material rep-

resentation which is false. Davis v. Butler, 154 Cal. 623, 98 P. 1047; Thomas v. Hacker, 179 Cal. 731, 178 P. 855. In Scott v. Delta Land, etc., Co., 57 Cal. App. 320, 207 P. 389, the court, after citing the foregoing authorities, holds that representations as to the productive quality of the soil, if they furnished an inducement to the vendees to enter into the contract made by them, would afford ground upon which to base a rescission when their falsity was established. It has been held that a misrepresentation as to the quantity of land is sufficient to warrant a rescission. Fox v. Robinson, 18 Cal. App. 585, 123 P. 813; Quarg v. Scher, 136 Cal. 406, 69 P. 96.

[4] Appellants assert that no damages were shown. There was testimony that plaintiffs received about three acres of land less than the acreage represented by defendants; that if a portion of a tract of this size was impregnated with alkali, it would reduce the sale value of the land $50 or $60 an acre. It is not essential to the right to rescind a contract for the purchase of property that the purchaser should be able to show that the property purchased was worth less than he paid for it. It is enough that he was induced by false representations to buy property which, if the representations had been true, would have been worth more than it actually was worth. Davis v. Butler, supra.

[5, 6] There is no finding as to the value of the use and occupation of the land during the time plaintiffs had possession of it, and no evidence in the record upon this question, and appellants are urging their right to an allowance upon this item. In support of their right they cite the case of Montgomery v. Meyerstein, 186 Cal. 459, 465, 199 P. 800. Respondent replies to this contention by stating that, although the evidence showed, without contradiction, that about $800 had been expended by plaintiffs in an effort to cultivate the land, the trial court found that only $100 had been so spent, and therefore must have allowed $700 for the use and occupation of the land. Apart from the fact that there is nothing in the record to indicate that such a position was taken by the trial court, we are also confronted with the discrepancy between the findings and the judgment with reference to this matter. The finding is that the plaintiffs are entitled to recover the $1,000 paid upon the purchase price of the land and also $100 expended in its cultivation, but the judgment, perhaps through inadvertence, is for $1,800. These portions of the record must be harmonized with each other. We might correct the judgment to make it conform to the findings, but we are powerless to make a finding of fact as to the value of the use and occupation of the land. It is also to be observed that the plaintiff is entitled to recover interest upon the amount paid by her under the contract, and this amount should enter into the calculations to be set forth in the findings.

The judgment is reversed, with directions to the trial court to receive evidence solely upon the question of the value of the use and occupation of the land, and make a finding upon the same and upon the amount of interest due upon money paid by plaintiff, and then enter judgment in accordance with the findings. It is so ordered, and also that each party to this appeal shall bear his own costs.

We concur: NOURSE, J.; STURTEVANT, J.

---

72 Cal. App. 748

PARRY v. CAMPBELL et al. (Civ. 5185.)

(District Court of Appeal, First District, Division 2, California. May 25, 1925. Hearing Denied by Supreme Court July 23, 1925.)

1. Appeal and error ⟸1170(3)—Technical error, if any, in overruling demurrer to complaint, disregarded where no miscarriage of justice.

In action for specific performance of contract for exchange of real property, although pleadings should have been more specific about value of defendant's house, so as to demonstrate that the transaction was fair and equitable to defendant, but proof showed that respective values of properties were such as to make exchange fair, the Court of Appeal was constrained, under Const. art. 6, § 4½, to disregard technical error, if any, in overruling defendant's demurrer to complaint; it appearing from entire record there was no miscarriage of justice.

2. Escrows ⟸9—Party waiving time limit, cannot repudiate arbitrarily thereafter, where other party has completed its part.

In an action for specific performance of contract for exchange of real properties, an escrow agreement of April 6th limited time of performance to 30 days, but contained a clause extending the period in the event the conditions were not completed within the time specified. On September 5th, after continuous negotiations, defendant notified the escrow holders that she would not complete the exchange. *Held*, that defendant, having waived the time limit, could not arbitrarily cancel the agreement thereafter, the plaintiff having completely performed everything required on her part.

3. Husband and wife ⟸267(9)—Husband estopped from claiming that he should not convey community property where wife signed contract with his consent.

Where a wife, with husband's approval and consent, signed contract for exchange of real property with plaintiff, and her husband subsequently signed her name and appended his initials to instructions under an escrow agreement, and took an active part in negotiations, *held*, in an action against the husband and wife for specific performance, that the husband was estopped from claiming that, because

he did not sign the original contract, and the property, although in his wife's name, was community property, he should not be bound to convey.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by Rose A. Parry against Amy I. Campbell and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Douglas L. Edmonds, Louis F. Labarere, and John A. Cronin, all of Los Angeles, for appellants.

James F. McBryde and Eugene J. Wix, both of Glendale, for respondent.

LANGDON, P. J. This appeal is taken by the defendants from a judgment against them enforcing specific performance of an agreement between them and plaintiff for the exchange of real property.

After a careful reading of a lengthy transcript upon appeal, it has become evident that there is ample evidence to support the findings of the court, and we shall state the facts as found by the trial court: On April 6, 1922, defendant Amy I. Campbell, with the authorization, knowledge, consent, advice, and approval of her husband, defendant W. A. Campbell, entered into an agreement with plaintiff by which she was to exchange a house in Los Angeles county for a certain ranch in Riverside county belonging to plaintiff. The terms of the exchange were clear and definite. The house was to be free and clear of all incumbrances, except a mortgage of $3,000, and the ranch was to be free and clear of incumbrances, save and except a first mortgage of $3,500 and a second mortgage of $7,250, to be given by Amy Campbell to plaintiff as a part of the purchase price of said ranch. An escrow agreement was entered into, the Glendale State Bank to act as escrow holder and to carry out the instructions of both parties with reference to the several matters and things to be done before the trade could be consummated. The details of the escrow agreement are set forth in the findings, but the enumeration of them here would only serve to lengthen and complicate this opinion. It is sufficient to say that plaintiff did everything required of her under the agreement and placed the bank in a position where it could consummate the trade. A deed from plaintiff to defendant, conveying the title to the ranch, was in the hands of the bank, but before delivering and recording the same the bank was to use funds in its possession under the escrow agreement to pay off an incumbrance against the property. In the meantime defendants had taken possession of the ranch and lived upon it for several months, and had placed plaintiff in possession of the house to be transferred to her. On September 5, 1922, defendant Amy I. Campbell notified the bank to return her papers and that she would not go on with the exchange. The two days preceding September 5th had been holidays at the bank, and this fact, together with the rush of business, had prevented the bank from consummating the trade before September 5th, although everything required of plaintiff had been done by her prior to that time. As this situation involves one of the "storm centers" of the appeal, we repeat the finding of the court with relation to it:

"That prior to September 5, 1922, and at all times thereafter and at all times mentioned in said complaint the plaintiff was ready and willing to perform and did tender and cause to be tendered to the defendant Amy I. Campbell the papers, instruments and money on her part to be performed, and that the said bank had the necessary papers but was not given sufficient time to complete its work by said defendants, all of which was without the fault of the plaintiff, and that the defendant had presented the papers to the said bank, but that said bank did not have sufficient time to complete the instructions as given by said defendants, all of which was without the fault of the plaintiff, and that it is true that, if the said bank had not been stopped on September 5, 1922, it could have completed its work and shown the Perris Valley ranch free and clear of incumbrances except such as were set forth in the instructions, and that the bank had other instructions and moneys in additional escrows that, if this escrow between Parry and Campbell had not been stopped, would have allowed the said bank to complete all of the instructions of both the plaintiff and defendants."

It is further found that there was no misrepresentation, concealment, circumvention, fraud, or unfair practices upon the part of the plaintiff in securing defendant's consent to the contract between them, and that the estimated values of the respective properties for the purpose of trade were fair and equitable.

The first contention of appellants is that their demurrer to the complaint should have been sustained, because the complaint does not allege sufficient facts to show that the consideration for defendant's agreement was adequate and that the contract was in all respects just and reasonable as to the defendant. The rule is unquestioned; our concern is with its application in the instant case. The complaint sets forth the agreement of the parties and embodies the escrow instructions to the bank. They indicate that defendant's house was to be valued at $8,000, and was to be deeded to plaintiff, subject to an incumbrance of $3,000, and in exchange therefor defendant was to receive the ranch, subject to a mortgage for $3,500, and to give to plaintiff a second mortgage upon said ranch in the sum of $7,250. The complaint also alleges:

"That the property agreed to be exchanged by plaintiff to defendant Amy I. Campbell, to wit, the ranch hereinbefore described, is of the value of $15,750 and upwards, and that the said exchange of property is a fair and just

exchange, and that the said exchange is a fair and equitable and just deal, particularly in so far as it concerns the defendant Amy I. Campbell, and that the terms of said exchange, particularly in so far as they affect the defendant Amy I. Campbell, are fair, just, and equitable, and that all the consideration, terms, and conditions of the agreement of exchange are fair, just and equitable."

[1] While it is true, perhaps, that under some decisions this pleading should have been more specific about the actual value of defendant's house, so as to demonstrate that the transaction was fair and equitable to defendant, nevertheless the proof shows conclusively that the value of the house and the value of the ranch were such as to make the exchange fair and equitable, and, even though technical error may have been committed in overruling the demurrer, in the light of the entire record before us, there has been no miscarriage of justice, and we are constrained, therefore, under section 4½ of article 6 of our Constitution, to disregard such error, if error there was. Baker v. Miller, 190 Cal. 263, 212 P. 11.

[2] It is contended that because the bank, through stress of business and because of intervening holidays, had not actually completed the details of the transfer by September 5, 1922, and as more than 30 days had elapsed from the date of the escrow instructions, the defendant had the right, upon that date, to decline to proceed with the exchange. This position is built upon the statement in the escrow instructions (following an enumeration of the documents handed to the bank) as follows:

"All of which you are authorized to use, provided you can hold for me within 30 days from date a certificate of title made by the Title Guarantee & Trust Company on the following described property:" (Describing the house owned by defendants.)

However, the same document contains the following clause:

"In the event the conditions of this escrow have not been complied with at the expiration of the time provided for herein, you are instructed to complete the same, at the earliest possible date thereafter, unless I shall have made written demand upon you for the return of the money and instruments deposited by me."

This latter clause is repeated by defendant in her letter of instructions to the bank, which was dated April 6, 1922. Difficulties were encountered in consummating the exchange, and the parties sent amended instructions to the bank from time to time. As late as August 14, 1922, Mrs. Campbell wrote to the bank returning to it, unsigned, a note and mortgage which had been sent to her for her signature, and stating that she desired some other arrangement. It is apparent, therefore, that she waived the 30-day limitation, and that she had no right to arbitrarily cancel the agreement on September 5th, when the other party had completely performed the same. As the trial court found, the delay on the part of the bank was without fault on the part of plaintiff who had done everything required of her, and the bank was as much the agent of defendants as of the plaintiff in this matter. Upon this question the trial court found:

"That while it is true that the escrow was not completed within 30 days, according to the terms of the original contract, it is true, and the court so finds, that the time within which said contract was to be completed was continued indefinitely by reason of another provision of the contract contained in the escrow instructions (quoting the provision hereinbefore set forth). That it is true the parties by consent permitted the period within which each was to perform, to continue indefinitely and, until September 5, 1922, when defendant notified the escrow agent of her conclusion to cancel said contract, and that the same was then and there terminated. That it is true that no opportunity was given plaintiff by defendants to perform after the period for performance had been extended and had become indefinite; that under the circumstances, the time that has elapsed was not unreasonable."

[3] The only other point urged upon the appeal is that the defendant W. A. Campbell, who is the husband of Amy I. Campbell, should not be bound to convey this property because he did not sign the contract, and the property, while standing of record in the name of the wife, is shown by the testimony to be community property. Under the facts of the case, this defendant is estopped to set up such a claim. It is true he did not sign the original contract, but the testimony shows, and the finding of the court was, that it was signed by his wife, after consultation with him, and with his entire consent and approval, and he signed his wife's name and appended his own initials to some of the supplemental instructions sent to the bank. Under the circumstances of this case, it was not necessary for his contract to have been in writing, because the plaintiff was given possession of the house, and both defendants went into possession of plaintiff's property. For months W. A. Campbell acquiesced in this situation, and took an active part in the negotiations with the bank over the completion of the transaction. Under such circumstances, the court had power to decree specific performance against him had he been the sole owner of the property.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

72 Cal. App. 755

PARRY v. CAMPBELL et al. (Civ. 5233.)

(District Court of Appeal, First District, Division 2, California. May 25, 1925. Hearing Denied by Supreme Court July 23, 1925.)

Exceptions, bill of ⊂=39(1)—Statutory limitation of time for presentation of bill of exceptions applicable although bill presented to clerk instead of judge personally.

The provision under Code Civ. Proc. § 650, that a proposed bill of exceptions and amendments must be presented within 10 days after service of the proposed amendments to the judge who tried the case, upon 5 days' notice to adverse party, applies equally where the bill of exceptions and amendments thereto are presented to the clerk for the judge instead of to the judge personally.

Appeal from Superior Court, Los Angeles County; Wm. C. Doran, Judge.

Action by Rose A. Parry against Amy I. Campbell and another for specific performance of a contract for exchange of real property. From an order appointing a receiver, defendants appeal. Dismissed.

Douglas L. Edmonds, Louis F. Labarere, and John A. Cronin, all of Los Angeles, for appellants.

James F. McBryde and Eugene J. Wix, both of Glendale, for respondent.

LANGDON, P. J. This is an appeal by the defendant from an order appointing a receiver to take charge of certain properties, and collect the rents, issues, and profits thereof, pending an appeal in an action between the same parties arising out of an alleged breach of contract of exchange of said properties, which appeal has this day been decided by this court and the judgment affirmed. Parry v. Campbell, 238 P. 127, numbered 5185 of the records of this court.

The plaintiff and respondent has made a motion to strike the transcript from the files and a motion to dismiss the appeal. The ground for these motions is that the bill of exceptions, which constitutes the transcript upon appeal, was not prepared, proposed, served, or presented to the clerk or the court or counsel within the time allowed by law, nor was proper notice of the time of settlement given counsel. These objections were made by plaintiff and respondent, who appeared specially for this purpose at the hearing in the trial court when the bill of exceptions was settled and allowed, and the trial court held that the law does not require the presentation of said proposed bill of exceptions or of said proposed amendments thereto within 10 days after service of said proposed amendments to said proposed bill of exceptions, and does not require the giving of 5 days' notice to the adverse party of the time of said settlement, when the bill of exceptions and amendments thereto are presented to the clerk for the judge who tried the case instead of to the judge personally, and the bill of exceptions was settled and allowed.

We are unable to find authority for the distinction above made and the Code of Civil Procedure (section 650) does not express it. The language pertinent here is as follows:

"The proposed bill and amendments must, within ten days thereafter [after service of proposed amendments], be presented by the party seeking the settlement of the bill, to the judge who tried or heard the case, upon five days' notice to the adverse party, or be delivered to the clerk of the court for the judge."

The limitation as to time seems to apply as well to a delivery to the clerk for the judge as to a delivery to the judge himself, and, as we have stated, we are unable to find any authorities construing the section otherwise. That being true, the appellant had no right to have his bill of exceptions settled after the expiration of the time mentioned in the Code. It is said, in Moultrie v. Tarpio, 147 Cal. 376, 81 P. 1112, with reference to the foregoing language of the Code:

"Compliance with this requirement is essential to the right of a party to have his bill of exceptions settled, and if he fails to so comply, his right is gone, unless he be relieved from the effect of such failure by the trial court under the provisions of section 473 of the Code of Civil Procedure."

The motion to strike the transcript from the files is granted. It follows that the appeal must be dismissed, and it is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

72 Cal. App. 705

DODD v. MADDOX et al. (Civ. 2851.)

(District Court of Appeal, Third District, California. May 19, 1925. Hearing Denied by Supreme Court July 16, 1925.)

1. Mechanics' Liens ⊂=313—Bond to secure performance of building contract binding on surety, though plans and specifications forming part of contract not filed with county recorder.

A bond given to secure the performance of a building contract is binding upon the sureties in action by assignee of materialmen, despite the fact that the plans and specifications forming a part of the contract were not filed with the county recorder.

2. Mechanics' liens ⊂=313, 315—Failure to file contractor's bond before commencement of work does not invalidate contract or release sureties.

Failure to file a contractor's bond before commencement of the work does not invalidate the contract or relieve the sureties of liability for claims of materialmen.

3. Mechanics' liens ⟸315—Part payment by owner to assignee of materialmen held not to prejudice sureties or relieve them from their obligations on contractor's bond.

Where owners of property made part payment to assignee of claims of materialmen, such payment did not prejudice sureties, or relieve them of their obligations on the contractor's bond, but merely relieved them to the extent of the sum paid by the owner, Civ. Code, §§ 2845, 2849, 2850, relative to rights of sureties, being inapplicable.

4. Mechanics' liens ⟸313—Fact bond was not given in proper amount and not filed held not to prevent materialmen from prosecuting personal action to recover on bond.

That a contractor's bond was not given in the proper amount, and that filings were not had so as to protect owners from liens under provisions of Code Civ. Proc. § 1183, does not prevent materialmen from prosecuting their personal action to recover upon the bond.

5. Mechanics' liens ⟸315—Invalidity of construction contract as between parties because not recorded as required by law does not relieve sureties on bond of contractor from liability.

Invalidity of construction contract as between parties because not recorded as required by law does not relieve sureties on bond of contractor from liability to materialmen.

6. Mechanics' liens ⟸315—Assignee of materialmen may maintain action against sureties on contractor's bond, irrespective of filing of liens on building.

Plaintiff assignee of materialmen, furnishing materials which were used in construction of building, may maintain an action against the sureties on the contractor's bond, given to secure performance of building contract, irrespective of filing or nonfiling of liens against building, such proceeding being merely a cumulative remedy.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by R. H. Dodd against Everett Maddox, Mary M. Emerson, executrix of the last will and testament of T. F. Emerson, deceased, and W. C. Ramsey. Judgment for plaintiff, and defendants appeal. Affirmed.

A. H. Carpenter, of Stockton, and Frank W. Sawyer, of San Francisco, for appellants.

Stephen N. Blewett and Cecil S. Johnson, both of Stockton, for respondent.

PLUMMER, J. Plaintiff brought this action as the assignee of certain materialmen, to recover upon a builder's bond given for the benefit of the owners, and also, for all persons performing labor upon or furnishing materials to be used in the work described in the contract referred to in said bond, at the request of the contractor therein named. The bond also provided that it should inure to the benefit of all persons performing labor or furnishing materials to be used in the work contracted to be performed; that recovery might be had upon said bond in any suit brought to foreclose liens on the premises, and also that an independent or separate action might be brought to recover on the bond. The plaintiff had judgment, and the defendants appeal.

It appears from the transcript that the total amount of the assigned claims aggregated the sum of $2,118.37, no part of which was paid by the contractor; that after the claims had been assigned to the plaintiff, the owners, out of the sum of $1,220 remaining in their hands, and being the unpaid balance on the contract price, paid to the plaintiff the sum of $900, and retained in their hands the sum of $320 to protect themselves against liens and asserted claims of others than the assignors of the plaintiff herein. The action is prosecuted for the remainder due on the assigned claims, to wit, $1,218.37.

The bond sued upon is in the following words and figures, to wit:

"Contractor's and Builder's Bond.

"Know all men by these presents: That Everett Maddox and T. F. Emerson and W. C. Ramsey, as sureties, are held and firmly bound unto Ward L. and Olive Jones in the sum of seventeen hundred ($1,700.00) dollars of the United States (which sum is an amount equal to at least fifty per cent. [50%] of the contract price named in the contract hereinafter referred to), to be paid to the said Ward L. and Olive F. Jones and any and all persons performing labor upon or furnishing materials to be used in the work described in said contract at the request of the contractor named therein, or any person acting for him, or by his authority, and to their heirs, executors, administrators or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators by these presents.

"Dated the 14th day of July, 1922.

"The condition of the above obligation is such that

"Whereas, on the 14th day of July, 1922, the above named principal, Everett Maddox, as contractor, entered into a written agreement with said Ward L. and Olive F. Jones as owner, for the erection of a building on that certain lot of land situated in the oaks lot 18, block 12, which contract is hereby referred to and made a part hereof.

"Now, therefore, in addition to any and all conditions for the performance of the contract above mentioned, this bond is also conditioned for the payment in full of the claims of all persons performing labor upon or furnishing materials to be used in the work described in said contract, or in performing said contract, and shall inure to the benefit of any and all persons performing labor upon or furnishing materials to be used in the work described in said contract, so as to give such persons a right of action to recover upon this bond in any suit brought to foreclose the liens provided for in chapter II of title IV, part III, of the Code of

Civil Procedure of the state of California, or in a separate suit brought on this bond.

"And now, therefore, further, if Everett Maddox, the said contractor, shall faithfully perform said contract according to its terms, covenants, and conditions, and shall also pay in full the claims of all persons performing labor upon or furnishing materials to be used in the work described in said contract, then this obligation to be void; otherwise to remain in full force and effect. Everett Maddox,
"Principal.
"T. F. Emerson,
"W. C. Ramsey,
"Sureties."

[1, 2] Although stated as 50 per cent. of the contract price, an error was made in computation, and the bond was given for a sum slightly less than one-half of the contract price of the building. This, however, does not affect any of the questions tendered for decision here, for the reason that the action is not prosecuted by the owners, and no question of limiting the amount of claims or liens to be paid by the owners is involved in this case. The suit is by materialmen, through the agency of their assignee. It also appears from the contract that there was a failure to file the plans and specifications and bond within the time prescribed by the codes, and this objection is urged by appellant as a reason for reversal herein. However, these questions have been decided adversely to appellant's contention, and we need not further consider the same than to refer to the decisions of the Supreme court relating thereto. A bond given by a contractor to the owner of a building, guaranteeing performance of the contract according to the conditions thereof, is valid and binding upon the sureties, notwithstanding the plans and specifications forming a part of the building contract were not filed with the county recorder. Blyth v. Robinson, 104 Cal. 239, 37 P. 904; McMenomy v. White, 115 Cal. 339, 47 P. 109. Likewise, it is held that the failure to file the contractor's bond before the work was commenced does not invalidate the contract or relieve the sureties. Hollenbeck-Bush P. Mill Co. v. Amweg, 177 Cal. 160, 170 P. 148; Hammond Lumber Co. v. Willis, 171 Cal. 565, 153 P. 947.

[3] It is also argued that the payment by the owners of the sum of $900 to the plaintiff in this action, after the claims of materialmen had been assigned to him, prejudiced the sureties, and therefore relieved them from their obligations. We see nothing of merit in this contention. The payment of the sum of $900 by the owners, instead of prejudicing the sureties, relieved them to that extent, and instead of being sued for the total sum of the bond, the action was prosecuted against them to recover only the sum of $1,218.37. Our attention is also called to sections 2845, 2849, and 2850 of the Civil Code, but these sections are not applicable to this case. No attempt was made in this case to require the creditors to proceed other than as the action was prosecuted. The principal on the bond in this case was made a party to the action. There is nothing in the case which involves section 2849 of the Civil Code, relating to a surety being entitled to the benefit of every security for the performance of the principal's obligations. It does appear, however, that the surety had the benefit of the payment of the sum of said $900, on account of the claims for materials furnished, held by the plaintiff.

[4, 5] The fact that the bond was not given in the proper amount, and that the filings were not had so as to protect the owners, under the provisions of section 1183 of the Code of Civil Procedure, in that materialmen might have enforced liens against the property of the owners, does not prevent the materialmen from prosecuting their personal action to recover upon the bond. Palmer v. White, 70 Cal. 220, 11 P. 647. It is also held that the fact that a construction contract is invalid as between the parties, because not recorded, as required by law, does not relieve the sureties on the bond of the contractor from liability. Watterson v. Owens River Canal Co., 25 Cal. App. 247, 143 P. 90.

[6] The appellants herein rely upon the case of Hubbard v. Jurian, 35 Cal. App. 757, 170 P. 1093, and other cases announcing and following the rule therein set forth. The case of Hubbard v. Jurian and others, covering the same interpretation of bonds such as involved herein, cannot, in view of the decision of the Supreme Court in General Electric Co. v. Amr. Bonding Co., 180 Cal. 675, 182 P. 444, longer be considered as authority upon the points here involved.

The facts before us are, in principle, practically identical with the issues determined in the General Electric Company Case. After setting forth the fact that the action might be had upon the bond to recover in any suit to foreclose liens, or upon a separate suit upon the bond, as provided for herein, and also further stating that the record showed that no liens had been filed, the Supreme Court considers the ruling had in Hubbard v. Jurian and other cases, and holds as follows:

"We are of the opinion that the cited cases were improperly decided so far as they held that a bond like the one before us is incapable of enforcement unless the claimants seeking to bind the sureties have filed their liens within the prescribed time."

In the case at bar no liens were filed. In the General Electric Company Case no liens were filed. The provisions of the two bonds are identical, and it therefore follows that the opinion of the Supreme Court, to which we are referring, is controlling, and it must be held, in accordance therewith, that the

plaintiff in this case, as the assignee of the materialmen furnishing materials which went into and were used in the construction of the building contemplated to be erected, and for the performance of which the sureties executed the bond here set forth, may maintain this action against the sureties, irrespective of the filing or nonfiling of liens against the building. As has been said in several cases, this proceeding is a cumulative remedy. The following cases have also followed the rule laid down in the General Electric Company Case, supra; Purington v. Olsten, 45 Cal. App. 621, 188 P. 288; Crocker Wheeler Co. v. American Bonding Co. of Baltimore, 45 Cal. App. 793, 187 P. 928; Standard Iron Works v. Maryland C. Co., 56 Cal. App. 601, 206 P. 136.

The judgment of the trial court is hereby affirmed.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

---

73 Cal. App. 95

GALLETTA v. JUSTICE COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5223.)

(District Court of Appeal, First District, Division 1, California. June 2, 1925. Rehearing Denied July 1, 1925.)

1. Dismissal and nonsuit ⟸81(2)—Superior court may vacate order of dismissal inadvertently or improvidently made.

Superior court has jurisdiction, in proper case, to vacate order of dismissal on notice within 6 months from entry thereof, if inadvertently or improvidently made, and such order is not void, though erroneous on facts, and such relief may be had by one in whose favor order was made.

2. Evidence ⟸82—Validity of order vacating order of dismissal presumed.

Every presumption is in favor of validity of order vacating order of dismissal, and any state of facts consistent with its validity will be presumed as against one which will defeat it.

3. Justices of the peace ⟸166(4)—Writ to quash execution on justice's court judgment in action dismissed by superior court on appeal denied after subsequent vacation of order of dismissal.

Mandamus to justice's court to recall and quash execution on judgment in action dismissed by superior court on appeal will be denied after subsequent vacation of order and dismissal of appeal, as involving collateral attack on orders of superior court, which record does not show were void, where facts presented or those on which court acted in vacating order are not shown.

Petition by A. Galletta for writ of mandate to the Justice Court of the City and County of San Francisco to recall and quash execution on judgment for Felix Lehman against petitioner. Writ denied.

H. Slikerman, of San Francisco, for petitioner.

M. H. Hernan, of San Francisco, for respondents.

CASHIN, J. Petition by A. Galletta for a writ of mandate to the justice's court of the city and county of San Francisco, to recall and quash an execution issued from that court.

An action was brought by respondent, Felix Lehman, against petitioner in said justice's court to recover the sum of $100. Judgment therefor was entered during the year 1915, and petitioner appealed therefrom on questions of law and fact to the superior court of the city and county of San Francisco. Thereafter no action by either party was taken in the superior court until July 24, 1924, when respondent, Lehman, moved to dismiss the appeal under the provisions of section 981a of the Code of Civil Procedure, upon which motion the court made and on November 6, 1924, entered its order and judgment dismissing the action; whereupon respondent on November 21, 1924, moved the court, on due notice to petitioner, for its order vacating the previous order and judgment, and for its order dismissing the appeal in accordance with the motion originally made, on the ground that the first order, in dismissing the action, had been inadvertently made by the court. After hearing, the court vacated the original order, restored the original motion to its calendar, and, after further consideration, made and entered, on January 5, 1925, its order dismissing the appeal; whereupon, pursuant to section 982, Code of Civil Procedure, the papers in the case were returned and filed in the justice's court, execution issued therefrom, and motion made by petitioner therein for the order of the justice court recalling and quashing the execution, which motion was denied. In the meantime—the exact date not appearing from the record, but apparently later than the date of the original order—petitioner filed in said superior court his motion to dismiss the action under the provisions of section 581, Code of Civil Procedure, for want of prosecution by respondent, which motion was presented on January 5, 1925, and by the court denied by and as a part of its order last mentioned dismissing the appeal.

Petitioner contends that the superior court, upon the making and entry of its order dismissing the action, thereby lost jurisdiction of the case, and that its subsequent orders vacating its original order and dismissing the appeal were void, that no judgment existed after the making of the original order dismissing the action on which the

execution might issue, and that it was and is the duty of the justice's court to recall and quash the execution. Petitioner does not contend that the superior court would have been without jurisdiction to dismiss the appeal in the first instance, or that the facts on which the motion therefor was based were not sufficient to justify such action under the provisions of section 981a, Code of Civil Procedure.

The record does not show the facts presented or on which the superior court acted in vacating its original order dismissing the action.

[1] The court had jurisdiction in a proper case, upon notice, and within 6 months from the entry of the original order of dismissal, to vacate such order if inadvertently or improvidently made, and such order, although erroneous on the facts, was not void, and such relief might be had by one in whose favor the order was made. Wolters v. Rossi, 126 Cal. 644, 59 P. 143; Consolidated Construcion Co. v. Pac. Elec. Ry. Co., 184 Cal. 244, 193 P. 238; Wiggin v. Sup. Ct., 68 Cal. 398, 9 P. 646; Brackett v. Banegas, 99 Cal. 623, 34 P. 344.

[2] Every presumption is in favor of the validity of the order vacating the order of dismissal, and any condition of facts consistent with its validity will be presumed to have existed, rather than one which will defeat it. Canadian, etc., Co. v. Clarita Land and Imp. Co., 140 Cal. 672, 74 P. 301.

[3] The proceeding before us is in effect a collateral attack upon the orders of the superior court which were not, so far as shown by the record, void. Wiggin v. Sup. Ct., 68 Cal. 398, 9 P. 646; Freeman on Judgments (5th Ed.) § 312; Frey v. Sup. Ct., 22 Cal. App. 421, 134 P. 733.

For the foregoing reasons the writ is denied.

We concur: TYLER, P. J.; KNIGHT, J.

---

73 Cal. App. 198

WEATHERBEE v. SINN et al. (Civ. 5118.)

(District Court of Appeal, First District, Division 1, California. June 2, 1925.)

1. Vendor and purchaser ⟸187—Time not essential, though originally of essence, where defaults are subsequently waived.

Time, originally of essence of contract, ceases to be essential, where defaults are subsequently waived, and becomes material thereafter only if vendor again makes it essential by proper notice and demand.

2. Vendor and purchaser ⟸187—Vendor's acceptance of past-due payments does not eliminate provisions as to future occurrences.

Vendor's acceptance of past-due payments waives all past defaults in performance, but does not eliminate, as to future occurrences, provisions making time of essence, releasing vendor from obligation to convey if vendee fails to comply with terms, and forfeiting payments already made in such case; only effect as to future being to give vendee reasonable time after the payment to perform his part of contract.

3. Vendor and purchaser ⟸317—Reasonable time for performance after waiver of vendee's default primarily fact question for trial court.

Reasonable time for performance after waiver of vendee's default depends on circumstances of each case and is primarily fact question for trial court.

4. Vendor and purchaser ⟸215—Vendees' assignee could not complain of insufficiency of notice of termination of contract, where action to quiet title was dismissed as to vendor, which received all payments made for want of service.

Defaulting vendees' assignee cannot complain that notice to vendees terminating contract was unreasonable as to time, where corporate vendor, which alone received all payments made under contract, was never served in assignee's action to quiet title and action was dismissed as to it.

5. Vendor and purchaser ⟸231(15)—Vendees' acknowledgment of recorded contract, insufficient to give vendor's successors constructive notice.

Acknowledgment of contract by vendees alone is insufficient to give vendor's successors constructive notice which would otherwise result from recordation thereof after proper acknowledgment by vendor.

6. Vendor and purchaser ⟸215—Equities held not with assignee of vendees in default as against subsequent purchasers.

Where vendees were in possession of and lived on improved premises for over five years, paid only small monthly rental, to which contract provided that payments should be applied in case of default, and made no attempt to comply with contract for several months after receiving notice of termination, equities were not with their assignee as against subsequent purchasers in latter's suit to quiet title.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by J. B. Weatherbee against Fred Sinn and others, in which named defendant filed cross-complaint. From a judgment for defendants and cross-complainant, plaintiff appeals. Affirmed.

A. M. Drew, of Fresno, for appellant.
Frank Kauke, of Fresno, for respondents.

TYLER, P. J. Action to quiet title to certain lands.

The complaint contains two counts—the first being one to quiet title, the other to recover the sum of $600, as money paid on the contract to purchase certain real property. The facts are as follows: On or about the 12th day of June, 1916, Ewing, McDaniel & Meux, a corporation, entered into an agree-

ment with A. P. Weatherbee and R. S. Weatherbee, assignors of plaintiff herein for the sale and purchase of an acre of land described as lot 6 of Woodrow Acre, Fresno county, Cal. The corporation agreed to sell, and the Weatherbees agreed to buy, the land and improvements thereon for the sum of $1,250. The contract required the payment of $25 upon the execution of the instrument, and the balance of the purchase price at the rate of $15 per month, payments to first apply upon interest and the balance upon principal; it also required the vendees to pay all taxes and assessments which might become due upon the property from the date thereof. It contained a provision that, in the event of failure on the part of the vendees to comply with its terms, the vendor could be released from all obligations in law and equity to convey the property, the vendees to waive all rights thereunder, and all money paid thereon to be considered as liquidated damages for the nonfulfillment thereof, the moneys received by the vendor to be applied as a reasonable rental for the use and occupancy of the said premises.

Time was declared to be of the essence of the contract. The vendees went into possession and payments were made by them at irregular intervals; the last being on May 16, 1921. At this time the Weatherbees were delinquent in an amount of $242.60, and, after application of the payments to the interest, the unpaid portion of the principal was the sum of $1,001.68 or thereabout, and none of the taxes for the year 1921 were paid by the vendees. On August 26, 1921, and after the vendees had been in actual occupancy of the premises for a period of over 5 years, and about the time they had abandoned their possession, a communication was sent to each of them by the company notifying them of their noncompliance with the terms of the contract. This notice demanded the payment of the amount of which the vendees were in default by September 1st following and advised them that, unless the amount was then paid, the company would declare the contract terminated and all rights thereunder forfeited. In reply to this communication, R. S. Weatherbee telegraphed the company asking for time to comply with the terms of the demand. No further action in this connection was had between the parties except that plaintiff made a tender some several months thereafter, a matter hereinafter referred to, and, the vendees having failed to make the payment, the corporation on October 4, 1921, conveyed the title of the property to defendant J. F. Ewing. A few days later, and on October 15, 1921, Ewing and his wife sold the same to one A. D. Becker, who assigned his interest to defendant Sinn, and he subsequently received a deed from the Ewings on December 18, 1921. At the time of these later transactions in relation to the sale of the property, the original agreement between the corporation and the Weatherbees was of record, but its execution was never acknowledged by the vendor corporation. On December 12, 1921, when the purchasers were some 7 months in default under the agreement, and some 3½ months prior to the conveyance of Ewing to Sinn, A. P. Weatherbee and R. S. Weatherbee, by J. B. Weatherbee, plaintiff herein, tendered J. F. Ewing, without knowledge of the sale to Becker, the sum of $310 in cash, being the amount of the principal and interest due up to that time on the original contract. Ewing refused to accept. An attempt was made at the trial to prove that this tender was not made in good faith, but on the contrary that it was made for the sole purpose of laying a foundation for the present action. No finding, however, was made upon this subject.

In the prayer of the amended complaint, plaintiff had asked that he be decreed to be the owner of an equitable interest in the premises, and that his title to the land be quieted, and on his second cause of action that he be repaid the sum of $637.50 for money paid by his predecessor in interest to the said defendants Ewing, McDaniel & Meux, Inc., and to J. F. Ewing, and for the further sum of $500 damages for breach of contract. Defendants Fred Sinn, J. F. Ewing, and Ada Ewing answered the complaint, setting forth that, by reason of the default on the part of the vendees, the contract of sale had been terminated, and defendant Fred Sinn, by cross-complaint, asked that his title to the property be quieted as against the plaintiff.

No service of summons was ever made upon the defendant Ewing, McDaniel & Meux, Inc., nor was any appearance made by the corporation and as to it the action was dismissed.

Under the facts as above narrated, the court found in effect, among other things, that plaintiff did not have any title or interest in an equity in the property. It further found that plaintiff's assignors were in default in the payment of installments due under the contract, and that they had forfeited all their rights thereunder. Additional findings were to the effect that at the time defendant Sinn took his conveyance he had no notice or knowledge of the contract of the Weatherbees nor of any claim by them to the property, or by any person claiming under them.

The findings being in favor of defendants and cross-complainant, the court rendered judgment to the effect that the action be dismissed as to the corporation (it never having been served) and that plaintiff take nothing, and that the title to the defendant Fred Sinn be quieted in the property as against plaintiff.

It is here claimed that the evidence fails to support the findings, and the notice attempting to terminate the contract between

the corporation and the Weatherbees is insufficient in form and effect to support the finding that the contract was terminated for the reason that it was inadequate and unreasonable in length of time of service. In support of this contention it is argued that, where time is made of the essence of the contract with reference to payments under contracts of the character here involved, and this covenant has been waived by the acceptance of money after it is due, such conduct will be regarded as creating such a temporary suspension of the right of forfeiture as can only be restored by giving a definite and specific notice of an intention to enforce it.

[1] It is true that where time is originally of the essence of a contract, and defaults have been subsequently waived, time ceases to be essential and becomes only material thereafter until the vendor again makes it essential by a proper notice and demand. Boone v. Templeman, 158 Cal. 290, 110 P. 947, 139 Am. St. Rep. 126; Stevinson v. Joy, 164 Cal. 279, 128 P. 751.

[2] The acceptance by the vendor of past-due payments waives all past defaults in performance, but does not alter the terms of the contract with regard to the future or eliminate as to future occurrences provisions that time is of its essence, that if the vendee fails to comply with its terms the vendor shall be released from all obligation to convey, and that payments already made shall be forfeited by such failure; its only effect as to the future is to give the vendee a reasonable time after the payment within which to perform his part of the contract. Hoppin v. Munsey, 185 Cal. 678, 198 P. 398.

[3] In such a case the question as to what is a reasonable time for performance after waiver of default on the part of the vendee depends upon the circumstance of each particular case, and is primarily a question of fact for the determination of the trial court. Id.

[4] Even if we assume that the notice here involved was insufficient as being unreasonable as to time, still we fail to see how plaintiff is in any manner benefited thereby. The corporation alone received all the payments that had been made under the contract, but it was never served, and the action against it was dismissed, and it is in no manner affected by the judgment.

[5] The trial court found that defendant Sinn had no notice whatever of the rights of the Weatherbees in the property. True it appeared that they had placed their agreement upon record, but its execution had never been acknowledged by the vendor corporation, and it constituted therefore no constructive notice to any one claiming under the vendor. An acknowledgment by the vendees alone under a contract of purchase of real property is insufficient to give the successors of the vendor the constructive notice which would otherwise result from the recordation thereof after proper acknowledgment by the vendor. Keese v. Beardsley, 190 Cal. 465, 213 P. 500, 26 A. L. R. 1538; Bell v. Sage, 60 Cal. App. 149, 212 P. 404. We are of the opinion therefore that the finding that defendant Sinn had no notice of the rights of plaintiff's assignors is conclusive against plaintiff herein, and is decisive of the case.

[6] The point is stressed that all the equities are with plaintiff, reference being made to the fact that some $600 had been paid under the contract, which sum was forfeited by the judgment. The equities are certainly not with the plaintiff. Plaintiff's assignors had been in possession and lived upon the premises, which were improved, for a period of over 5 years and the total sum they paid amounted to a very small monthly rental which the contract provided the payments made should be applied to in the event of a default. After receiving their notice, they made no attempt to comply with the contract until several months thereafter. However this may be, as above stated, we are of the opinion that the finding that defendant Sinn had no notice of the rights of plaintiff or his assignors is conclusive so far as the plaintiff is concerned, and whatever rights he may have, if any, are against the corporation and not against the defendants.

The judgment is affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

72 Cal. App. 497

HOLTHAM v. SAVORY et ux. (Civ. 5059.)

(District Court of Appeal, First District, Division 2, California. May 2, 1925.)

1. Evidence ⊂⇒461(1) — Mutual agreement, canceling terms of contract sued on, relating to employment as broker and to another matter, held cancellation of entire agreement, precluding admission of parol testimony to show contrary intent.

Mutual agreement in writing, that all matters, to show that provisions for plaintiff's employment as broker were not canceled, were fully settled and adjusted, and contract "hereby canceled by mutual consent of said parties hereto," *held* to have canceled whole contract, and parol evidence was not admissible to show contrary intent, in view of Civ. Code, §§ 1638, 1639.

2. Evidence ⊂⇒461(1)—When parol evidence is admissible in connection with a written instrument stated.

Where language used in a contract is ambiguous or fairly susceptible of either one of two interpretations contended for by the parties, parol evidence is admissible to construe the contract according to the true intent of the parties at the time of its execution.

3. Reformation of instruments ⟸1—Remedy of party desiring to sue on one part of agreement, whole of which by mistake was canceled, held suit to reform cancellation.

Remedy of party desiring to sue on one part of agreement, whole of which by mistake was canceled, *held* suit to reform the cancellation.

4. Brokers ⟸43(2)—Broker could not prevail, in absence of some memorandum in writing subscribed by party sought to be held or his agent.

In broker's action to recover commissions, broker could not prevail, in absence of some note or memorandum in writing, subscribed by defendant or his agent, in view of Code Civ. Proc. § 1973, subd. 6.

Appeal from Superior Court, City and County of San Francisco; J. L. Hudner, Judge.

Action by Mollie J. Holtham against George E. Savory and wife. From an adverse judgment and from an order denying new trial, plaintiff appeals. Affirmed.

Berry & Watson, of Stockton, for appellant.

Thomas W. Forsyth, of San Franscisco, for respondents.

PRESTON, Justice pro tem. This action is for the recovery of a real estate broker's commission in the sum of $1,500. The case was tried by the court without a jury, and judgment went for the defendants. From this judgment, and the order denying a new trial, the plaintiff prosecutes this appeal.

The facts necessary for a correct understanding of the questions involved on this appeal can be thus briefly stated:

Defendant George E. Savory owned approximately 200 acres of land in San Joaquin county, Cal. Appellant is a duly licensed real estate broker. On January 6, 1923, they entered into the following written contract, to wit:

"Superintendent's Contract.

"Stockton, Calif., Jan. 6, 1923.

"This contract is between George E. Savory, to be known hereafter as the party of the first part, and Mollie J. Holtham, to be known hereafter as the party of the second part.

"The party of the second part is to plant, seed and take off a crop of grain or hay (or plant as otherwise directed) on the Simms ranch of about 110 acres located at Simms Station off the French Camp road and the Murphy ranch of about 90 acres located about 1,800 feet east of same on the same road, the property of the first party.

"When the hay or grain has been taken off, the party of the second part is to plant the same acreage with Egyptian corn as a second crop and to harvest and put the same under shelter or as otherwise directed.

"For the services of the party of the second part, the party of the first part agrees to pay a salary of one hundred and twenty-five dollars ($125) or a Dodge touring car 1916 model valued at $300 and $100 monthly cash. If said party of the second part can rent the buildings on either or both places, said rent shall be placed to the credit of the party of the first part;

"The party of the first part hereby agrees that the Dodge touring car of $300 value may be applied as part payment on a Chevrolet coach car 1923 model and credit same to the credit of the party of the second part said $300, to be deducted from the salary of the party of the second part at the rate of twenty-five dollars ($25) per month, said party of the second part agreeing to pay the balance due on the Chevrolet coach of $834.63 in three payments of three months each to protect the party of the first part.

"The party of the first part places the said properties in the hands of the party of the second part for sale for the period of one year from date at a price to be subject to his approval.

"This contract to expire when ranches are sold or on January 1, 1924.

"[Signed] Geo. E. Savory, Owner.

"[Signed] Mollie J. Holtham, Superintendent."

Soon after the execution of this contract, the plaintiff moved upon the property and took possession thereof, and remained upon the premises until on or about the 26th of August, 1923, when she removed from the land and took up her residence in Modesto, Cal., leaving a caretaker in charge of the ranch.

Some time prior to October 16, 1923, a controversy arose between the plaintiff and defendant, George E. Savory, with reference to the payment of certain bills contracted by plaintiff while on the ranch, and the use and possession by plaintiff of an automobile, mentioned in the foregoing contract, belonging to defendant, George E. Savory. During this time the defendants resided in San Francisco, and plaintiff went to San Francisco and there met the defendants, and they all went to the office of defendants' attorney, and there, in the presence of all parties, the attorney for the defendants wrote on the original contract, and at the end thereof these words:

"October 16, 1923. All matters herein contained are fully settled and adjusted and the foregoing contract is hereby canceled by mutual consent of said parties hereto;"

And the same was then and there signed by both plaintiff, Mollie J. Holtham, and defendant, George E. Savory.

Thereafter, and before January 6, 1924, the ranch was sold to one Paul C. Fisher for $30,000, and plaintiff then brought this action to recover a 5 per cent. commission upon the sale price. Defendants answered, denying all of the allegations of the complaint, and as an affirmative defense, alleged that the said original contract relied upon by plaintiff had been canceled by mutual con-

sent, and pleaded the purported cancellation of October 16, 1923, above set forth. A trial was had; plaintiff took the witness stand in her own behalf, and, after a number of preliminary questions had been propounded to her by her own counsel on direct examination, and after both the original contract and the purported cancellation were placed in evidence, she was asked by her own counsel this question, "Did you have any conversation with Mr. Savory with respect to the sale of the properties on October 16, 1923?" to which an objection was interposed upon the ground that it was "an attempt to alter the terms of a written instrument." Then followed considerable discussion between counsel and the court, and, among other things, the following occurred:

"Mr. Watson: I am only attempting to show the court and explain what the parties understood at that time. It is a well-known fact, and it is elementary, that the acts and circumstances surrounding the facts are admissible to explain an ambiguity; and that is our purpose in offering this evidence, if your honor please.

"The Court: Well, I don't really see anything about it, except cancellation.

"Mr. Watson: That is our case, if your honor please, * * * it is our honest conclusion that the brokerage contract was not canceled, but the superintendent's was. There was nothing in dispute between them, except their mutual accounts, and those were settled. There were two contracts there which ran to separate dates. * * * There was nothing in dispute so far as the brokerage contract was concerned. There wasn't anything earned at that time by the plaintiff. * * * There is absolutely nothing so far as I can glean from the purported cancellation referring to the brokerage contract at all; and the facts and circumstances surrounding bear that contention out. * * * We might just as well have a ruling upon that * * * if your honor holds that it is a cancellation. * * *

"The Court: That is the way it looks now. Everything contained within the four corners of the paper referred to, and it sees no ambiguity; the meaning is clear, distinct, direct, and positive, and it has all the effects and earmarks of a cancellation. I don't know how else it could be effected. Anything further?

"Mr. Watson: It is a question of law.

"The Court: Anything further?

"Mr. Watson: There is no use going any further, if your honor please, and that is the reason we are submitting the issue at the present time.

"The Court: Very well. Judgment for the defendants."

[1] Therefore the sole question for determination on this appeal is: (1) Did the trial court err in holding that the purported cancellation of October 16, 1923, prevented the introduction of parol testimony?

Section 1638 of the Civil Code provides:

"The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

Section 1639 of the same Code provides:

"When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

The "other provisions" referred to by this section, however, are not applicable to clear and explicit terms of a contract freely entered into without any attendant circumstances of fraud, mistake, or accident. Halfhill Co. v. Fishermen's Exch., 50 Cal. App. 231, 195 P. 68.

Measuring the wording of the cancellation of October 16, 1923, by the foregoing rules, we see no escape from the conclusion that it is clear, explicit, and unambiguous and only susceptible of one meaning, and that is that the entire contract, with all of its provisions, is cancelled. Indeed, it would be difficult to imagine the use of more apt words to convey this meaning.

[2] The rule contended for by appellant is only applicable where the language used in the contract is ambiguous, or fairly susceptible of either one of two interpretations contended for by the parties, in which event parol evidence is always admissible for the purpose of construing the contract according to the true intent of the parties at the time of its execution. Balfour v. Fresno C. & I. Co., 109 Cal. 221, 41 P. 876; Joy v. Rousseau, (Cal. App.) 236 P. 972. But it is our judgment, as above stated, that the wording of the cancellation contract leaves no room for an application of this rule.

[3] If the contention of appellant be correct, and and it was in fact the intention of the parties to only adjust and settle the superintendent's contract, then appellant's remedy would have been first an appropriate action to reform the cancellation of October 16, 925, but such is not the form of action here resented.

[4] In view of the conclusion that we have reached, that the entire contract was canceled, the other points presented on this appeal become immaterial; for, in the absence of some note or memorandum in writing, subscribed by the respondent, George E. Savory, or his agent, appellant could not prevail in this action. Section 1973, Code Civ. Proc., subd. 6.

It follows, therefore, that the judgment should be, and it is hereby, affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

73 Cal. App. 128

JAEGER v. JAEGER. (Civ. 5119.)

(District Court of Appeal, First District, Division 1, California. June 4, 1925. Rehearing Denied July 3, 1925.)

Divorce ⟸308—Court by order may require payment by father of medical expenses of child of divorced parents incurred prior to entry of such order.

Under Civ. Code, § 138, as amended in 1905, providing that court at any time after divorce may make its order for the custody, care, education, maintenance, and support of minor children of the marriage, a court may by such order provide for the payment by the father for the support of the child prior to the entry of the order as well as thereafter, and an order requiring estate of father to pay for the medical expenses of child incurred prior to entry of order is valid.

Appeal from Superior Court, Sonoma County; R. L. Thompson, Judge.

Action by Lillian Fisk Jaeger against Samuel Allen Jaeger, by James R. Edwards, guardian of his estate. From a judgment for plaintiff, defendant appeals. Affirmed.

Harry T. Kyle, of Santa Rosa, for appellant.

R. M. Barrett, of Santa Rosa (Edgar D. Peixotto, of San Francisco, of counsel), for respondent.

CASHIN, J. Respondent, Lillian Fisk Jaeger, was formerly the wife of Samuel Allen Jaeger, an incompetent person, who appears as appellant herein by James R. Edwards, the guardian of his estate. The only issue of the marriage was Pualeilani Jaeger, a minor, whose age at the date of the orders hereinafter mentioned was four years, and of whose person and estate respondent has, since June 23, 1922, been the duly appointed, qualified, and acting guardian. By a final decree of the superior court of Sonoma county, entered on July 27, 1922, the parties were divorced, the grounds therefor being the fault of appellant. The care and custody of said minor by said decree were awarded to respondent. By the decree appellant was ordered to pay to respondent the sum of $100 each month for her support, and for the maintenance, support, and education of the minor the further sum of $30 each month. After the interlocutory decree, and before the entry of the final decree, after proceedings regularly had, appellant was adjudged to be incompetent, and the said James R. Edwards was duly appointed and qualified as the guardian of his estate. Thereafter, during the month of February, 1923, the said minor, due to an attack of tonsilitis, followed by pneumonia, became ill, the condition of illness and convalescence continuing until the month of August, 1923. Her condition made necessary an operation, the employment of physicians and nurses, and the purchase of medicines. On April 13, 1923, the superior court, on application of respondent, and the consent of appellant through his guardian, given in open court, made its order for the payment by appellant of the sum of $66 for the services of nurses for the minor theretofore rendered and made necessary by such illness. The illness continuing, respondent, between the date of said order and the month of August, 1923, procured the services of physicians and nurses, one of said nurses having been employed prior to and paid pursuant to the order made in April, and the furnishing of medicines for the minor, but made no application to the court for orders directing appellant to furnish or pay for such services and medicines until October 29, 1923, after the recovery of the minor. On the date last mentioned respondent filed her petition for the order of the court directing appellant to pay the additional expenses incurred, amounting to the sum of $993.85, alleging that the estate of appellant was ample, that the guardian of his estate had on hand funds sufficient to pay, and, according to the testimony of respondent, that she was without estate, and her earnings, with the amount allowed by the final decree for her support, were not sufficient therefor and for the extraordinary demands due to such illness; that she had borrowed the sum of $518.85, which had by her been paid on account of the expenses incurred, and that of such expenses the sum of $475 remained unpaid, together with the sum so borrowed. The court, after due notice and hearing, made its order directing the guardian to pay to respondent from the estate of appellant in the due course of administration thereof the sum of $993.85, as and for the maintenance and support of the minor, in addition to the monthly payments theretofore ordered. From this order the appeal was taken.

It is not denied by appellant that the services or medicines were necessary, that the charges therefor were reasonable, that the estate of appellant is able to pay, or that had the application been made before the services and medicines were furnished, the court, the necessity appearing, would have had authority to make the order; but contends that the services and medicines having been procured in advance thereof it was without power to make the order appealed from.

We are satisfied that the petition was sufficient to support the order if the court had authority on the facts to grant the relief prayed. The court acted pursuant to the provisions of section 138 of the Civil Code, as amended in 1905 (St. 1905, p. 43), which section, as originally enacted, was as follows:

"In an action for divorce the court may, before or after judgment, give such direction for the custody, care, and education of the children of

the marriage as may seem necessary or proper, and may at any time vacate or modify the same."

The section was amended in 1905 to read:

"In actions for divorce the court may, during the pendency of the action, or at the final hearing or at any time thereafter during the minority of any of the children of the marriage, make such order for the custody, care, education, maintenance and support of such minor children as may seem necessary or proper, and may at any time modify or vacate the same."

Prior to the adoption of the codes, the statute (Stats. 1851, p. 187, § 7), authorizing courts to make orders subsequent to judgment for the maintenance of the children of the marriage, provided:

"In any action for a divorce, the court may, during the pendency of the action, or at the final hearing, or afterwards, make such order for the support of the wife, and the maintenance and education of the children of the marriage, as may be just, and may at any time thereafter annul, vary or modify such order, as the interest and welfare of the children may require."

In the case of Wilson v. Wilson, 45 Cal. 399, on appeal from an order of the district court, made pursuant to the statute of 1851, supra, requiring the divorced husband to pay the plaintiff (wife) certain sums for the future and past maintenance of the minor child of the marriage, there having been no provision made therefor in the decree, and the wife having incurred the expense necessary for such past support, the order was affirmed, the court holding that, under the statute, supra, where it is shown that the interest and welfare of the child required it, and that such order is just, it was within the power of the court to provide for the payment by the husband of the past as well as the future maintenance of the child. Section 138 of the Civil Code, as originally enacted, empowered the court to "give such direction for the custody, care, and education of the children of the marriage as may seem necessary or proper," either by the original decree or a modification thereof. In the case of McKay v. McKay, 125 Cal. 65, 57 P. 677, relied on by appellant, an appeal from an order of the superior court directing the payment by defendant (the divorced husband) of sums for the past and future support of the children of the marriage awarded by the decree to the plaintiff (wife), and in which decree no provision was made for the maintenance of the children, the court, in reversing the order for the past and affirming the order for the future support, referred to the case of Wilson v. Wilson, supra, and held that, the Wilson Case having been decided prior to the adoption of the codes, and under a statute expressly authorizing the court to make an order subsequent to the judgment for the maintenance of the children of the marriage, could not be regarded as an authority under a different provision of the code; that the provisions of section 138 of the Civil Code in form in force, in the use of the term "direction" instead of "payment," implied that the action of the court was to be limited to the "care, custody, and education" which the children were to subsequently receive under its direction.

The facts of the McKay Case, as shown by the opinion, were that the plaintiff after the decree married one Polastri, who took the children into his own family and supported them as members thereof; that plaintiff claimed no compensation for such support; that as to any compensation therefor such would be to recompense Polastri for moneys spent upon the children. The court held that under the provisions of section 209 of the Civil Code, while Polastri was not bound to maintain his wife's children by McKay, yet, having received them into his family and supported them, it was to be presumed that he did so as a parent, and that where such was the case they were not liable to him for their support, nor he to them for their services, and that he could have no claim on defendant McKay for such support. The court proceeds to discuss the general rule that where the children have already been sufficiently cared for by the voluntary act of the mother or of strangers the court is not empowered to compel the father to reimburse these persons for such expenses. Citing Loveren v. Loveren, 100 Cal. 493, 35 P. 87, and section 208, Civ. Code.

After the decision in the McKay Case, section 138 of the Civil Code was, by the statute of 1905, page 43, amended to read as above. In Harlan v. Harlan, 154 Cal. 341, 98 P. 32, the court, in considering the apparent conflict between the decision in the McKay Case and that of Shattuck v. Shattuck, 135 Cal. 192, 67 P. 45, held that the word "care," as used in section 138 of the Civil Code as originally enacted, is a broader term than the word "maintenance," and that, combined with "custody and education," it included every element of provision for the physical, mental, and moral welfare of the child; that an order for the benefit of the children is equally within the jurisdiction of the court under said section 138, whether it uses the term "maintenance and support" or the broader and more inclusive expression "custody, care, and education"; and further that "all that was held in McKay v. McKay was that the court should not, by an order made in such a case, compel the husband to reimburse the wife or a third party for past expenditures incurred for the benefit of the children." The court in the McKay Case did not indicate its dissent from the decision in the Wilson Case, supra, based upon the provisions of the statute then in force, but was of the opinion that, under the language of section 138 of the Civil

Code as originally enacted, the court was without power to do more than to give such direction as might be proper for the future custody, care, and education of the children of the marriage. The amendment includes not only the power to make such order for the "maintenance and education"—the language of the statute of 1851 on which the decision in the Wilson case, supra, was based—but also for the "custody, care, education, and support" of such children, with power under both statutes to modify the order in proper cases. The Wilson and McKay Cases, both in law and fact, were clearly to be distinguished, as is in our opinion to be distinguished from the latter the case at bar. In the instant case the court modified the original decree providing for the "maintenance, support, and education" of the child by providing by its order of April 13, 1923, for additional payments to meet the expense, as may be inferred from the testimony of the mother, of what might reasonably have been believed to be an illness of short duration due to tonsilitis. Pneumonia following, immediate recourse to the services of physicians, the incurring of expense for medicines, and the further services of the nurses theretofore employed and whose employment was impliedly authorized by the order of April, 1923, became necessary. Had respondent been able to adduce at the hearing in April, 1923, evidence reasonably supporting the conclusion that the existing illness of the child would develop into conditions so serious and prolonged, the court would have had power to order the payment of the necessary expenses from time to time as needed; but from the nature of such cases evidence of such necessity would rarely appear to the ordinary observer, and the opinions of skilled medical practitioners as to the expense of treating and the duration of a disease would be largely matters of conjecture. Such circumstances, the emergency shown, and her dependent condition preclude the inference that her act in procuring relief for the child was voluntary in the sense that it was deliberate, or that no reliance was placed by her on orders previously made and to be made in the future by the court.

The case of Gay v. Gay, 146 Cal. 237, 79 P. 885, was an apeal from an order made after judgment of divorce rendered in favor of the plaintiff wife. The order required the husband to pay certain sums for her maintenance pending the appeal from the judgment, and in part provided for the payment of a sum covering a period preceding the motion and order. It was urged that the superior court was without power to order what was in effect a reimbursement of the cost of the wife's past support. The court, in distinguishing the decision in Loveren v. Loveren, supra, wherein an order for the reimbursement of a wife for expenses paid out of her separate estate or for moneys obtained upon her own credit was reversed, said:

"In the case cited, the rule that payments for past expenses shall not be allowed, is not absolute, but is subject to the qualification that such an order may be made whenever it appears that such payment is necessary to enable the wife to further prosecute or defend her case. And the same qualification to the rule should apply to applications by the wife for support. If it should appear to the court that it was necessary, in order to insure the support of the wife upon the amount to be paid to her periodically in the future, that existing wants or expenses incurred by her should be provided for, the court, within the qualification announced * * * would have the right to do so."

The court further held with reference to the order before it on appeal that the superior court, in making such order, properly took into consideration that in the interim between the entry of the judgment and the making of the order the wife was in indigent circumstances; that necessarily, being without means, she must have been restricted in supplying herself with many things suitable to her condition in life, or that, if these things were supplied, they must have been obtained upon credit asked and extended on the faith of a subsequent allowance to be made by the court; that under this state of circumstances it would be only proper for the court to make an immediate allowance in gross adequate to meet present actual wants arising therefrom, or to discharge her indebtedness and restore her credit, or for both purposes; that the court, by doing this in the first instance, realized that it would leave her free from embarrassment through existing wants or present indebtedness, obviate the necessity of devoting any part of the future allowance to the payment of such indebtedness, and so enable her to live in the future upon the allowance provided for that purpose.

The reasoning of the court in Gay v. Gay, supra, in construing the language of section 137 of the Civil Code, and applying the section so construed to the facts before it, is equally pertinent to the present case. Neither section 137 nor section 138 of said code expressly provides for allowances for past support either of the wife or children; but considering the purpose of both, and that the first bears such construction in support of an order based on facts analogous to those in the instant case—wherein it is apparent from the evidence that the allowance originally made for the support of the wife and child was insufficient to meet the necessities due to the illness of the child, that both were without other means sufficient therefor; that if the necessity was to be met the credit of the wife must be pledged, based upon the faith of a subsequent allowance by the court, and that to place the burden upon them or either would in effect deprive them of the

possibility of living upon the allowance provided for the future—we are led to the conclusion that the language of section 138, Civil Code, as amended, makes it equally clear that the section permits an order under similar conditions to accomplish like results.

The amendment adopted in 1905 to section 138 of the Civil Code was a substantial re-enactment of the statute of 1851, supra, which statute had been judicially interpreted by the court in Wilson v. Wilson, supra. No intention to the contrary being shown, and the Wilson Case, in respect of the court's interpretation of the law then in force, not having been overruled, it may fairly be inferred that the Legislature intended that the amendment should bear the same interpretation which had been given to the original act. Black's Law of Judicial Precedents, p. 235; Black's Interpretation of Law, p. 607; Lewis' Sutherland Statutory Construction (2d Ed.) § 399. It is our opinion that in view of the purpose to protect the interests of the children and to enforce the obligations of the parents (Harlan v. Harlan, supra), a reasonably liberal construction of the language of the section as amended leads fairly to the conclusion that the order appealed from in this case was authorized thereby.

The order is therefore affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

---

73 Cal. App. 74

PEOPLE v. LEW HOE. (Cr. 1242.)

(District Court of Appeal, First District, Division 2, California. June 1, 1925.)

1. Homicide ⊂=250—Evidence sufficient to sustain conviction for murder.

In prosecution for murder, evidence *held* sufficient to sustain conviction.

2. Criminal law ⊂=1137(5)—Answer to improper question asked witness by trial court held not prejudicial, where requested by counsel for accused.

In murder prosecution, where trial court asked officer if, in obtaining written statement from accused, latter had been asked whether deceased had said that accused had shot him, on belief that counsel for accused, in looking over list of questions, had not objected to that one, answer to question, after objection had been made, and court had withdrawn it, but resubmitted it on request of counsel for accused, *held* not prejudicial.

Appeal from Superior Court, City and County of San Francisco; Louis H. Ward, Judge.

Lew Hoe was convicted of murder, and he appeals. Affirmed.

Sylvester J. McAtee, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. This is an appeal by the defendant from a judgment upon a verdict of a jury finding him guilty of murder. Appellant's statement of facts fairly summarizes the outstanding features of the record, which are:

[1] Lum Wing Lock, the deceased, lived in a room on the second floor of a building on Grant avenue in San Francisco, Cal. Another room close by was occupied by his son, Lum Sing Gum, and a companion, Mock Jim. In another room, No. 35, upon the same floor, lived the defendant and appellant. At about 6 o'clock on the morning of March 8, 1924, the deceased was shot while he was in a kitchen upon the same floor, but at a little distance down the hall from the room of the deceased. This was a community kitchen, and not directly connected either with the sleeping room of the deceased or of the appellant.

The deceased was shot twice in the back, the bullets penetrating the abdomen and passing through the body. The weapon with which the shooting was done was held so close to the body of the deceased as to leave powder burns upon his clothing. He died within a few hours.

Mock Jim. the young Chinese who occupied the same room with Lum Sing Gum, the son of the deceased, testified that on that morning he had left his room to go to a toilet situated on the opposite side of the hallway from where the kitchen was located. He saw the deceased walking ahead of him in the hallway, and saw him enter the kitchen. Mock Jim entered the toilet, and while there he heard some one walking in the hall, and then he heard a pistol shot. He put his head outside the door of the toilet and saw the defendant a few steps away from him, firing his revolver into the kitchen. He heard three shots fired, and retreated again into the toilet as the defendant turned and started back to his room. While the shots were being fired, Mock Jim heard the deceased call out: "Save my life, Lew Hoe is shooting me." After the defendant re-entered his room, Mock Jim went to the kitchen and assisted the son of deceased in carrying the wounded man into the hall.

The testimony of Mock Jim is corroborated by the testimony of Lum Sing Gum, son of deceased, who stated that, while he was still in bed, Mock Jim left the room which they were occupying together; that shortly afterwards the witness heard a shot; that he jumped out of bed and heard two other shots fired in rapid succession and heard his father cry out: "Save my life, Lew Hoe is shooting me." Lum Sing Gum ran into the hallway in time to see the defendant walk

rapidly down the hall and enter his own room. He did not see any weapon in the hands of defendant, but stated that defendant had his hand in his coat pocket.

The police officers were called and they knocked at the door of the room occupied by defendant and demanded admittance in English and in Chinese, but the defendant refused to open the door, and the officers broke it open and found the defendant. They asked him about a revolver and, he replied that he had "no gun." Upon searching the room, the police found a revolver under the mattress of defendant's bed. There were no cartridges in it, but one of the officers testified that when it was found the barrel was still warm as though the weapon had recently been discharged. Defendant also denied that he had any cartridges for this revolver. After defendant had been taken to the police station, a further search of his room revealed three cartridges of a size to fit his revolver, hid away in the bottom of a chopstick holder upon the wall of the room.

The foregoing testimony sustains the verdict, regardless of the conflict raised by the denials of defendant, and regardless of the unexplained circumstance that no empty cartridge shells were found in defendant's room after a most careful search.

[2] The only ground urged by the appellant for a reversal of the judgment is that the court was guilty of misconduct with relation to certain evidence offered by the prosecution. This was a written statement signed by defendant before the trial. When it was offered in evidence, it was objected to. However, counsel for defendant stated that all portions of this statement were admissible except one question and answer, which he indicated to the court with his finger. The court said he would ask questions of the police officer based upon this written statement of defendant, and objections could be made to each question. A number of questions were asked, and the answers were given by the officer by refreshing his recollection with the signed statement of defendant. No objection was made until the court asked the officer if defendant had been asked: "Did Lum Wing Lock say that you shot him?" Objection was made, upon the ground that this embodied an accusation which had been immediately denied by defendant and was therefore inadmissible against him, and the action of the court in stating it before the jury was assigned as misconduct. The court replied that this was not the statement which counsel had indicated he would object to, and that the court understood that the question to which counsel had pointed was: "Did you shoot Lum Wing Lock? A. No." The court had omitted this question and answer from his examination of the witness. When counsel insisted that he had objected to the question which the court had asked and not to the one which was omitted by the court, the objectionable question was ordered stricken out. However, counsel for defendant insisted that the answer to this question should also be read to the jury, since they had heard the question, and the court had the answer repeated by the witness, which was: "Yes, but he tell a lie."

Conceding that the question and answer were not admissible, nevertheless no prejudice could have resulted to the defendant from a mere reading of the question alone, because the jury did not know but what the answer to it was in the negative. It was only when the counsel for defendant insisted upon the answer being read into the record that the fact came before the jury that deceased had made an accusation against defendant. It is apparent that there is no prejudicial error presented by this incident which would warrant a reversal of this judgment.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

72 Cal. App. 757

TROY v. TROY. (Civ. 4952.)

(District Court of Appeal, First District, Division 2, California. May 27, 1925. Rehearing Denied and Opinion Modified June 25, 1925. Hearing Denied by Supreme Court July 24, 1925.)

1. Contracts ⇐332(1)—Complaint need not allege ownership of loan.

In action to recover a loan, where neither complaint nor proof in any way suggested assignment or transfer by plaintiff of any rights, complaint *held* not required to allege that plaintiff was owner and holder of obligation.

2. Pleading ⇐236(5)—Amendment as to due date of note sued on not abuse of discretion.

In action to recover loan which had been evidenced by writing, trial amendment of complaint as to due date, in order to conform to proof, *held* not abuse of discretion, notwithstanding it was made after motion to strike evidence as not in conformance with pleadings.

3. Limitation of actions ⇐25(1)—Action on note not barred.

Action to recover loan, evidenced by writing, payable on or before 90 days from April 11, 1913, *held* not barred, where action was commenced on April 10, 1917, in view of Code Civ. Proc. § 337.

4. Pleading ⇐238(3)—Evidence held admissible to show plaintiff was not estopped to seek to amend to conform to proof.

Where action to recover loan, evidenced by writing, was commenced on facts as disclosed to attorneys by plaintiff's son, and complaint alleg-

ed improper due date, admission of son's testimony as to telling attorney of having forgotten due date *held* admissible to show that plaintiff should not be estopped by allegations of her pleading from setting up proper due date to conform to proof.

5. Appeal and error ⇐1012(1) — Weight of testimony is for trial court, and will not be disturbed, except for abuse of discretion.

In case tried by court, weighing of testimony is function for trial court, which appellate court will not disturb, except for abuse of discretion.

6. Husband and wife ⇐232(3)—Wife's testimony as to lending husband money and letting him have custody of note evidencing it not inherently improbable.

In action to recover loan, testimony of wife that she loaned former husband money, and let him have custody of writing evidencing loan, and that he had refused to return same to her, *held* not inherently improbable.

7. Husband and wife ⇐232(3)—Finding that husband did not have contract with wife for $5,000 for legal services rendered her sustained.

In action to recover loan by wife against former husband, evidence *held* to sustain finding that husband did not have express contract with wife for $5,000 a year for legal services rendered her.

8. Trial ⇐397(3)—Refusal to find reasonable value of husband's services as wife's attorney sustained, where not in issue.

In action by wife to recover loan to former husband, where latter counterclaimed on basis of alleged contract for $5,000 per year for services as her attorney, failure of trial court to find reasonable value of husband's services to wife *held* not error, in absence of any allegation of promise of wife to pay reasonable compensation.

9. Appeal and error ⇐716—Appellate court interested only in conclusions of trial court and not reasons.

Reasons of trial court as indicated by a memorandum written by him for guidance of counsel in preparing finding will not be considered on appeal; conclusions only being considered.

10. Appeal and error ⇐715(2) — Irregularities occurring in courtroom must be presented by bill of exceptions.

Although, under Code Civ. Proc. § 658, irregularities of court, adverse party, or attorney for adverse party not occurring in courtroom may properly be presented by affidavit, all irregularities occurring in the courtroom must be presented by bill of exceptions made up from reporter's notes showing occurrence, objection, and exception.

11. Witnesses ⇐391—Questions in impeachment may be leading.

Where, on cross-examination, a party has made certain statements that questions to another witness, introduced for impeachment purposes, are leading is not improper.

12. Judgment ⇐570(4)—Action dismissed several months before trial of present action held not a bar to latter.

In action against former husband to recover loan, a former action between same parties for an accounting *held* not a bar, where latter case was dismissed on motion of defendant several months before trial in present case.

13. Judgment ⇐590(1)—Divorce decree in action alleging cruelty in borrowing money and not returning it held no bar to action to recover loan.

In action to recover loan by wife against former husband, decree in divorce action in which wife had alleged cruelty of husband in borrowing money and not returning it *held* not a bar, especially where loan sued for was not especially alleged in divorce decree, and where no accounting between husband and wife was asked or made.

14. Fraudulent conveyances ⇐241(2) — Conveyance of property by wife could not be complained of by husband as fraudulent, in absence of judgment against her.

In action to recover loan by wife against former husband, in which latter counterclaimed, refusal of court to allow him to amend by alleging her fraudulent conveyance of her property to defeat any sum he might recover *held* proper, as he had obtained no judgment at time of motion, and could not complain of her disposition of property.

15. Appeal and error ⇐760(1) — Appellate court will not search lengthy record for alleged error.

Appellate court will not search lengthy record for alleged error in absence of direction thereto by counsel.

16. Witnesses ⇐286(5)—Admission of memorandum book, on redirect examination of party, to show it was not manufactured, as was sought to be shown on cross-examination, not error.

Where plaintiff had referred to memorandum book, in which she kept record of financial transactions, and defendant, on cross-examination, had attempted to prove that memorandum book had been recently manufactured by witness, and that items had not been entered as of date that they occurred, admission, on redirect examination, of memorandum book to show it was not manufactured as claimed *held* not error.

17. Appeal and error ⇐207 — Argument to which no objection was offered at trial will not be considered error.

Argument of attorney, even if going outside the record, to which no objection was made at trial, will not be considered prejudicial error.

18. Appeal and error ⇐911(3)—Judicial duty presumed regularly performed, in absence of competent evidence to contrary.

Although presiding judge was not the regular judge for county, and there was nothing in record to show his authority to preside, judicial duty will be presumed to have been regularly performed, in absence of any competent legal evidence to the contrary.

On Petition for Rehearing.

19. Appeal and error ⊜762—Objection that judge, hearing motion for new trial, had no jurisdiction waived, where not presented in opening brief.

Objection that judge who heard motion for new trial, had no jurisdiction of such hearing *held* waived, where not presented in opening brief.

20. Appeal and error ⊜760(1)—Objectionable argument must be pointed out in appellant's opening brief.

In relying for reversal on alleged improper argument, even if matters objected to were contained in bill of exceptions, they would not be considered on appeal, where location of matter objected to was not stated in opening brief.

21. Appeal and error ⊜715(2)—Objections to conduct of counsel must be contained in bill of exceptions and not affidavits.

Objections to conduct of counsel in presenting evidence and the rulings thereon must be contained in bill of exceptions, and not in affidavits, for consideration on appeal.

22. Appeal and error ⊜970(1)—Trial court held not prejudiced by improper offer of evidence.

It will not be assumed on appeal that trial court, sitting without jury, in trial of civil action, was prejudiced by suggestions of fact contained in questions or offers of evidence to which objections were sustained.

Appeal from Superior Court, City and County of San Francisco; Emmett Seawell, Judge.

Action by Hortense S. Troy against Robert P. Troy. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; Seawell, J., and Houser, Justice pro tem., deeming themselves disqualified, not participating herein.

Robert P. Troy and H. H. McPike, both of San Francisco, for appellant.

Francis J. Heney, of Los Angeles, John D. Rutledge, of San Francisco, and W. S. White, of Los Angeles, for respondent.

STURTEVANT, J. This is an appeal by the defendant from a judgment rendered against him in an action commenced by the plaintiff to recover $17,000 alleged to have been loaned by the plaintiff to the defendant. The appellant has brought up the judgment roll and a bill of exceptions—a record consisting of 1500 pages. The appellant has filed three briefs, and the respondent has filed three. Those facts will account for the length of this opinion.

In the original complaint, and likewise in the amended complaint, the plaintiff alleged that "on April 11, 1913, defendant herein borrowed from plaintiff herein, and plaintiff herein loaned to defendant herein, the sum of $17,000; and on said date defendant herein promised in writing to repay said sum of $17,000 to said plaintiff. * * *" In the original and amended complaints the above language was followed with the phrase "within a reasonable time after said April 11, 1913." During the trial, and after the plaintiff's evidence had been introduced, the trial court allowed the plaintiff to strike out the phrase last quoted, and to insert in lieu thereof, "on or before ninety (90) days from and after the said 11th day of April, 1913, with interest thereon at the rate of 6½% per annum." In the original and amended complaints the second paragraph was "that a reasonable time for repayment of said sum, after said April 11, 1913, has elapsed." In the same order last above mentioned the trial court authorized the plaintiff to strike out those words, and to insert in lieu thereof "that defendant has paid the said interest thereon up to and including the 31st day of December, 1915, but has not paid said interest, or any part thereof, since the said 31st day of December, 1915, and said interest is now due, owing, and unpaid from defendant to plaintiff."

[1] The appellant makes the attack that the plaintiff's complaint does not allege that she is the owner and holder. Neither in the complaint nor in the proof as introduced at the trial was there any suggestion of assignment or transfer by the plaintiff of any of her rights. The whole theory of the plaintiff's case was that she claimed to have loaned the defendant money, and that at the time of the loan, or about that time, a writing evidencing the loan was executed by the defendant to the plaintiff. Under such facts it was not necessary that the allegations referred to should have been incorporated in the complaint. 8 C. J. 885, § 1158; Pryce v. Jordan, 69 Cal. 569, 11 P. 185.

[2, 3] The appellant also complains because the trial court allowed the amendment mentioned above. An examination of the testimony given by the plaintiff discloses that the amendments but conform to the proof. A mere comparison of the allegations contained in the original complaint and the allegations contained in the complaint as finally amended is a sufficient refutation of the statement that any of the amendments changed or purported to change the cause of action. Conceding that there is an inconsistency between an obligation which is payable in a reasonable time and one which is payable in three months, such inconsistency was not a legal objection to an allowance of an application to amend, but was a circumstance to be considered by the trial court after the submission of the whole cause for the purpose of determining the rights of the parties. Having determined that the writing executed contained the statement that it was payable "on or before ninety days from and after the 11th day of April,

1913." it is clear that the trial court was correct in holding that an action commenced on the 10th day of April, 1917, was not barred by the statute of limitations. Code Civ. Proc. § 337.

[4] The action was commenced in the city and county of San Francisco at a time when the plaintiff was at Los Angeles. The plaintiff's son, W. S. White, an attorney at law, called upon and stated certain facts to T. M. O'Connor and William A. Kelly, both attorneys at law, and employed them to commence the action. During the presentation of the plaintiff's case she called as a witness Mr. W. S. White for the purpose of showing that the variance between the allegations of the original complaint and the sworn testimony given by the plaintiff while on the stand arose by reason of a want of information by the agents of the plaintiff as to the facts and not by reason of inconsistent statements of the plaintiff. Over numerous objections he was allowed to testify regarding the facts as he had stated them to Mr. O'Connor. In that behalf the witness testified as follows:

"At that time I told Mr. O'Connor something about whether the note bore interest or what rate of interest. I told him that the note bore interest, and as to the rate of interest I was not certain. I told him that I had a conversation with my mother both concerning the interest and the maturity of the note. I told him that I had a conversation, several conversations, with Mrs. Troy relative to the principal and maturity of this note, and as to both the maturity and the amount of interest I was not certain. And also I stated I was not certain as to how much interest had been paid on the note. I told him I was not certain because I had forgotten it. It was in the office of O'Connor & Kelly that the attachment suit was prepared. I was present when the word 'interest' was stricken out of the writ of attachment. We did not know just how much interest had been paid on the note, and therefore we could not allege the amount in the complaint; consequently we could not make an affidavit upon which the sheriff could have a writ of attachment; so in order to be certain, and have a proper attachment for $17,000, we struck out the amount of interest, because it was an uncertainty involved."

Conceding that Mr. White's testimony was hearsay, it is patent that the statements did not purport to include any testimony to the effect that the $17,000 was a loan, or that the loan had not been repaid. Furthermore, for the purpose of showing that the plaintiff should not be estopped by the allegations of her pleadings, the testimony was not objectionable. The appellant did not ask the trial court to limit the testimony, and there is nothing contained in the record showing that the trial court used the testimony for any purpose other than that for which it was proper to use it.

[5, 6] When the plaintiff commenced the presentation of her case, she took the stand, and testified in support of the allegations contained in her complaint. Thereafter she was cross-examined. She gave sworn testimony sustaining every allegation contained in her complaint. True it is that there are some inconsistencies and contradictions in her testimony, but they went merely to the weight of her testimony, and the weighing of the testimony was a function of the trial court which this court may not disturb, unless there was an abuse of discretion. In this instance we are not in the least inclined to hold that there was an abuse of discretion. The plaintiff testified that she paid the defendant the money and that it was a loan. The defendant later admitted receiving the money, but claimed that it was not a loan. The plaintiff claimed that the defendant executed to her on the next day a promissory note reciting the facts alleged in her complaint as finally amended; that later he brought the note to her at their house, and after he had read it he induced her to let him have the custody of the paper; that she did so; and that thereafter the defendant never returned the paper to her. All of these facts, it may be conceded, were contradicted by the defendant, but the conflicts in the evidence were wholly for the trial court. The defendant cites numerous passages, and argues that the showing made by the plaintiff is inherently improbable. We cannot so hold.

[7, 8] The defendant interposed a pleading marked cross-complaint and counterclaim. Therein he pleaded that from the 10th day of January, 1904, to the 28th day of October, 1916, he acted as the manager and attorney at law of the plaintiff; that he so acted under an express agreement that his compensation should be $5,000 per annum. He alleged that he received on March 27, 1913, $17,000 from the plaintiff, and that there remained due and owing to him the sum of $32,000. Throughout the trial of the case it was therefore the contention of the defendant that, although he received from the plaintiff the said sum of $17,000, he did not receive it as a loan. In this connection it is pertinent to note that the plaintiff and defendant intermarried July 22, 1904, and they lived together as man and wife until the latter part of the year 1915, when they separated. The defendant devotes a great deal of time and space to show that he was employed by and performed services for the plaintiff, and that his cross-complaint and counterclaim therefore should have been sustained by the trial court. If the mere fact of a husband rendering services to his wife constituted a cause of action, there might be something in the appellant's contention. However, respondent argues it was her claim that any services rendered by the defendant for the plaintiff were rendered gratuitously and not otherwise, and that there was no connection whatever between the rendition of services by the defendant and the pay-

ment by the plaintiff of $17,000 to the defendant. In support of that contention the trial court found the facts as claimed by the respondent. Conceding that there may be some contradictions in the evidence, it is clear from an inspection of the record that the trial court was clearly correct in holding that the preponderance of the showing was to the effect that the defendant did not hold any express contract in the sum of $5,000 or any other sum. In this connection the defendant complains because the trial court did not make a finding as to the reasonable value of the defendant's services, but it is a sufficient reply to that contention that the pleadings on which the trial was had did not present the issue. In so far as there was anything purporting to be an allegation of a promise to pay the defendant "reasonable compensation," the trial court found the fact against the appellant in finding No. 14.

Many attacks are made on the findings, and we have noted the most of them above. The first finding purports to reply to the allegations contained in paragraph 1 and paragraph 2, of plaintiff's complaint as finally amended. However, it contains some words not responsive to the allegations mentioned. It refers to the writing "evidencing" something. The defendant claims that language is a conclusion of law. Conceding that it is, the contention reaches nowhere. The other findings sufficiently support the judgment.

[9] In ruling the case the learned judge who presided at the trial wrote a memorandum for the guidance of counsel in preparing findings. The defendant caused the memorandum to be inserted in the bill of exceptions, and thereafter in his brief the defendant proceeded to dissect the memorandum, and now asks this court to express its opinion as to whether the reasons assigned by the trial judge are correct or incorrect. However, this court is merely concerned with the conclusions of the trial judge and not with his reasons. In the interest of time this court will not therefore go further into that subject.

[10] In his motion for a new trial the defendant included all of the statutory grounds, including "irregularity in the proceedings of the court, jury, or adverse party, * * * by which either party was prevented from having a fair trial." In support of his motion based on the ground last stated the defendant cites passages contained in an affidavit that is printed in the bill of exceptions, folios 3918 to 4406. As to any irregularities of the court, or of the adverse party, or of the attorneys for the adverse party, that did not occur in the courtroom, it is patent that the proper method of presenting them is by affidavit. Code Civ. Proc. § 658. However, as to any irregularities which occurred in the courtroom it is equally patent that the bill of exceptions, made up from the reporter's notes showing the occurrence, the objection, and the exception, is the proper embodiment of such matters. Gay v. Torrance, 145 Cal. 144, 78 P. 540. In this connection appellant complains regarding "leading questions involving misconduct and reversible errors," but the facts presenting this alleged error are contained in the affidavit above mentioned, and are not set forth in the bill of exceptions.

[11] The plaintiff had rested her case. The defendant had introduced the greater part of his case. Among other things, he had taken the stand, and had been examined and cross-examined at great length. As one of the witnesses for the defense, the defendant took the stand and testified in support of the allegations of his pleadings. On cross-examination one of the attorneys for the plaintiff called to the attention of the witness a certain date in the year 1905, at 1776 Bush street, San Francisco, and a conversation alleged to have been held between the witness and the plaintiff in the presence of Miss Hortense White and William S. White, no one else being present, and thereupon counsel asked the witness if at the time mentioned he had a conversation with the persons named in which the question of putting Mrs. Troy's property in a trust was discussed. The witness neither affirmed nor denied, but made an answer in the nature of an explanation. Thereupon other questions regarding the same subject were propounded, some of which were answered in the negative. Almost immediately thereafter similar proceedings were had regarding a conversation between the witness and Mr. W. S. White in the month of April, 1913, while riding in an automobile in the vicinity of the residence of Abe Ruef, in which conversation it was claimed the witness had said in substance that for anything he might do for his wife he would not think of charging one cent, because she was his wife. The witness answered the question in the negative. Thereafter the plaintiff called W. S. White as a witness, and propounded substantially the same questions to him. Over the objection of the appellant that the question was leading, the court allowed the witness W. S. White to answer the questions. That questions in impeachment are leading is not a sound objection.

During the progress of the trial, after the plaintiff had rested her case, the defendant moved that all of the testimony of the plaintiff be stricken out because in the original complaint and the amended complaint she alleged that the note in question was payable in a reasonable time, and because she had not alleged that the same bore interest, whereas the plaintiff had introduced evidence to the effect that the note was payable in 90 days, and that it carried interest at the rate of 6½ per cent. As we have shown in another part of this opinion, permission was asked and granted allowing the plaintiff to amend her pleading to conform to the proof.

Counsel has not quoted passages from the record informing us as to whether the amendments were made before or after the motion to strike out was made. Assuming, in support of the appellant's point, that the amendments were made subsequently, the irregularity was not so grave as to constitute a reversible error.

[12, 13] Immediately thereafter the appellant moved for a nonsuit on the ground that the action was barred by the statute of limitations. If the trial court accepted the testimony of the plaintiff as being true, and on the hearing of a motion for a nonsuit the trial court was bound to so accept it, it is quite clear that the attack as made was not well founded. The motion was based on the further ground that there was no proof that the alleged obligation was ever delivered and that there was no proof of a contract. For the same reasons the motion was not well founded. The motion was also based upon the same variance that the motion to strike out was based upon. The same reasoning that demonstrates that it was not a reversible error to deny the motion to strike out is equally applicable to the ruling of the trial court denying the motion for a nonsuit. The motion for a nonsuit was also based on the claim that another action, No. 85258, which was an action commenced by the same plaintiff against the same defendant to obtain a decree in accounting, was a bar to the case on trial. The record shows that the action last mentioned was dismissed on motion of the defendant November 1, 1920, several months before the trial of this action commenced. That action having been dismissed, the order of dismissal was not a bar to this action. Neither does the fact that action 85258 was commenced and was pending for a while support the contention of the defendant that the plaintiff split, or attempted to split, her cause of action. The motion was also based on the ground that a divorce action was commenced by the plaintiff against the defendant, action known as No. 85872, and that the judgment therein was a bar. In that action the plaintiff alleged as an act of cruelty that the defendant borrowed from the plaintiff numerous sums of money, and thereafter did not repay them. The $17,000 alleged loan was not specified in the allegations nor findings. In the divorce action no judgment was asked or entered to the effect that the defendant was indebted or was not indebted to the plaintiff in the sum of $17,000. The judgment in the divorce case was no bar in this. We do not find that the trial court committed error in denying the motion for a nonsuit. While speaking of the divorce action, it may be noted at this time that the defendant admitted that the judgment roll in the divorce action did not show the judgment in that case to be a bar, and he sought to introduce evidence to prove that nevertheless in the divorce action evidence was introduced of and concerning the $17,000 claim. The evidence was objected to and excluded. The fact, if it be a fact, that in the divorce case the parties introduced evidence without the issues made by the pleadings would not strengthen the defendant's contention in this case.

[14, 15] The defendant asked permission to amend his answer by inserting allegations therein that the plaintiff committed a fraudulent act by deeding away her property without consideration prior to the commencement of this action for the purpose of defrauding the defendant out of any sum that might be awarded against her. The application was made on the further ground that shortly before she commenced this action she did, by false assurances of her love and affection, cause him to make her a gift of property of the value of $25,000. As the defendant had not at the time the motion was made obtained any judgment against the plaintiff, he was not in a position to complain regarding the disposition she had made of her separate property. As to when the defendant asked permission to allege plaintiff's misconduct regarding the obtaining of a fraudulent gift of $25,000, as to what the contents of the proposed pleading were, and as to the procedure followed by the defendant, he has not called any part of the record to our attention so that we can be informed thereon. We are not called upon to search such a lengthy record for material that may or may not support such a contention.

[16] While the plaintiff was on the stand giving testimony regarding financial transactions between herself and the defendant, she testified that she kept a memorandum book, which she produced, but did not offer in evidence. On cross-examination the defendant propounded to her many questions attempting to prove the fact that the memorandum book had been recently manufactured by the witness, and that the items therein were not entered as of the date that the transaction occurred. Thereafter, on re-direct examination, the plaintiff offered the memorandum book as a piece of evidence to show that it was not manufactured as claimed. Over the objection of the defendant the trial court admitted the book in evidence, and in doing so it committed no error.

The defendant makes numerous points to the effect that the attorney for the plaintiff was guilty of misconduct in the trial of the case. These acts of misconduct, each and all, are claimed to have occurred in the courtroom when the reporter was present and as the trial proceedings were being had. Although a bill of exceptions of many hundred pages is before us, no passage is cited which it is claimed shows any of the facts excepting passages contained in an affidavit made by the defendant and presented to the trial

court on his motion for a new trial. We do not understand that such is the proper practice. Gay v. Torrance, supra. Furthermore, in the trial of an action before the court, when no jury is present, it is not at all clear what word of mouth on the part of opposing counsel could or would constitute reversible error on appeal, nor what procedure would support the point. However, be that as it may, the record before us certainly does not show any fact or facts in this connection which would constitute reversible error. These matters are set forth in the record, transcript pages 1310–1429 inclusive. No one of the assignments justifies special consideration in this opinion.

[17] On the trial of the case, when the plaintiff was on the stand as a witness, the check for $17,000 drawn in favor of the defendant was exhibited to her, and she testified regarding filling in the blanks on the check and filling in the blanks on the stubbook. Later she offered the check in evidence, but did not offer the entries on the stubbook. Still later, during the trial, she offered in evidence the entries made on the stubbook. The offer was objected to, and the objection was sustained. During the arguments it is claimed that the plaintiff's attorney went outside of the record and argued that the entries on the stubbook should have been received in evidence. It does not appear from the record whether an objection was made that the argument was outside of the record, or what relief, if any, was asked for. It does not appear, therefore, that any error was committed, or, if error was committed, that the error was in the least prejudicial. On the same kind of a record the defendant assigns certain acts as being misconduct on the part of the court. We have read the entire record. There is nothing in any one of the assignments.

[18] The defendant makes several points to the effect that the judge who presided at the trial had no authority to so preside. For some time prior to the date of the trial Judge Murasky was presiding in department 2 of the superior court in and for the city and county of San Francisco. That was the court in which the action was heard and determined. During the same time Judge Shortall was presiding judge in the city and county of San Francisco. During the same time Judge Seawell was one of the duly elected, qualified, and acting judges of Sonoma county. The foregoing matters are matters of which this court probably will take judicial notice. The bill of exceptions, the judgment, and the findings each and all show that Judge Seawell presided at the trial. In his brief the defendant makes several statements of fact. Statements of fact should properly be contained in the bill of exceptions, and be quoted or cited, if necessary, in the briefs. The bill of exceptions contains, among other things, the affidavit of Robert P. Troy made to be used in support of his motion for a new trial. Except as contained in that affidavit as so embodied in the bill of exceptions, the record is silent as to how Judge Seawell happened to preside at the trial. The statements contained in that affidavit are each and all statements that purport to have been made to the affiant by (1) Judge Murasky, (2) Judge Shortall, (3) Judge Seawell, and (4) perhaps some others. Some of those statements were made by one of the judges speaking to the affiant in the absence of plaintiff's counsel and some of the statements purport to have been made in the presence of the defendant and plaintiff's counsel. The affidavit contains many expressions on information and belief. The affidavit was not answered by any counter affidavit on behalf of the plaintiff, nor any counter affidavit in support of the judicial act of any one of the judges above named. In the absence of any competent legal evidence to the contrary, it will be presumed that judicial duty has been regularly performed. As Judge Murasky had the legal power to invite Judge Seawell to come to San Francisco and sit in his department, in support of the judgment it will be presumed that he made the request. As the Governor had the right to request Judge Seawell to attend at any court and hear a case there pending, in the absence of evidence to the contrary it will be presumed in support of the judgment that the Governor made the request. As extra sessions of the superior court may legally be held, in the absence of any evidence to the contrary, in support of the judgment it will be presumed that Judge Seawell was regularly called to San Francisco to hold an extra session of said superior court. Finally, as Judge Shortall was a judge of the superior court, he had the power to reassign any of the cases and to take the cases, if necessary, into his own department, and, in the absence of any evidence to the contrary, it will be presumed in support of the judgment that he did so, and caused the court to be presided over by Judge Seawell at his request. Moreover, it will not be disputed that the superior court had jurisdiction of the parties, and that the superior court had jurisdiction of the subject-matter of the action. Conceding, for the sake of argument, that if any irregularity existed in the authenticity of the request made to have Judge Seawell try the case, then and in that event such irregularity constituted an error; still there is not a word in the record showing, or tending to show, that the error, if it be an error, was in any respect prejudicial.

We find no error in the record. The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

On Petition for Rehearing.

PER CURIAM. [19] The point that the trial judge who heard the motion for a new trial had no jurisdiction to hear the motion was not presented in the opening brief of the appellant, and it was therefore waived. Hihn v. Courtis, 31 Cal. 398; Webber v. Clarke, 74 Cal. 11, 13, 15 P. 431; Bacigalupi v. Phœnix Bldg., etc., Co., 14 Cal. App. 632, 112 P. 892.

[20-22] In the opinion heretofore filed a paragraph on pages 6 and 7 is devoted to a consideration of the claim of the appellant that certain misconduct on the part of the plaintiff's attorney occurred during the trial which constituted prejudicial error, and the court adverts to the fact that, if such matters were contained in the bill of exceptions, the location of the objectionable matters was not stated in the appellant's opening brief. We repeat the statement. It was also stated by the court that the acts and conduct of counsel in presenting evidence, the objections thereto, and the rulings thereon, should be contained in the bill of exceptions and not in affidavits, if an appellant would have the same considered by the court. The appellant also questions the correctness of that statement, but we are not inclined to depart therefrom. No misconduct occurring outside of the courtroom, nor occurring at a time when the court was not actually in session, is charged in any form or manner. But, if we concede for the purpose of argument that the record correctly sets forth the point, still the ruling must be the same. The full measure of the appellant's point is that the plaintiff's attorney made an offer to prove that the appellant did, without any authority, sign the plaintiff's name to a mortgage written for the sum of $75,000, and that the offer was made at a time when the defendant was presenting his defense, and when it would have been irregular for the plaintiff to introduce any evidence, and that the offer was repeated several times. But the offer was not accepted. The proof was not made, and the matter then stands thus: Will it be assumed on appeal that the trial judge, sitting without a jury in the trial of a civil action, allowed his mind to be prejudiced by the suggestions of fact contained in questions or offers of proof to which objections were sustained? It is patent that such is not the rule.

The last point made reiterates the contention that the trial court erred in refusing the appellant permission to file a cross-complaint asking that gifts of the alleged value of $25,000 should be canceled on the ground that they were obtained by reason of false representations. Our former opinion fully covered the subject.

A rehearing is denied.

72 Cal. App. 725

CHERNEY et ux. v. JOHNSON et al.
(Civ. 2755.)

(District Court of Appeal, Third District, California. May 22, 1925. Hearing Denied by Supreme Court July 20, 1925.)

1. Contracts ⟸258—Improvidence not ground for relief from voluntary contracts.

Parties cannot be relieved from their voluntary contracts on mere ground that they are improvident.

2. Vendor and purchaser ⟸44—Finding that vendor misrepresented location of boundary line held supported by testimony.

Testimony *held* sufficient to support finding that vendor misrepresented location of boundary line of land sold.

3. Vendor and purchaser ⟸174—Default in payments no bar to maintenance of action, begun before payments were due, for rebates from price and cancellation of note.

Purchasers in default are not barred from maintaining action, begun before any payments were due, for rebates from price and cancellation of purchase-money note.

4. Vendor and purchaser ⟸168 — Purchaser may withhold payments, pending action for damages, after discovering fraud.

One induced by fraud to make contract to purchase realty may withhold payments after discovering fraud, pending action for damages.

5. Vendor and purchaser ⟸185—Purchasers held not to have forfeited rights under contract by failure to pay installment due after action for rebates from price was begun.

Purchasers *held* not to have forfeited rights under contract not making time of essence, nor providing for forfeiture on default, by failure to pay installment, which became due after action for rebates from price and cancellation of note was begun; forfeiture of rights under contract being different from rescission thereof, which entitles purchaser to return of purchase money paid, less any damages to vendor because of breach.

6. Vendor and purchaser ⟸341(6) — Vendor, praying for termination of contract, cannot complain of decree giving him alternative of performing on receipt of balance due.

Vendor, praying for termination of contract, in answer to purchaser's suit for rebates from price and cancellation of note, cannot complain of decree giving him alternative of performing contract on receipt of balance due.

7. Vendor and purchaser ⟸341(5)—Vendor, retaining possession of land worth contract price, bound to return purchase price paid on termination of contract under alternative decree.

Vendor, having suffered no detriment by termination of contract under alternative decree on his refusal to perform as authorized thereby, where he retained possession at all times and land was worth agreed price, was obligated to return full amount of purchase money received.

8. Appeal and error ⊂⊃878(1)—Parties not appealing bound by decree.

Parties not appealing are bound by decree.

9. Vendor and purchaser ⊂⊃341(6)—Purchasers held entitled to return of purchase money paid, if vendor elected to abide by part of decree terminating contract if he refused to accept balance due.

By accepting decree terminating contract, if vendor refused to accept payment of balance due, purchasers rescinded contract at vendor's option, after latter repudiated it by attempted termination thereof as alleged in answer, and were entitled to return of purchase money paid, if vendor elected to abide by such part of decree.

Appeal from Superior Court, Sacramento County; Ernest Weyand, Judge.

Action by Vincent Cherney and wife against W. D. Johnson and another. From a judgment against the named defendant, he appeals. Affirmed.

Meredith & Chester, of Sacramento, for appellant.

White, Miller, Needham & Harber, of Sacramento, for respondents Cherney.

George, Hinsdale & Pigott, of Sacramento, for respondent Natomas Co., of California.

FINCH, P. J. Prior to the transactions herein set forth R. N. Hicks was in possession of the lands involved in this suit under an executory contract of sale thereof to him by the Natomas Company, one of the defendants. The contract, dated December 27, 1917, provides for a payment of $1,873.25 at the time of the execution thereof and annual installments of $499.54 on December 27th of every year thereafter to and including the year 1932, with interest at the rate of 6 per cent. per annum, payable annually; the purchaser to have the right to pay any or all installments at any time. Overdue installments are to draw interest at the same rate as the principal. The purchaser is required to pay all taxes, assessments, and water charges on the land, and, upon his failure to make such payments, the vendor is given the option to pay the same; the purchaser to reimburse the vendor, with interest at 6 per cent. per annum thereon. Time is made of the essence of the contract, and the vendor is given the option to declare the purchaser's rights under the contract forfeited upon his default in making any payment when due. Hicks paid all installments and interest which became due up to and including December 27, 1919. No subsequent payments have been made.

The Goodland Company was engaged in selling real estate and maintained offices in Sacramento, Chicago, and Manitowoc, Wis. Defendant Johnson is a lawyer, his office being in Chicago, and he was the fiscal agent of the company. The plaintiffs owned a farm in Wisconsin, which they desired to sell, with the view of locating in California. A. J. Torrison, a representative of the Goodland Company, who was in charge of its Manitowoc office, approached plaintiffs relative to the purchase of lands by them in the Natomas district, near Sacramento. The plaintiffs theretofore had been endeavoring to sell their Wisconsin farm, both personally and through the Goodland Company. Under the circumstances stated, the plaintiffs came to California; Johnson and Torrison coming on the same train with them. They arrived in Sacramento February 11, 1920, and on the 13th Johnson and Torrison took them to see the lands in controversy, as well as other lands. The tract contains 57.51 acres. It is bounded on the south and the west sides by roads and on the east by an irrigation canal. A strip of land containing about 15 acres and lying west of the canal is separated from the main body of the land by a small drainage ditch. The land lying east of the drainage ditch is inferior in quality to the remainder of the tract and several feet higher in elevation. Practically all of the land west of the ditch had a crop of peas growing upon it, but there appears to have been no cultivated crop upon that part lying east of the ditch. The plaintiffs were first taken to the southwest corner of the tract, where they examined the soil, and thence to the northwest corner, where another examination was made.

Plaintiff Vincent Cherney testified that while on the tract Johnson "described it as 57½ acres. It was in peas. I told him it looked to be kind of a small patch for 57 acres. He says I must consider it is level land; it is very deceiving. * * * When he explained that to me, I did believe him. * * * He said the east boundary was as far as the peas were on." The witness further testified that he was not on the land "over half an hour. * * * When we first crossed on the southwest corner, Mr. Johnson says he was in a hurry; that I better come back." On their return to Sacramento, the plaintiffs signed an application, addressed to the Goodland Company, to purchase the land for $18,690.75, and as an initial payment, they gave the company their promissory notes in the aggregate sum of $9,345.40. As a part of the same transaction, Johnson signed an instrument in the form of a letter, addressed to plaintiffs, as follows:

"In case you are unable to sell your Manitowoc county farm on or before April 1, 1920, then it is agreed that, if you notify us by that time, we will agree to resell the 57.51 acres, purchased by you this day, of Natomas land, or take the deal off your hands and cancel sale."

On the following day the plaintiffs left Sacramento, without again inspecting the land, and returned to Wisconsin. On the

next day after the foregoing instruments were executed, Johnson learned that the Goodland Company had no authority to sell the land, and he then acquired an option in his own name to purchase the land from Hicks. The plaintiffs finally sold their farm in Wisconsin, and on the 26th day of March, 1920, at Manitowoc, the following agreement between them and Johnson was executed:

"Following is to supersede all former agreements between us in reference to your purchase of lots 101 and 102, 57.51 acres, of Natomas Elkhorn subdivision, Sacramento county, California:

Purchase price of said lots, 6 per cent. interest	$18,690 75
You gave mortgage on account	9,000 00
You gave note, due in 8 months, for	1,000 00
Balance to be paid in 8 or 9 annual payments	8,690 75

"You to receive two-thirds of present pea crop.

"You to pay for cultivating peas at $5 per day, not to exceed $150, however.

"You to pay cost of harvesting peas.

"Above-described note for $1,000 to be paid on or before eight months; but your two-thirds of pea crop is to be applied in liquidation of said note."

On the following day Johnson received $9,000 in payment of the "mortgage on account" mentioned in the agreement, and he thereafter assigned the note for $1,000 referred to therein to third persons, making a total of $10,000 received by him on the purchase price of the land. The plaintiffs again arrived in California June 6, 1920, and on the next day they discovered that the tract includes the 15 acres of land of inferior quality between the irrigation canal and the drainage ditch. They thereafter learned for the first time that the land is within the boundaries of a reclamation district and burdened with a bonded indebtedness of $4,000. They have never taken possession of the land or received any of the proceeds thereof.

The complaint was filed November 12, 1920. It is alleged therein, among other things, in addition to the said false representations, that Johnson informed plaintiffs that he would not pay any of the aforesaid bonded indebtedness, and demanded that plaintiffs pay the same, and that he "has threatened to declare, and will attempt to declare, forfeited plaintiffs' rights and interest under said agreement of March 26, 1920, in the event that plaintiffs shall not pay * * * said bonds, and * * * has refused and will refuse to credit plaintiffs on the purchase price of said real property with any payments which they may make under the provisions of said bonds; * * * that defendant Johnson has refused to credit plaintiffs with more than $1,000 on account of the deficiency in quality of the land hereinbefore set forth." The prayer is for judgment that "plaintiffs are entitled to a rebate of $3,000 upon the purchase price provided in said agreement of March 26, 1920, on account of the deficiency in quality of said land, and are entitled to a further rebate therefrom in the amount now due upon said bonds; that said decree shall direct said defendant Johnson to assign said contract of December 27, 1917, to plaintiffs, and shall adjudge and decree that defendant Johnson shall pay to plaintiffs such sum as this court may find to be due from him to plaintiffs, and shall surrender and cancel said promissory note in the sum of $1,000 executed and delivered by plaintiffs to defendant Johnson on March 26, 1920, or that such other, further, and different relief be granted as may be proper in the premises."

The answer of defendant Johnson was filed August 6, 1921. The answer denies the allegations of the complaint which are material to the determination of this appeal, and alleges that plaintiffs failed to pay the first installment of the purchase price of the land, and interest, which became due March 26, 1921; that on the 28th day of March, 1921, "this defendant served a written notice on plaintiffs, demanding payment of the amounts above referred to," and stating "that unless said sums were paid in accordance with said contract that their interest in the contract and in the lands therein described would be terminated; that on or about the 2d day of August, 1921, this defendant served on plaintiffs a certain notice in writing dated July 25, 1921, terminating, canceling, and ending all the right, title, and interest in said lands and in said contract by reason of the default of plaintiffs." The prayer of the answer is "that plaintiffs take nothing in this action, and that this court make its decree, ordering, adjudging, and decreeing that all the right, title, and interest of plaintiffs in and to said lands has been terminated, and that said contract between this defendant and plaintiffs has been terminated and ended, and that this defendant have judgment for costs of suit, and for such other and further relief as may be proper."

The defendant Natomas Company took the position of a mere stakeholder, its counsel stating "that the contract holder owes the Natomas Company a certain sum of money and is in default, but we do not care to take advantage of the default or terminate the contract."

The court found the facts hereinbefore stated, including those alleged in the complaint, to be true; that at the time of the trial, which commenced January 31, 1922, "there was unpaid from defendant Johnson to said corporation (Natomas Company), on account of the principal of said purchase price, the sum of $6,494.02; that * * * there was due, owing, and unpaid from defendant Johnson to said corporation, * * * on account of installments on principal, on account

of interest thereon, and on account of taxes, reclamation assessments, and water charges, the sum of $2,777.08; that all of said sums are secured by said contract, and must be paid in order to enable the defendand Johnson to acquire title from said corporation; * * * that at all times mentioned in said complaint the real property therein described was and is now subject to a reclamation assessment duly and legally assessed against said property, in the sum of $4,000, no part of which has been paid." The court further found that Johnson misrepresented to plaintiffs the location of the east boundary line of the land as hereinbefore stated; that the value of the land is $1,575 less than it would be if it were all of the same quality as that pointed out to plaintiffs; "that at all times herein mentioned the defendant W. D. Johnson has been and is now in possession of said real property; * * * that prior to the commencement of this action, the defendant Johnson informed plaintiffs that he would not be bound by the terms of said contract of March 26, 1920, and that he would not perform the covenants and conditions on his part to be performed as provided by the terms of said contract, nor has defendant Johnson at any time retracted his refusal to perform said contract;" and that Johnson demanded payment of plaintiffs and served notice upon them of termination of the contract as alleged in his answer.

As conclusions of law from the facts found, the court held "that there has been a breach of said contract of March 26, 1920, by the defendant Johnson; that plaintiffs are entitled to a decree of this court directing a specific performance by defendant of said contract; that plaintiffs are entitled to assume said reclamation assessments, and should receive a deduction from the purchase price to be paid by them in the sum of $4,000, on account of the lien of said reclamation assessment, and are entitled to a further deduction from said purchase price in the sum of $1,575 on account of deficiency in quality of said land;" that after making such deductions there remains unpaid on the purchase price of the land the sum of $3,115.75 with interest thereon from March 26, 1920, payable in eight or nine installments, as provided in the contract, at the option of plaintiffs; and that plaintiffs are entitled to a decree terminating and rescinding said contract of March 26, 1920, in the event that defendant shall fail to perform said contract, and are entitled, in such event, to the repayment of all sums paid by them, with interest thereon at 7 per cent. per annum from date of payment.

Judgment was entered, requiring specific performance of the contract by Johnson; directing the plaintiffs to pay to the clerk of the court, within 30 days after entry of the decree, such part of the said sum of $3,115.75 remaining unpaid on the purchase price as might then be due, together with interest, in accordance with the terms of the contract, the same to be paid by the clerk to Johnson upon delivery by the latter of a receipt showing payment of the amount due the Natomas Company under the terms of the Hicks contract, including payments made by that company in Johnson's behalf, as authorized by that contract; and directing Johnson to file with the clerk an undertaking in the sum of $4,000 indemnifying plaintiffs against "any loss they may sustain by reason of the failure of the defendant Johnson to comply with the terms" of the Hicks contract. Omitting parts of the decree not material here, it continues as follows:

"It is further ordered, adjudged, and decreed that if plaintiffs, within 30 days from the date hereof shall make the payments herein provided to be made by them, and if defendant shall fail to file said receipt within 60 days from date of notice of entry of this decree, said contract of March 26, 1920, shall be and is hereby declared terminated and rescinded, and said clerk shall thereupon repay to plaintiffs the sums paid to him by plaintiffs under the terms hereof, and shall enter judgment in favor of plaintiffs and against defendant W. D. Johnson in the sum of $10,000, with interest thereon from March 27, 1920, at the rate of 7 per cent. per annum to the date of entry of said judgment in the sum of $10,000. * * * It is further decreed that full jurisdiction of this case is retained, to the end that further judgment and decree may be entered herein in accordance with the foregoing, in the event that defendant Johnson shall fail to comply with the terms hereof."

The defendant Johnson has appealed from the judgment. If that part of the decree, which provides for the termination and rescission of the contract in the event of Johnson's failure to comply with the other provisions of the decree, were omitted therefrom, it might be doubtful whether an affirmance would be possible. The decree is in harmony with natural justice, but, unfortunately, natural justice and legal justice do not always coincide. Appellant concedes that he is under legal obligation to pay the assessment of $4,000, which is a lien on the land, as well as all sums due and to become due under the Hicks contract, before he will be in a position to give plaintiffs the title he agreed to convey to them, although he contends that he is not under obligation to them to make these payments until the time arrives at which they become entitled to a deed. Under appellant's theory of the case, plaintiffs must continue to pay the installments of the purchase price as they fall due and take their chances of his ability and willingness to clear the land when they become entitled to a deed. At the time the contract between the parties was executed, the amount of money necessary to clear the land under the Hicks contract, including the assessment

of $4,000, greatly exceeded the unpaid installments under the contract between the parties, and this excess has been increased subsequently by payments made by the Natomas Company in Johnson's behalf and which remain a charge upon the land.

[1] Johnson is a lawyer. He has "been in the land business about five or six years in California, * * * and before that in Texas." From his position with the Goodland Company it may be inferred that he is a shrewd business man. He drafted the contract between the parties. The plaintiffs had never been in California prior to February 11, 1920, and were not familiar with California lands, and did not know that the lands in question were within a reclamation district, or subject to an assessment for the reclamation thereof. Their transactions with Johnson were improvident in the highest degree. Parties cannot be relieved from their voluntary contracts, however, on the mere ground that they are improvident.

[2] Appellant contends that the evidence does not support the finding to the effect that Johnson misrepresented the location of the east boundary line of the land. The testimony of plaintiff Vincent Cherney, hereinbefore set out, is clearly sufficient to support such finding. It is urged that other findings are not supported by the evidence, but in view of the conclusion reached on another feature of the case it is unnecessary to discuss them.

[3, 4] It is contended that respondents were not in a position to maintain the action because, as asserted, they were in default in their payments under the contract. No payments, however, were due when the action was commenced. Further, it has been held that "one induced by fraud to enter into a contract for the purchase of real estate may withhold payments after the discovery of the fraud and pending the action for damages." Palladine v. Imperial Valley Farm Lands, 65 Cal. App. 727, 749, 225 P. 291, 300.

[5] Neither is there any merit in the contention that the plaintiffs have forfeited their rights under the contract by their failure to pay the installment which became due after the commencement of the action. Time is not made of the essence of the contract, and it contains no provision for a forfeiture of plaintiffs' rights thereunder in case of their default. In support of his contention that plaintiffs have forfeited their rights under the contract, appellant cites 39 Cyc. 1370, where it is stated that, although time is not made of the essence of a contract to sell land, "if the purchaser, without excuse, fails to pay at the stipulated time, the vendor, being in no default, and able and ready to perform all then required of him by the contract, may notify the purchaser to pay within a reasonable time, or he (the vendor) will treat the contract as rescinded." The rescission of a contract is very different from the forfeiture of a party's rights thereunder. In case of a rescission of an executory contract of sale of land on account of the purchaser's default, in the absence of anything in the contract to the contrary, the purchaser is entitled to the return of the purchase money theretofore paid by him, less any damages suffered by the vendor by reason of the breach.

[6-9] In this case the appellant notified the respondents that he had elected to terminate the contract, and in his answer prayed the court for a decree adjudging the contract terminated. The court has entered an alternative decree to that effect. The appellant is in no position to complain that the court gave him the alternative of doing something else in lieu of the decree for which he prayed. He is at liberty to choose between the decree for which he prayed in his answer and the doing of the alternative things required of him. The appellant has at all times retained possession of the land. He alleged in his answer and testified at the trial that the land is worth the amount which the respondents agreed to pay therefor. Having suffered no detriment by the termination of the contract, the appellant is under obligation to return to respondents the full amount of the purchase money which he has received from them. It may be that the respondents have just cause of complaint against that part of the decree which, in effect, gives appellant the right to terminate the contract, but they have not appealed, and are therefore bound by the decree. By accepting the decree they have, in effect, rescinded the contract, at the option of appellant, after the latter had repudiated it by his attempted termination thereof as alleged in his answer. Under such circumstances the respondents are entitled to a return of the purchase money paid by them, in the event that the appellant shall elect to abide by that part of the decree which terminates the contract. 27 R. C. L. 625; Gaume v. Sheets, 181 Cal. 119, 183 P. 535; Phelps v. Brown, 95 Cal. 572, 30 P. 774; Drew v. Pedlar, 87 Cal. 443, 25 P. 749, 22 Am. St. Rep. 257; Peloian v. Waldman, 54 Cal. App. 116, 201 P. 344.

The other contentions made by appellant have no bearing upon the ground upon which this decision is based, and need not be discussed.

The judgment is affirmed.

We concur: PLUMMER, J.; ANDERSON, Justice pro tem.

72 Cal. App. 786

BARRIOS & Co., Inc., v. J. R. GARRETT CO. (Civ. 2883.)

(District Court of Appeal, Third District, California. May 28, 1925. Hearing Denied by Supreme Court July 27, 1925.)

1. Brokers ⟸94—Letter construed as not conferring authority on fruit broker to conclude contract for sale of raisins.

Letter construed as not conferring authority on fruit broker to conclude contract for sale of raisins, but as conferring authority to offer any person desiring to purchase the raisins an option to make the purchase, the option being subject to the right of the principal or its president to accept or reject it.

2. Frauds, statute of ⟸116(1, 2)—Subscription by third party to written memoranda of sale as agent of defendant did not bind latter in absence of authority to so act for defendant.

Subscription by third party to written memoranda of sale as agent of defendant did not bind latter, under Civ. Code, § 1624, subd. 4, and Code Civ. Proc. § 1973, subd. 4, in absence of authority to so act for defendant.

3. Frauds, statute of ⟸85—When contract for sale of goods or chattels at price not less than $200 is valid stated.

To render valid a contract for sale of goods or chattels at a price not less than $200, the same, or some note or memorandum thereof, must be in writing, and subscribed by the party to be charged, or by his agent, unless the buyer accepts or receives part of the goods, or pays at the time some part of the purchase money, in view of Civ. Code, § 1624, subd. 4, and Code Civ. Proc. § 1973, subd. 4.

4. Corporations ⟸432(12)—Evidence held not to show acts of defendant or its president creating implication it dealt with and held out third party as its agent to sell its raisins.

Evidence *held* not to show acts or conduct of defendant or its president creating implication it dealt with and held out third party as its agent to sell its raisins.

5. Frauds, statute of ⟸158(2)—Telephonic conversation held inadmissible to show ratification of agent's unauthorized agreement to sell raisins.

In view of Civ. Code, § 2310, section 1624, subd. 4, and section 2309, telephonic conversation of defendant principal *held* inadmissible to show ratification of its agent's unauthorized agreement with plaintiff to sell raisins for price exceeding $200.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Action by Barrios & Co., Inc., against the J. R. Garrett Company. Judgment for plaintiff, and defendant appeals. Reversed.

Richard Belcher, of Marysville, for appellant.

Goldman & Altman, of San Francisco, for respondent.

HART, J. This action is for damages for the alleged breach of two several contracts alleged to have been entered into between the plaintiff and the defendant, whereby, so it is alleged, the latter sold and agreed to deliver to the former two several lots of "Thompson's Seedless Raisins, soda dipped," at a certain specified price.

The complaint is in two counts. The first is founded upon an agreement alleged to have been made by the parties on or about the 15th day of September, 1922, whereby the defendant agreed to sell to the plaintiff, and the latter agreed to purchase from defendant, 2,400 cases of raisins, of the variety above described, "of the 1922 pack, delivery to be made immediately when said pack of 1922 was ready for shipment," the total amount to be paid by plaintiff to defendant therefor being the sum of $5,500, "f. o. b. cars, at Marysville." The second count or cause of action is upon a contract alleged to have been made the same day, between the parties for 500 boxes of raisins of the same variety and pack as those above mentioned, for the sum of $1,156.25, "f. o. b. on cars at Marysville," to be shipped to plaintiff "immediately when said pack of 1922 was ready for shipment." The complaint, in appropriate language, alleges these facts, and, further, that the defendant refused and has always refused to perform the terms of said alleged contracts or any part thereof, while the plaintiff is and at all times has been ready, willing, and able to perform said contracts on its part; that by reason of the alleged breach by defendant of the contract declared upon in the first count of the complaint, the plaintiff has suffered damage in the sum of $2,850, and for the like breach of the contract forming the basis of the second cause of action stated in the complaint, plaintiff has been damaged in the sum of $593.75. The aggregate amount of damages prayed for as in compensation for the loss alleged to have been sustained by the plaintiff by reason of the alleged breach of the two contracts counted on is the sum of $3,443.75.

The answer consists of specific denials of the averments of both counts of the complaint.

Upon the issues thus framed a trial was had before a jury, who awarded the plaintiff a verdict for the sum of $2,356.25, in consonance to which judgment was entered. A motion for a new trial by defendant was denied, and the latter appeals from the judgment upon a record prepared according to the method prescribed by section 953a of the Code of Civil Procedure.

It is expressly conceded in the brief of

counsel for the plaintiff that the facts as to the alleged making of both contracts sued on are identical, except as to the amount of the raisins and time for delivery, which, it is further likewise conceded, are not of importance on this appeal; hence, as counsel on both sides have so considered and discussed the points raised, so the appeal will be considered and disposed of upon the theory that the two contracts are one.

The primary and all-important question submitted for decision is whether the alleged agreements for the alleged breach of which plaintiff claims to have been damaged to the extent of the aggregate sum stated in the ad damnum clauses of the complaint are invalid or nonenforceable because they do not comply with the mandates of the statute of frauds. There are numerous other matters which are discussed in the briefs. One involves the contention by the defendant that whatever transactions the plaintiff, through one Greene, had concerning the purchase of raisins were between the former and E. B. Wilcox, individually, or not as a representative or an officer or agent of the defendant. But, as to this and all other points, some of which are directly connected with and subsidiary to the points first above stated, it is to be said that, if we find ourselves required to hold that the agreements sued on are nonenforceable because they offend the statute of frauds, then, obviously, the case would come to an end, and the consideration of the other points referred to would be purely academic and superfluous.

The plaintiff, prior to and at the time of the institution and the trial of this action, was engaged in the business of importing and exporting merchandise, including fruit, in the city of San Francisco, its principal place of business. The defendant at the same time, at the city of Marysville, its principal place of business, was engaged in the business of purchasing raisins from growers and packing the same for the general trade. Warmington-Duff Company, connected with the transactions herein involved, was, at all the times mentioned, engaged in San Francisco in the business of wholesale distributor of fruit products, or the business of fruit broker.

At all the times mentioned Alberto Barrios was president of plaintiff corporation, E. B. Wilcox was vice president and the secretary of defendant corporation, and L. C. Greene, Jr., sales manager of the Warmington-Duff Company. On the 11th day of September, 1922, Greene, representing the Warmington-Duff Company, addressed the following letter to defendant:

"Gentlemen: Mr. Herbert Hynes of the Hynes Packing Company of Sacramento was kind enough to inform the writer that you purchased raisins from the growers and packed them for your trade. If you have any packed raisins to offer, please quote us, making your price read regular terms and 2½ per cent. brokerage to us. At the present time, we are interested in Thompsons seedless raisins, soda dipped, and would be glad to have you quote us on a car or less than car of same. Any attention you may give our request will prove to our mutual advantage.

"Yours very truly, Warmington-Duff Co.,
"By Greene."

On the following day (September 12, 1922), defendant replied to the above letter. Said reply was written on a printed letterhead of defendant. On the left-hand corner thereof was printed the name of A. W. Lewis, as president, and on the right-hand corner thereof the name of E. B. Wilcox, as vice president. Said letter reads:

"Warmington-Duff Co. San Francisco, California.—Gentlemen: We acknowledge yours 11th. Replying thereto, would state that we are hoping to have three or four cars Thompson seedless, soda dipped, a part of which you are at liberty to sell for delivery just as soon as the raisins can be stemmed and boxed on the basis 9½c, usual terms, f. o. b. cars Marysville. Any sales made would be subject to our confirmation.

"Yours truly, J. R. Garrett Co."

The above letters—the one from Warmington-Duff Company, by L. C. Greene, Jr., to defendant, and the last from the latter to Warmington-Duff Company—constituted all the writings directly bearing on the transactions involved herein between Warmington-Duff Company and the defendant. In other words, there was no other letter or writing, save and except the defendant's letter to Warmington-Duff Company dated September 12, 1922, from which any implication could possibly arise or be drawn that the latter was ever authorized in writing to sell the raisins to the plaintiff or any other person. This is testified to by said L. C. Greene, who, as seen, was acting, and did at all times act, for Warmington-Duff Company in the transactions upon which this action is founded. Greene testified that, a day or two subsequent to the receipt by him of the letter purporting to be from the defendant and dated September 12, 1922, he called at the office of the plaintiff corporation and saw and communicated to the president thereof the proposition contained in the said letter from defendant. After some conversation with Barrios, Greene wired Wilcox, from San Francisco, and under date of September 14, 1922, as follows:

"On receipt this wire please wire us option one car preferably two Thompson seedless soda bleached packed twenty fives at nine half cents cars Marysville less two and two and half brokerage first half October shipment for cable reply Saturday noon coast payment thanks Warmington Duff Co."

Greene testified that the Warmington-Duff Company received a reply to the above wire in the form of a letter written on the stationery of the defendant. The letter reads:

"Owing to more favorable offering made us, cannot now offer at less than nine three quarters less discounts mentioned or nine one quarter net Marysville. This for one or two cars subject acceptance by ten a. m. Saturday sixteenth and subject to satisfactory assurance regarding payment. While think early October delivery can be made owing to existing conditions this cannot be guaranteed."

The original of the said letter was not produced, but a copy thereof, which did not show the date of the letter nor by whom it was signed, was introduced in evidence. Greene, however, testified that he believed that the letter was received either on the 15th or 16th of September; that, at any rate, it related to the negotiations relative to the sale of the raisins referred to in the complaint, and that upon receipt thereof he again interviewed Barrios, president of plaintiff, and further proceeded with negotiations looking to the sale of the raisins to the plaintiff; and that Barrios, acting for plaintiff, agreed to purchase the raisins. Thereupon, Greene, so he testified, called Wilcox on the phone, and thus getting in conversation with Wilcox, stated to the latter that "he had a buyer for the raisins, told him the amount Mr. Barrios was willing to pay, and asked him to enter the order for the raisins in question at 9½c, to which Mr. Wilcox replied that he would take the order as submitted as Mr. Greene." Immediately following this conversation, Greene prepared in triplicate a sales memorandum containing the terms of the agreement of sale as the same was finally completed by the conversation with Wilcox over the telephone. These several memoranda were designated, respectively, as the "buyer's copy," the second as the "seller's copy," and the third as the "broker's copy." The seller's copy was forwarded to defendant, the buyer's delivered to the plaintiff, and the broker's retained by Greene for the Warmington-Duff Company. The memorandum of the transaction involving the sale of the 2,400 cases and that of the transaction relative to the sale of the 500 cases were identical in form. Each of the memoranda, or the original and the copies thereof contained the statement, "all orders are subject to confirmation," and signed "Warmington-Duff Co., per L. C. Greene, Jr.," initialed "LCG/J." Except in so far as might be inferred from the words "for account of J. R. Garrett Co., Marysville, California," contained in the memoranda, the instuments do not show that the Warmington-Duff Company was acting as agent for the Garrett Company. No reply was ever made to said memoranda or anything done with reference thereto by the defendant or Wilcox, although it was admitted by the latter that the memoranda covering the two contracts were received by him. Greene testified that agreements in writing, subscribed by plaintiff, and embracing the terms of the sale, as indicated by the memoranda, were to be and were in fact sent to defendant for its signature thereto immediately following the forwarding of the memoranda to the latter. Wilcox admitted the receipt of these writings or proposed written agreements.

It appears that, prior to the 18th day of October, 1922, the plaintiff, through the Warmington-Duff Company, forwarded to defendant instructions for the shipment of the raisins. Said instructions, so Wilcox stated, were received by him or the defendant. Defendant, up to said 18th day of October, made no reply to said instructions either by delivering raisins to plaintiff or by letter or other means of communication, and on that day Barrios went to Marysville to interview the defendant or Wilcox and ascertain the reason for the delay on the part of the latter in complying with the instructions theretofore given by plaintiff to defendant for the shipment of the raisins. Barrios testified that it was on the occasion of this visit to Marysville that he, for the first time, learned from Wilcox that it was claimed by the latter that the negotiations between him and Greene, representing the Warmington-Duff Company relative to the sale and purchase of raisins, were carried on by him (Wilcox) in his own individual right or personal capacity and with reference to raisins belonging to him individually, and not to defendant. Barrios, at that time, so he stated, insisted that his dealings looking to the purchase of the raisins were with defendant and not with Wilcox, as an individual, or in his own right, and that plaintiff would wholly depend upon and expect Garrett & Co. to carry out the terms of the agreements made by and between Wilcox, acting for defendant, and Greene, acting for the Warmington-Duff Company. Upon his return to San Francisco, Barrios, so he continued to testify, addressed to the defendant a letter (dated October 20, 1922), in which he requested definite information as to the time at which the raisins would be ready for shipment. "The only reply which he (Barrios) received to this communication was a telegram dated October 24, 1922, signed by E. B. Wilcox," in which he stated: "Have received no money; therefore call all negotiations off." See respondent's brief, page 9.

On cross-examination, Greene testified that it was not clear in his mind whether, in the conversation with Wilcox over the telephone, on the 14th day of September, 1922, the day on which the memoranda above spoken of were prepared, the latter stated to him (Greene) that the raisins to which their negotiations related were not the property of defendant but that of Wilcox. Greene further testified that he understood the words, "All orders subject to confirmation," substantially the language of the defendant's

letter of September 12, 1922, to the Warmington-Duff Company, meant, and were intended to mean, that the seller "takes or accepts the order, and, in so doing confirming the order"; that the Warmington-Duff Company never secured in writing an acceptance or confirmation of the order, or any reply to the written contracts expressing the terms of the agreements which he forwarded to the defendant. He stated that all his dealings regarding the raisins in question were with Wilcox. One of his communications by wire was addressed to Wilcox "in care of Garrett Co."; another, a letter, was addressed to the Garrett Company, and contained the words, "Attention, Mr. Wilcox." Greene said that the "sales memoranda," above mentioned, contained no statement or made no reference to the execution of written agreements by the parties as in confirmation of the terms of said memoranda, but that such agreements were prepared, signed by plaintiff, and, at the request of the latter, forwarded to defendant to be signed. Greene said that there was no acceptance or confirmation of his proposition to sell the raisins to the plaintiff other than that which was orally obtained from defendant through Wilcox in his conversation with Greene over the telephone immediately following the submission of the proposition to sell to plaintiff. In brief, Greene testified that, from the 15th day of September, 1922, the time he sent the sales memoranda to defendant, until the 1st day of December, 1922, he never received any written communication from the J. R. Garrett Company or Wilcox concerning the raisins in question.

It is clear from the evidence as shown by the foregoing statement that the plaintiff's claim that a contract whereby the raisins were sold to it is wholly predicated upon the letter from defendant under date of September 12, 1922, to the Warmington-Duff Company and the purported oral ratification by Wilcox over the telephone of the proposition by Greene to sell to plaintiff, according to the terms of said letter. Indeed, there is no other evidence than that afforded by said letter and that of the telephone conversation showing or tending to show that a contract whereby defendant, through the Warmington-Duff Company, or any other person, sold or agreed to sell the raisins to plaintiff.

[1] It is too plain to afford ground for legitimate discussion that the defendant did not intend by its letter of September 12, 1922, to invest the Warmington-Duff Company with authority to consummate a sale of the raisins. The concluding language of the letter unquestionably supports this conclusion. The insertion in the letter of the words, "Any sales made would be subject to our confirmation," clearly indicates that the intention of the defendant, if, indeed, as a matter of fact it authorized said letter to be written or its name subscribed thereto, was was to limit the authority of the Warmington-Duff Company in the matter of negotiating a sale of the raisins entirely to the act of procuring a purchaser ready, able, and willing to purchase the fruit according to the terms stated in the letter. Indeed the real effect of the letter was merely to confer on the Warmington-Duff Company the authority to offer any person desiring to purchase the raisins referred to therein an option to make such purchase, which option was subject to the right of the defendant or Wilcox to accept or reject. Normart v. Safer et al. (Cal. App.) 227 P. 943, 946, et seq.; Norton v. Overholtzer, 63 Cal. App. 388, 218 P. 637.

[2] But the plaintiff does not seriously, if at all, undertake to combat the soundness of the construction thus given said letter. Indeed, the very fact that, through the Warmington-Duff Company, it besought the execution by defendant of memoranda and written agreements whereby a sale of the fruit according to the proposition contained in the letter would be completed, is plainly pregnant with the admission on the part of both plaintiff and the Warmington-Duff Company that they fully understood that the authority conferred upon the latter by the letter was expressly restricted to the procurement of a satisfactory purchaser of the raisins, the proposal to buy, if any was received, being subject to ratification or confirmation by the defendant. It follows that the memoranda of the alleged sale, signed by the Warmington-Duff Company as agent of the defendant, were wholly without legal force. In other words, the Warmington-Duff Company being without authority to consummate a sale of the raisins, its subscription to the written memoranda of the two agreements of sale as agent of defendant was entirely gratuitous, and the writings not binding upon the defendant or Wilcox.

[3] To render valid a contract for the sale of goods or chattels at a price not less than $200, the same, or some note or memorandum thereof, must be in writing, and subscribed by the party to be charged, or by his agent, unless the buyer accepts or receives part of the goods, etc., which are the subject of the sale, or pays at the time some part of the purchase money. Civ. Code § 1624, subd. 4; Code Civ. Proc. § 1973, subd. 4. There is no claim that the plaintiff paid any part of the purchase price or received any part of the raisins; and it is obvious that the alleged agreements did not satisfy the requirements of the Code section just cited. In fact it is plainly manifest that, since the memoranda contained a statement clearly indicating that the terms thereof were to be subject to confirmation by defendant, neither the plaintiff nor the Warmington-Duff Company regarded them as binding unless so confirmed, or, in other words, that they regarded the act of the Warming-

ton-Duff Company, in subscribing to the writings as agent of defendant, as not imparting to the memoranda any binding force, so far as defendant was concerned.

[4] It is contended that defendant is estopped from denying the validity of the agreements by reason of certain acts and conduct of the defendant from which authority in the Warmington-Duff Company to close a bargain for the sale of the raisins was implied, and that plaintiff was controlled by such acts and conduct in dealing with the Warmington-Duff Company. This position finds no support in the record. The evidence discloses no acts or conduct on the part of defendant or Wilcox from which it could be implied by third parties that it (defendant) was dealing with or holding out the Warmington-Duff Company as its agent in the sale of its raisins. On the contrary, the acts and conduct of the plaintiff, as revealed by the evidence, were clearly evincive of the fact that it and its president knew or realized at all times that the Warmington-Duff Company was without authority to conclude a contract for the sale of raisins. The written memoranda and the proposed written agreements, and the circumstances attending their preparation and transmission to defendant by the Warmington-Duff Company, conclusively show this to be true. A similar question as to the scope of the authority of an agent in a real estate transaction arose in Norton v. Overholtzer et al., 63 Cal. App. 388, 395, 218 P. 637, 640, supra, where Shenk, J., pro tem. (now a Supreme Justice) said:

"The appellants contend that by the authorization given to Davis he was the ostensible agent of the respondent in the transaction, and sections 2316, 2317, and 2330 of the Civil Code are referred to in support of the contention. But no such question is involved here. It was in evidence without contradiction that when the contract of September 19th was signed Mr. Davis disclosed to the appellants that he was acting for respondent as her agent and had authority to sign for her, and that no request was made by the appellants to ascertain the scope of his authority or to exhibit to them his written authorization. Under such circumstances Davis could bind his principal only when acting within the scope of his authority, and it was incumbent upon appellants to ascertain the scope of that authority. Mudgett v. Day, 12 Cal. 139; Davis v. Trachsler, 3 Cal. App. 559, 86 P. 610."

The instant case in this particular, if anything, is even stronger against the plaintiff than the same situation was against the appellants in the case from which the above excerpt is taken, for here it is clear that no inquiry by plaintiff as to the extent of the authority of the Warmington-Duff Company in the premises was necessary, since all the authority vested in the latter was clearly expressed in writing, which was in its possession, and the written agreements were prepared by Greene and signed by plaintiff, and thereupon, at the request of the latter, forwarded to defendant for its approval and signature. These circumstances require no analysis to perceive and properly appreciate their effect. They plainly speak for themselves as to the question in hand.

[5] The claim that there was a ratification of the proposed sale is virtually answered above. The contention is, of course, based upon the testimony of the conversation over the telephone between Wilcox and Greene, in which, so the last-named testified, the former, in effect, stated that any proposition submitted for the sale of the raisins would be approved or confirmed or accepted by him or the defendant. But that testimony was obviously incompetent as proof of that fact, if it was a fact. Civ. Code, § 2310. That section declares, inter alia, that "a ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified." See, also, Norton v. Overholtzer, 63 Cal. App. 388, 393, 218 P. 637; Blood v. La Serena L. & W. Co., 113 Cal. 227, 41 P. 1017, 45 P. 252. As has been shown, such agreements as those in the instant case, being for the sale of goods at a price not less than but exceeding $200, are required to be in writing, and subscribed by the party to be charged or by his agent. Civ. Code, § 1624, subd. 4; see, also, Civ. Code, § 2309; Church v. Collins, 18 Cal. App. 745, 748, 124 P. 552.

There are, as above stated, other points presented here, but these, in view of the conclusion at which we have arrived, as indicated by the foregoing discussion, need not be considered.

For the reasons herein stated, the judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

73 Cal. App. 83

LEACH v. DAUGHERTY, State Commissioner of Corporations. (Civ. 5025.)

(District Court of Appeal, Second District, California, Division 1. June 1, 1925.)

1. Licenses ⟸21—Legislature may provide a commission or board empowered to ascertain existence of facts on the findings of which may depend the right to continue a profession or business.

By legislative act, commission or board may be empowered to ascertain existence of facts on the findings of which may depend the right to continue in the practice of a profession or a regulated business, and this applies where the inquiry is to be made by such commission or board preliminary to issuance of a license to transact a regulated vocation in the first instance.

2. Constitutional law ⟸62—Licenses ⟸7(1)—Statute providing for investigation of business reputation of applicants for broker's certificate held not unconstitutional.

Provisions of Corporate Securities Act, § 6, providing that the corporation commissioner may make whatever investigation deemed advisable as to an applicant's business reputation before issuing a broker's certificate, *held* not unconstitutional "in that no rules, regulations, or specifications are set forth in the said corporate Securities Act defining what shall constitute good business reputation, and an unauthorized delegation of legislative authority.

3. Brokers ⟸3—Citation to a broker to attend before corporation commissioner for the purpose of ascertaining whether or not a broker's certificate should be issued need not state any direct charge or complaint against him.

Where broker applied to corporation commissioner for renewal of license which was subsequently refused under Corporate Securities Act, § 6, an allegation that the commissioner was without jurisdiction to determine question of petitioner's good reputation, since the citation contained no direct charge or complaint against him, was without merit, since his right to engage in business as a broker for the succeeding year was not vested, but wholly contingent on the quasi judicial determination of the commissioner, and any application for license would be controlled by statute, which would be ample to direct petitioner's attention to scope of inquiry to be held.

4. Licenses ⟸22—Statute does not require written notice to applicant for license that commissioner will make investigation regarding his reputation.

Corporate Securities Act, § 6, does not provide for nor contemplate any written notice to an applicant that a commissioner will make investigation regarding his reputation, but permits such further investigation by commissioner as he shall deem advisable.

5. Licenses ⟸22—Findings of fact of corporation commissioner in applications for brokers' licenses conclusive on appeal.

The exercise of the power given to a corporation commissioner under the Corporate Securities Act, § 6, to investigate an applicant for a broker's license, being judicial, or at least quasi judicial, his finding of fact, based upon the evidence, is conclusive upon appeal.

Application by M. A. Leach for a writ of certiorari to review an order of Edwin M. Daugherty, Commissioner of Corporations of the State of California, denying an application for a broker's certificate. Order affirmed.

Bailie, Turner & Lake and Henry P. Goodwin, all of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and John W. Maltman, Deputy Atty. Gen., for respondent.

HOUSER, J. Certiorari. During the years 1922 to 1924, inclusive, petitioner was duly licensed in this state in the business of "acting as a broker for corporate securities." On December 6, 1924, he filed with the corporation commissioner his application for a renewal of his state license to continue in such business. Thereupon the corporation commissioner caused to be served on petitioner a "citation" requiring him to attend before the corporation commissioner at a specified time and place "in the matter of an investigation and examination of" petitioner's "affairs," for the purpose of ascertaining whether or not a broker's certificate should be issued to him. Pursuant thereto, and in accordance with the requirements of the "citation," an "investigation and examination" was had, with the result that, on "findings of fact" to the effect that petitioner was of "bad business repute," and on "conclusions of law" therefrom "that the application of M. A. Leach for a broker's certificate should be denied," it was ordered by said corporation commissioner that petitioner's said application be denied, and the issuance of the certificate applied for was accordingly refused.

The proceedings upon which such order was based are alleged by petitioner to have been in excess of the jurisdiction of respondent as such corporation commissioner, and by a writ of review an adjudication is sought from this court that the order issued by such corporation commissioner denying petitioner's application for a broker's certificate, is illegal and void.

Section 6 of the Corporate Securities Act (Stats. 1917, p. 673, as amended by Stats. 1919, p. 231, Stats. 1921, pp. 1008, 1114, and Stats. 1923, p. 87) provides that—

"The commissioner shall examine such application, and shall make such further investigation of the applicant * * * as he shall deem advisable. If, from such examination, the commissioner shall be satisfied of the good business reputation of the applicant * * * he shall issue such certificate. Otherwise, he shall refuse the same and deny the application and notify the applicant of his decision. * * *"

The principal point made by petitioner, as to which there is any controversy by the parties hereto, in substance, is that the provisions of said section 6 of the Corporate Securities Act, which authorized the corporation commissioner to refuse to grant a broker's certificate, on the ground that the corporation commissioner may not be satisfied of the good business reputation of the applicant, are unconstitutional, "in that no rules, regulations, or specifications are set forth in the said Corporate Securities Act defining what shall constitute good business reputation," and that such power, attempted to be conferred upon the corporation commissioner is an unauthorized delegation of legislative authority.

Considering such objection, it would appear that the leading case of Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, is so conclusively against petitioner's contention that little room is left for argument. That case, like the one at bar, involved the issuance of a broker's license to operate and to transact business in corporate securities under a statute in the state of Ohio, which was similar to the statute here in question. One of the provision of the Ohio statute was to the effect that, if the commissioner having charge of the issuing of licenses was satisfied that the applicant for the license was of "good repute," upon the payment to the commissioner of certain fees, the applicant would thereupon become entitled to be registered as a licensed dealer in securities. Mr. Justice McKenna delivered the opinion of the court, which, in part, was as follows:

"We turn back, therefore, to consider the more specific objections to the law. The basis of them is, as we have seen, the power conferred upon the commissioner, which is asserted to be arbitrary. The objection is somewhat difficult to handle. It centers in the provision that requires the commissioner, as a condition of a license, 'to be satisfied of the good repute in business of such applicant and named agents,' and in the power given him to revoke the license or refuse to renew it upon ascertaining that the licensee 'is of bad business repute, has violated any provision of the act, or has engaged or is about to engage, under favor of such license, in illegitimate business or fraudulent transactions.' It is especially objected that, as to these requirements, no standard is given to guide or determine the decision of the commissioner. Therefore, it is contended that the discretion thus vested in the commissioner leaves 'room for the play and action of purely personal and arbitrary power.' We are a little surprised that it should be implied that there is anything recondite in a business reputation or its existence as a fact which should require much investigation. * * * Besides, it is certainly apparent that, if the conditions are within the power of the state to impose, they can only be ascertained by an executive officer. Reputation and character are quite tangible attributes, but there can be no legislative definition of them that can automatically attach to or identify individuals possessing them, and necessarily the aid of some executive agency must be invoked. The contention of appellees would take from government one of its most essential instrumentalities, of which the various national and state commissions are instances. But the contention may be answered by authority. In Gundling v. Chicago, 177 U. S. 183, 44 L. Ed. 725, 20 S. Ct. 633, an ordinance of the city of Chicago was passed on which required a license of dealers in cigarettes, and, as a condition of the license, that the applicant, if a single individual, all of the members of the firm, if a copartnership, and any person or persons in charge of the business, if a corporation, should be of good character and reputation, and the duty was delegated to the mayor of the city to determine the existence of the conditions. The ordinance was sustained. To this case may be added Red 'C' Oil Mfg. Co. v. Board of Agriculture, 222 U. S. 380, 394, 56 L. Ed. 240, 245, 32 S. Ct. 152, and cases cited; Mutual Film Corp. v. Industrial Commission, 236 U. S. 230, 59 L. Ed. 552, 35 S. Ct. 387, Ann. Cas. 1916C, 296; Brazee v. Michigan, 241 U. S. 340, 341, 60 L. Ed. 1034, 1035, 36 S. Ct. 561 [Ann. Cas. 1917C, 522]. See, also, Reetz v. Michigan, 188 U. S. 505, 47 L. Ed. 563, 23 S. Ct. 390; New York ex rel. Lieberman v. Van De Carr, 199 U. S. 552, 50 L. Ed. 305, 26 S. Ct. 144."

[1, 2] It is well-settled principle of law in this state that by legislative act a commission or board may be empowered to ascertain the existence of facts, upon the finding of which may depend the right to continue in the practice of a profession or a regulated business. Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; Suckow v. Alderson, 182 Cal. 247, 187 P. 965; Hewitt v. Board, 148 Cal. 592, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750; Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418. And, as is pointed out in the case of Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, supra, and authorities there cited, the same rule obtains where the inquiry is to be made by such commission or board preliminarily to the issuance of a license to transact a regulated vocation in the first instance.

The so-called Real Estate Brokers' Act (Stats. 1919, p. 1272) is analogous to the statute here under consideration, in that one of the provisions of the former act, in substance, requires that any person desiring to engage in business as a real estate broker shall make application for a license so to do, and which application shall be accompanied by the recommendation of two real estate owners, certifying to the moral character of the applicant. The act further empowers the real estate commissioner to require "such other proof as he may deem advisable of the honesty, truthfulness, and good reputation of any applicant for a license."

In the case of Riley v. Chambers, 181 Cal. 589, 185 P. 855, 8 A. L. R. 418, which involved the constitutionality of the Real Estate Brok-

ers' Act, the court said, in part, that the point under discussion was definitely settled by the Supreme Court of the United States in the case of Hall v. Geiger-Jones Co., supra, and that while "the act does not in so many words authorize the commissioner to refuse a license if he is not satisfied as to the honesty, truthfulness, and good reputation of the applicant, * * * such authority is necessarily implied." It was therein held that the act was not invalid because of the requirement that persons desiring to engage in the occupation of real estate broker should furnish evidence of good moral character to the satisfaction of the commissioner.

The case of Brecheen v. Riley, 187 Cal. 121, 200 P. 1042, also involved the Real Estate Brokers' Act, but had to do with the power of the commissioner to revoke the license. The court in that case referred to many California authorities on the subject, and held that such power conferred upon the commissioner was valid and in harmony with constitutional rights.

Petitioner cites several cases in support of his contention, including: Abrams v. Daugherty, 60 Cal. App. 297, 212 P. 942; Harbor Commissioners v. Excelsior Redwood Co., 88 Cal. 491, 26 P. 375, 22 Am. St. Rep. 321; Ex parte Wall, 48 Cal. 279, 313, 17 Am. Rep. 425; Schaezlein v. Cabaniss, 135 Cal. 466, 67 P. 755, 56 L. R. A. 733, 87 Am. St. Rep. 122; Ex parte Cox, 63 Cal. 21; People v. Parks, 58 Cal. 624; Yick Wo v. Hopkins, 118 U. S. 356, 6 S. Ct. 1064, 30 L. Ed. 220; City of Sonora v. Curtin, 137 Cal. 583, 70 P. 674; In re Peppers, 189 Cal. 682, 209 P. 896; Jacobs v. Dental Board, 189 Cal. 709, 209 P. 1006; Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643. But none of such authorities appears to be inconsistent with the doctrine as heretofore announced.

[3, 4] Incidentally, it is urged that, because of the fact that the "citation" which was served upon petitioner contained no direct charge or complaint against him, the corporation commissioner was without jurisdiction to hear and determine the question of petitioner's "good reputation"; and the case of Abrams v. Daugherty, 60 Cal. App. 297, 212 P. 942, is cited as an authority to support the contention that, before the corporation commissioner may be authorized to proceed with a hearing of the nature of that here under consideration, the accused must be duly notified of the express charge perferred against him. It will be noted, however, that the case to which petitioner has referred dealt, not with an application for a license, but with a situation involving the revocation of a license. In that case a property right in the licensee had already accrued, of which he could be devested only by "due process of law." In the instant case, while petitioner at the time his application was filed was a licensee for the current year, his succeeding right to engage in the business as a broker was not vested, but was wholly contingent upon the quasi judicial determination by the commissioner of the moral fitness of petitioner to engage in his chosen vocation. The proceedings looking to the issuance of a license were initiated by petitioner when he filed his application therefor. From that point onward he was obliged to be governed and controlled by the provisions of the statute covering an application for a license, rather than by any procedure applicable to a situation arising after a license had been issued. The statute does not expressly provide for, nor apparently contemplate, any written notice to the applicant that the commissioner will make any investigation or examination regarding the good reputation of the applicant, but permits "such further investigation of the applicant (by the commissioner) as he shall deem advisable." Not only the question of whether or not any "further investigation or examination" shall be had, but as well, in the event that any such investigation or examination should be instituted, its nature and extent are apparently left to the determination of the corporation commissioner. In view of the terms of the statute, the "citation" to petitioner, notifying him of the intention of the corporation commissioner to make such investigation and examination, was ample to direct his attention to the scope of the inquiry to be made. The return to the writ herein, which contains the transcript of the testimony of the numerous witnesses called by petitioner, evidences the fact that no misunderstanding of the purport of the notice was present in the mind of petitioner so as to prevent a full and complete presentation by him of the evidence in his behalf bearing upon the issue of his good reputation.

[5] It is also suggested by petitioner that the findings are not supported by the evidence; but an examination of the reporter's transcript of the proceedings had at the hearing discloses the fact that several witnesses testified, in substance, that petitioner's business reputation was bad. To quote from petitioner's brief herein, the authorities are harmonious to the effect that "the exercise of the power given to the corporation commissioner under the Corporate Securities Act to investigate an applicant for a broker's license is judicial or at least quasi judicial." So much being conceded, the commissioner's finding of fact, based upon the evidence, is conclusive upon this court.

It follows that the order of the commissioner should be affirmed, and it is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

73 Cal. App. 1

GREENEICH v. KNOLL. (Civ. 2861.)

(District Court of Appeal, Third District, California. May 28, 1925. Hearing Denied by Supreme Court July 27, 1925.)

1. Municipal corporations ⟸706(5)—Evidence of truck driver's negligence sufficient.

In action for death of 13 year old boy, struck by a truck at night on slippery pavement while riding a bicycle, evidence *held* sufficient to sustain a finding of driver's negligence.

2. Municipal corporations ⟸705(4)—Violation of statute requiring certain lights on vehicles is negligence per se.

Violation of Vehicle Act, § 13, subd. (d), as amended by St. 1919, p. 207, § 10, requiring a truck to carry at the front at least two lighted lamps, sufficient to reveal an object in the road for distance of 75 feet or over, is negligence per se.

3. Municipal corporations ⟸706(5)—Failure to maintain proper lights on truck proximate cause of death of boy on bicycle.

In action for death of 13 year old boy, riding bicycle at night on slippery pavement when struck by truck, failure of truck to maintain lights required by Vehicle Act, § 13, subd. (b), as amended by St. 1919, p. 207, § 10, *held* a proximate cause of accident under evidence.

4. Municipal corporations ⟸706(7)—Failure of bicycle to carry headlight held not proximate cause of accident as matter of law.

In action for death of boy riding bicycle on dark night, when struck by a truck with insufficient headlights, absence of headlight on bicycle, as required by Vehicle Act, § 13, subd. (b), as amended by St. 1919, p. 207, § 10, which merely requires sufficient light for bicycle to be seen at certain distance, *held* not proximate cause of accident as matter of law; there being no requirement that light be strong enough to disclose objects in road.

5. Municipal corporations ⟸706(7)—Absence of reflex mirror at rear of bicycle not proximate cause of injury from truck traveling without lights, as matter of law.

In action for death of boy riding bicycle at night, when struck by truck traveling with inadequate lights, absence of reflex mirror at rear of bicycle, as required by Vehicle Act, § 13, subd. b, as amended by St. 1919, p. 207, § 10, *held* not proximate cause of accident, as matter of law; it being improbable that reflex mirror would have reflected the dim lights of the truck.

6. Negligence ⟸85(1)—Age and mental capacity may be considered by jury in determining infant's negligence.

Age and mental capacity may be considered by jury in determining infant's negligence.

7. Municipal corporations ⟸706(7)—Contributory negligence of deceased boy riding bicycle at night not conclusive.

In action for death of boy riding bicycle at night, when struck by truck traveling with inadequate lights, contributory negligence of deceased *held* not conclusively shown under evidence.

8. Appeal and error ⟸1001(1)—Jury verdict on conflicting evidence conclusive.

Verdict of jury on issue of fact, based upon sufficient evidence to sustain it, is conclusive on appeal.

9. Trial ⟸260(1) — Refusal of instruction otherwise covered not error.

Refusal of requested instruction, contents of which had been fully covered by other instructions given, *held* not error.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Caroline Greeneich against Jacob Knoll. Judgment for plaintiff, and defendant appeals. Affirmed.

Jacobs & Jacobs, of Stockton, and Frank Henning, of Lodi, for appellant.

Steele & Gannon, of Lodi, for respondent.

FINCH, P. J. Plaintiff, a widow, sued to recover damages for the death of her minor son, alleged to have been caused by the negligence of the defendant. She was given judgment, and the defendant has appealed.

Respondent objects to the consideration of the evidence, on the ground that appellant's request for a transcript thereof was not filed in time. To uphold the contention would be to affirm the judgment; no error appearing upon the face of the judgment roll. A decision of the question, however, is unnecessary, as the judgment must be affirmed on the merits.

Plaintiff's son was of the age of 13 years and 11 months, and was in the eighth grade of the elementary schools. He was in charge of a newspaper route, and during the evening of December 9, 1922, he was engaged in delivering papers to residents along Cherokee lane, a paved highway running in a southerly direction from the town of Lodi. He was riding a bicycle without a light or reflex mirror; the light which he had been accustomed to use being then in a repair shop. The evening was rainy, and the pavement was wet and slippery.

Shortly before 6 o'clock of the same evening the defendant's son, of the age of 20 years, was driving one of defendant's trucks in a northerly direction along Cherokee lane. The truck, which was of 2½ tons carrying capacity, was loaded with about 130 empty grape boxes, the weight of the truck and boxes being 7,000 pounds. It was equipped with presto headlights and kerosene dashlights. The gas supply of the headlights became exhausted during the trip and only the dashlights were burning at the time of the accident. The driver of the truck and a boy of the age of 11 years were seated in the cab, which was entirely inclosed, except that the windshield was open to give

a better view of the road ahead. An automobile was following the truck at a distance estimated by the witnesses to be from 50 to 100 feet therefrom. Another automobile was traveling south along the same road. When these two automobiles were about opposite each other a loud crash was heard, and two of the empty boxes fell off the truck. The truck continued along the road to the north, but the two automobiles at once came to a stop. The body of plaintiff's son was found lying on the east half of the pavement, the skull and face so crushed as to cause instant death, several teeth lying on the pavement, and blood flowing from the crushed head. The broken bicycle, which evidently the boy had been riding, was lying near the body. "The body was lying just a trifle further north than the bicycle, and the boxes were on further than that, about * * * 3 or 4 feet." A witness who was sitting in his house 237 feet distant from the scene of the accident, with the doors and windows closed, testified that he heard the crash, that "it was a quick crash." None of the occupants of the two automobiles saw the boy prior to the accident. Defendant's son and the boy with him testified that they did not see the boy or his bicycle at any time. The driver of the automobile which had been going south followed and passed the truck after the accident, alighted from his machine, and signaled the driver of the truck to stop, but the latter continued to go north. The driver of the machine again followed and passed the truck and succeeded in halting it near the edge of the town of Lodi. He testified that he asked defendant's son "if he realized * * * he had run over a boy and killed him"; that defendant's son replied, "No; if anybody run over a boy and killed him, you did, * * * ask the little boy if we run over anybody"; and that the little boy said, "No; we didn't run over anybody." C. R. Fisher, a deputy sheriff and traffic officer of San Joaquin county, testified that he tested the dashlights on the truck two days after the accident; that at the time the test was made it was a very dark night and not raining; that the lights were so dim that, sitting in the driver's seat, with the windshield open, he could not see a man standing in front of the machine at a greater distance than about 10 feet. The defendant's son testified that at the time the test was made the lights were in the same condition as they were at the time of the accident. The driver of the automobile which was following the truck immediately before the accident testified that he had been traveling between 20 and 25 miles an hour, that when he saw the truck he slowed down to between 16 and 20 miles an hour, and that the truck "got ahead of me—that is, further than it was." He also testified that his lights were good, that they showed "the truck up plainly," that he saw the sides of the truck and underneath it, and that he did not "see any object along the side of the truck or underneath it or anywhere around it." The driver of the truck, the defendant's son, testified that he could see the road clearly for 40 or 50 feet ahead of the truck, that he watched the road "all the time," that he did not see a boy "on a bicycle or otherwise," that he was not traveling over 15 miles an hour, and that the truck did not run over anything. A witness for the defendant testified that the speed limit of the truck is 18½ miles an hour.

[1-3] Appellant contends that the evidence is insufficient to support the implied finding of the jury that the defendant's negligence was the proximate cause of the death of plaintiff's son; that if the "boy was killed by the motor truck of defendant at all there were only two possible ways in which it could have been done: One is on the theory that he was towing at the side of the truck, and his bicycle slipped on the wet and slippery pavement and threw him under the truck, and the right-hand wheel ran over his head. * * * The other would be on the theory that the Greeneich boy, just before the accident, was riding in front of the truck." In support of the verdict it must be presumed that the jury found that the boy was not towing at the side of the machine. The driver of the automobile which was following the truck testified that his lights showed "the truck up plainly," that he saw the sides of the truck, but did not see "any object along the side of the truck * * * or any where around it." Adopting the only other theory suggested by appellant, the negligence of the driver of the truck is clearly proved. It was within the province of the jury to accept the evidence which was most favorable to the plaintiff. From such evidence it appears that the heavy truck was being driven at a high rate of speed, over a slippery road, on a dark and rainy night, with front lights so dim that they would not reveal objects more than 10 feet ahead. If such were the facts, then the driver of the truck was grossly negligent. If it be inferred, contrary to the evidence, that the motor truck was "so governed or mechanically constructed or controlled that it cannot exceed a speed of fifteen miles per hour," the Vehicle Act in force at the time of the accident required the truck to "carry at the front at least two lighted lamps which * * * shall be sufficient to reveal any person, vehicle or substantial object on the road straight ahead for a distance of seventy-five feet or over." Stats. 1919, p. 207. The violation of the statute was negligence per se. It cannot be successfully maintained that such negligence was not a proximate cause of the accident.

[4, 5] It is urged that the deceased was

guilty of contributory negligence "in not having a light or reflex mirror on his bicycle." During the period from a half hour after sunset to a half hour before sunrise, "every bicycle while on the public highway shall carry a lighted lamp visible under normal atmospheric conditions at least three hundred feet in the direction toward which such bicycle is faced, and shall also carry at the rear of such bicycle a reflex mirror or a lighted lamp exhibiting a red light plainly visible under normal atmospheric conditions for a distance of at least two hundred feet toward the rear." Stats. 1919, p. 207. The foregoing provisions do not require that the front light of a bicycle shall be sufficient to reveal persons or objects on the road ahead, as in the case of motor vehicles. If the front light of a bicycle is itself visible from a point 300 feet ahead, it complies with the law, even though it may reveal no part of the road or objects thereon or be visible from the rear. It cannot be said, therefore, as a matter of law, that the absence of a front light on the bicycle in any manner contributed to the accident. It would have been a sufficient compliance with the law to carry a reflex mirror at the rear of the bicycle, its evident purpose being to reflect the light from motor vehicles approaching from the rear and thereby give the drivers of such vehicles warning of the presence of the bicycle on the road. If the lights on the motor truck were insufficient to reveal an object on the road more than 10 feet ahead, it is not probable that a reflex mirror at the rear of the bicycle would have served to prevent the accident. Granting that the reflection of the light from the motor truck upon a reflex mirror could be seen at a greater distance ahead than a person or other object on the road, it cannot be held that the jurors were not warranted, in view of the dim lights on the truck, in drawing the inference that such reflected light would not have been visible to the driver of the truck in time to avoid the accident. If it would not have been so visible, then the absence of a reflex mirror was not a contributing cause of the accident. The court, at defendant's request, instructed the jury that, if the deceased did not carry lights or a reflex mirror, in accordance with the law as herein stated, he was guilty of negligence, and that, "if you believe from the evidence in this case that the death of the said Alvin F. Greeneich was proximately caused by or resulted from such negligence, then you must render a verdict in favor of the defendant."

[6-8] This discussion has proceeded upon the theory that the deceased was of such age as to be held accountable for his conduct to the same extent as one of full age. In determining whether the deceased was guilty of contributory negligence, the jury had the right to take into consideration his age and mental capacity. "There is no precise age at which, as a matter of law, a child is to be held accountable for all his actions to the same extent as one of full age. Consolidated, etc., Ry. Co. v. Carlson, 58 Kan. 66, 48 P. 635. In that case it is said: 'The question as to the capacity of a particular child at a particular time to exercise care in avoiding a particular danger, is one of fact, falling within the province of a jury to determine.'" Cahill v. Stone & Co., 153 Cal. 571, 577, 96 P. 84, 19 L. R. A. (N. S.) 1094; Mayne v. San Diego Electric Ry. Co., 179 Cal. 173, 177, 175 P. 690. At defendant's request, the court instructed the jury as follows:

"It is the law that such a boy is required to exercise such an amount of care as is in accord with his maturity, experience, and capacity as he travels on a public highway, and that amount of care so to be exercised by him is to be determined by the jury upon the proof of all the facts and circumstances in the testimony; but there is no presumption that such a boy has not the ability to exercise some amount of care as he travels on or uses a public highway. It was therefore incumbent upon said Alvin F. Greeneich * * * to use such care and caution as a reasonably prudent person of the age, capacity, and experience of said Alvin F. Greeneich would reasonably be expected to exercise and use under the circumstances at the time he met his death, considering the amount of traffic on said highway and the condition of the weather and highway at such time. A failure to exercise such a degree of care will be deemed negligence, and if you find from the evidence in this case that the said Alvin F. Greeneich was guilty of negligence, and that such negligence was the proximate cause of his death, then I instruct you that plaintiff cannot recover."

It thus appears that the question of contributory negligence was submitted to the jury in accordance with defendant's theory of the case, and upon instructions framed by his counsel. The evidence is sufficient to support the implied finding of the jury upon that issue, and the verdict is conclusive on appeal.

[9] Appellant complains of the court's refusal to give the following instruction:

"Before you would be justified in rendering a verdict in favor of the plaintiff in this case, you must be convinced by a preponderance of the evidence, first, that the defendant's employee was guilty of negligence in the equipment or operation of the truck in question at the time and place mentioned in the complaint, and, second, that such negligence was the proximate cause of the injuries complained of."

In other instructions the court told the jury that the plaintiff must prove her case by a preponderance of the evidence, defining that term; that to "constitute actionable negligence there must be causal connection between the negligence complained of and the injury suffered, and for the negligence to be the proximate cause of the injuries there must first appear that it was a duty owing

from the defendant to the plaintiff, second, that it was a negligent breach, third, that the injuries resulted as a direct consequence of such breach," and that negligence, "however illegal, in the absence of evidence showing it to have been a proximate cause of the injury complained of, furnishes no legal ground for complaint." Other instructions of similar import were given. It thus appears that every proposition of law contained in the refused instruction was repeatedly stated in other instructions, and it was not necessary to further repeat the same.

The judgment is affirmed.

We concur: PLUMMER, J.; SHIELDS, Justice pro tem.

---

73 Cal. App. 114

BURG BROS. v. BERCUT et al. (two cases). (Civ. 5107.)

(District Court of Appeal, First District, Division 1, California. June 3, 1925. Rehearing Denied, with Modification, July 3, 1925. Hearing Denied by Supreme Court July 30, 1925.)

1. Vendor and purchaser ⟸84 — Forfeiture clause held not to affect election of remedies.

In suit by vendor for purchase price of land, additional provisions in forfeiture clause *held* not to vary rule that vendor of land, who has received part of purchase price, is not restricted to retention of money paid, and is not deprived of right to sue for purchase price, by provisions of such clause.

2. Vendor and purchaser ⟸84—Vendor held not deprived of right to sue for purchase price by forfeiture clause.

In contract for purchase of land, provision in forfeiture clause that, in event of default by buyer, moneys already paid shall be applied as liquidated damages, does not restrict vendor's election to sue for balance of purchase price.

3. Frauds, statute of ⟸131(2)—Whether oral renewal contract within statute immaterial where original written contract not superseded or canceled.

In suit by vendor for purchase price of land sold on installment contract, wherein it was alleged that after interval in which no payments were made parties orally agreed that payments should be resumed on consideration of waiver of accrued interest, question whether there was part performance of oral agreements so as to avoid effect of statute *held* immaterial, where pleadings and proof were sufficient to establish prima facie that original written contract was in force at time of suit, and had not been canceled or superseded.

4. Vendor and purchaser ⟸301, 314(1)—Vendor has action at law to recover debt in which he need not allege and prove contract just and reasonable.

Conceding that when vendor sues in equity for specific performance of contract of purchase of land he must allege and prove that consideration is adequate and contract just and reasonable, vendor need not adopt that remedy, but may bring action at law to recover debt, and in so doing he waives his security, and it becomes unnecessary to allege or prove fairness and adequacy of consideration.

5. Trial ⟸165—On motion for nonsuit, inferences and presumptions considered in plaintiff's favor.

On motion for nonsuit, all inferences fairly deducible and all presumptions fairly arising from evidence are considered as facts proved in favor of plaintiff.

Appeal from Superior Court, San Francisco County; Edmund P. Mogan, Judge.

Suits by Burg Bros. against Henri Bercut and others and against Peter Bercut and others. Judgment for defendants in each case, and plaintiff appeals. Reversed as to certain defendants, and affirmed as to others.

Wm. T. Kearney, of Richmond, for appellant.

Samuel T. Bush, of San Francisco, for respondents.

KNIGHT, J. These two actions were tried together, and resulted in judgments of nonsuit, from which judgments plaintiff appeals.

The principal question presented is whether the defendants, as vendees, under installment contracts to purchase land, after having made part payment of the purchase price, may, under the forfeiture clause of said contracts, terminate the same, and, other than forfeiting the money previously paid, avoid further liability thereunder. The forfeiture clause of the contracts reads:

"* * * In the event of a failure of the buyer to comply with any of the terms or conditions of this agreement, *and the continuance of such failure for a period of 60 days after performance due*, the seller shall be released from all obligations in law or in equity to transfer and convey said property, or any part thereof, and the buyer shall forfeit all rights under this agreement, and all rights to any and all moneys which he shall theretofore have paid hereunder, *and said moneys shall be applied as rent for the use of said premises*, and as liquidated damages *and expenses occasioned by such default*, and not as a penalty." (Italics ours.)

Respondents contend in support of the judgments of nonsuit that, on account of the language employed in said forfeiture clause, said contracts were, in legal effect, options to purchase, and not agreements for the purchase and sale of the property (California Land Security Co. v. Ritchie, 40 Cal. App. 254, 185 P. 625; Beckwith-Anderson Land Co. v. Allison, 26 Cal. App. 475, 147 P. 482); that by reason of said clause the vendees were given the right, at any time, to abandon the purchase of said property by forfeiting the moneys previously paid, and that said

forfeiture constituted the exclusive remedy of the vendor in case of abandonment; that respondents having in fact abandoned the purchase of said property, said contracts became null and void, and gave to the vendor the right to retain the money already paid, but deprived him of any other remedy (Armstrong v. Irwin [Ariz.] 221 P. 222, 32 A. L. R. 609).

It has been uniformly held in several cases in this state, however, that forfeiture clauses similar in substance and effect to the one now under consideration—except for the portions herein above italicized—are intended for the benefit of the vendor by which, at his option, in case of the vendee's default, he is relieved of his obligation to convey the property contracted to be sold, and may regard as forfeited all payments theretofore made by the vendee, or, waiving the forfeiture, he may require the vendee to complete his contract. The vendee is given no option, but must abide by the election of the vendor (New Richmond Land Co. v. Ivanovich, 52 Cal. App. 222, 198 P. 221; Wilcoxson v. Stitt, 65 Cal. 596, 4 P. 629, 52 Am. Rep. 310; Smith v. Mohn, 87 Cal. 489, 25 P. 696), and that the vendee may not work a rescission of the contract by mere default on his part in the payment of the purchase price (Newton v. Hull, 90 Cal. 487, 27 P. 429). The rule announced appears to be grounded upon the proposition that the remedy provided for in said clause is but a declaration in express terms of what would have been the legal rights of the parties without such provision. Glock v. Howard, 123 Cal. 1, 55 P. 713, 43 L. R. A. 199, 69 Am. St. Rep. 17.

[1, 2] We are unable to agree with respondents' contention that the presence of those additional provisions, hereinabove italicized, changed the meaning of the entire forfeiture clause, so as to remove the case from the operation of the universal rule established in this state by the cases above cited, and thus deprived the vendor of the right, granted him by law, to stand upon the contract and sue to enforce its performance when the vendee defaulted in making payments. An analysis of those additional provisions, in the light of the entire forfeiture clause, shows plainly, we think, that they do not constitute an abridgment of the vendor's right to exercise the option afforded him by law, in the matter of election of remedies, but pertain only to the application of the forfeited payments as a part of the measure of damages that shall be allowed in the event that the vendor elected to terminate the contract; and even in that regard said additional provisions would appear to be of little value, because without them the measure of damages would be the same, and would necessarily include the rental value for the use of the premises during the vendee's occupation thereof under the contract, and also the expenses occasioned by the vendor's default in the performance of the contract.

The case of Armstrong v. Irwin (Ariz.) supra, cited and relied on by respondents, cannot be accepted as controlling the situation here for the reasons, first, that the court there took into consideration, in determining the question of the intention of the parties, other clauses of the contract, and the evidence offered in support thereof, relating to the occupation and cultivation of the farming land which was the subject of the contract, and from which the court was able to find, as a fact, that the payments were required to be made in such sums and at such times as indicated that, in case of default, it was the intention that a relation in the nature of landlord and tenant should arise. That element does not appear in the instant case. The contracts here pertain to unimproved city lots, which, so far as the evidence shows, were not utilized for any useful or profitable purpose during the life of the contracts; secondly, the court's conclusion there in holding that the vendor was restricted to the sole remedy provided for in the contract is partly based upon the use in the forfeiture clause of the term "liquidated damages." In that respect the decision apparently is not in accord with the conclusions reached in the case of New Richmond Land Co. v. Ivanovich, supra (which was not cited in the Arizona case), wherein the forfeiture clause of the contract likewise provided that the forfeited payments should be applied as "liquidated damages," and even went farther and declared that, upon the vendee's default in payment, "the agreement should become void"; nevertheless, the court adhered to the principle established in the earlier California cases, and held that the vendor's right of election of remedies was not thereby restricted, but that upon the vendee's default he might still treat the contract as being in force, and sue for and recover the balance of the purchase price.

For the reasons stated, we are of the opinion that the forfeiture clause of the contracts involved in these cases falls within the scope of the rule stated in New Richmond Land Co. v. Ivanovich, supra, and in the other cases therein cited, and that the vendor, in the instant case, was not deprived, by the terms of said forfeiture clause, of the right to treat the contracts as being in force, and to sue for the unpaid balance of the purchase price.

The other cases cited by respondent, California Land Security Co. v. Ritchie, supra, and Beckwith-Anderson Co. v. Allison, supra, are not in point for the reason that they were cases involving brokers' commissions, wherein the brokers secured from prospective buyers contracts providing, unconditionally, for the forfeiture of a deposit upon failure of the buyer to make the purchase, which clearly showed those contracts to be options to purchase without obligation beyond the forfeiture of the deposit.

[3] The complaints in the present actions set forth the execution, on January 8, 1913, of written contracts for the sale and purchase of the land, fixing a purchase price for each of two parcels of land contracted to be sold in the sum of $2,250, of which amount $225 was paid at the time the contract was signed and the balance was made payable in monthly installments of $40 each, with interest on deferred payments; that between January, 1913, and April, 1916, approximately $928.01, principal and interest, was paid on one contract, and $1,009.40, or thereabouts, was paid on the other contract; that no further payments were made on either contract until the year 1919. It is then alleged that in 1919 it was mutually agreed, in consideration of the waiver of accrued interest, that said contracts "should be renewed and extended," and that the vendees should "thereupon pay in part performance of said agreement of renewal" the sum of $40, and thereafter pay the monthly sum of $40, together with interest and taxes, until the full amount of said purchase price specified in said contracts was paid. The evidence in this regard shows that these so-called renewed agreements were oral, and that thereafter two payments of $40 each were made on both contracts between the months of March and July, 1919, after which all payments ceased.

Respondents contend that proof of part performance of these oral agreements was not sufficient to avoid the effect of the statute of frauds, in that respondents did not take possession of the property contracted to be sold. If, in order to maintain these actions, appellant is compelled to rely upon the oral agreements of 1919, there is much force in respondents' contention, for the evidence shows that neither at the time said oral agreements were made nor thereafter did respondents take possession of the land, in the manner required by the rule stated in the cases of Hambey v. Wise, 181 Cal. 286, 184 P. 9, and Harper v. Goldsmith, 156 Cal. 245, 104 P. 451, 28 L. R. A. (N. S.) 689, 134 Am. St. Rep. 124; consequently part performance of the oral agreements such as was essential to meet the demands of the statute of frauds was not established. But before appellant may be obliged to rely upon the oral agreements of 1919, the evidence must be such that the court is able to declare as a matter of law that the original written agreements of 1913 were canceled and superseded by the so-called renewed agreements of 1919. The evidence adduced in support of appellant's case fails to establish that fact. On the contrary, a prima facie showing was made that said written agreements of 1913 were not canceled or superseded by the oral agreements of 1919, but thereafter continued to be, and up to the time of the commencement of these actions were, in force. On this point the witness Burg testified that in 1919, after a number of unsuccessful attempts were made to collect the installments past due, he agreed that if respondent would resume and continue to make payments until the full purchase price was paid he would waive accrued interest; that the proposition was acted upon by respondents by making two payments on each contract, after which the payments stopped; that he then considered the oral agreement at an end, and the obligation to pay the accrued interest revived. Burg further testified that the transactions of 1919 in fact resulted in an agreement for "renewal of payment," as distinguished from a "renewal of contract." Upon this same point the witness Bercut testified that in 1919, on the occasion mentioned, Burg offered to cancel all interest up to that time if he would resume payments; that he asked for some time to think it over, and afterwards made two payments; but that he stopped making further payments because he "did not get anything to confirm" what Burg had said in reference to the accrued interest. True, there was some uncertainty on the part of counsel for appellant, during the discussion before the trial court, as to whether the actions were founded upon the written contracts of 1913 or upon the oral contracts of 1919, or both. But inasmuch as the pleadings and proofs were sufficient to establish, prima facie, that the written contracts of 1913 were in force at the time of the commencement of suit, we are of the opinion that relief under those contracts should not have been denied. The question, therefore, of whether or not there was part performance of the oral agreements of 1919 becomes immaterial.

[4] Finally, respondents make the contention that the allegations of the amendments to the complaints, and the proofs by which it was sought to establish the fact that the contracts were just and reasonable, were legally insufficient for that purpose. It may be conceded to be the law, as respondents contend, that where the vendor files his bill in equity asking for the specific performance of the contract he must allege and prove that the consideration provided for in the contract sought to be enforced is adequate, and that the contract is just and reasonable to the defendant (Joyce v. Tomasini, 168 Cal. 235, 142 P. 67), but it is also the law that the vendor is not compelled to adopt that form of remedy. Instead of doing so he may, even where he has retained legal title to the land, bring an action at law merely for the recovery of the debt; in doing so he thereby waives his security, and it becomes unnecessary for him to allege or prove that the consideration for the contract was fair and adequate (Amaranth Land Co. v. Cory, 182 Cal. 66, 186 P. 786).

The form of complaints originally filed here contained no allegations that the contracts sued upon were fair, just, and reasonable, and from which it might be reason-

ably concluded that appellant had adopted the latter form of action; but after the motions for nonsuit were made, and evidently for the purpose of meeting the objections made by respondents in support thereof, appellant amended its complaints so as to allege that the contracts were fair and equitable, and thereafter reopened its case to offer proof in support of those allegations. Counsel for appellant nevertheless insists that he has never sought and does not now seek relief in equity through specific performance, but that he is suing in law merely for the recovery of the debt. Assuming, however, as respondents assert, that the final position taken by counsel for appellant before the trial court in reference to this matter was equivocal, and assuming further that said amendments and proof upon the issue of the adequacy of consideration were wholly insufficient, it is obvious, we think, that those matters did not operate to destroy the entire cause of action, but merely served to deny to appellant additional equitable relief which he might have obtained through a suit for specific performance, and that such allegations and proof might be eliminated entirely and appellant still be entitled, under the allegations of the original complaints, and in the absence of any proof whatever of an adequate consideration, to relief in law—namely, a judgment for the purchase money. In other words, the matter of the allegations and proof upon the issue of a fair contract was vital only after the court reached the point of granting the relief; and, although equitable relief might then have been denied, the right of the vendor to recover upon the debt would still remain. The trial court therefore was not justified in dismissing the actions upon the ground urged.

[5] Summarizing, it appears that the complaints filed herein were susceptible of being construed as actions at law, instituted by appellant as a vendor, who had retained legal title to the land, to recover the debts represented by the unpaid portions of the purchase money due under written contracts of sale, and for that purpose and upon that theory said complaints were legally sufficient to constitute causes of action. Evidence was adduced in support of those allegations sufficient to maintain the actions, as actions at law, against Henri Bercut, Peter Bercut, and Celine Bercut, who were the original vendees under said agreements of 1913, but not as against their assignee Jean Bercut and Grant Meat Market. Wilson v. Beazley, 186 Cal. 437, 199 P. 772; Tarpey v. Curran (Cal. App.) 228 P. 62. And although it appeared that part of the demand sued upon was barred by the statute of limitations, the statute had not run against the balance; in that state of the record—all inferences fairly deducible and every presumption fairly arising from the evidence being considered as facts proved in favor of appellant (Gregg v. Western Pac. R. R. Co., 193 Cal. 212, 223 P. 553)—the motion for nonsuit, as to the original vendees, in our opinion, should have been denied.

The judgments are reversed as to respondents Henri Bercut, Peter Bercut, and Celine Bercut, and are affirmed as to respondents Jean Bercut and Grant Meat Market.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 68

ALLEN'S COLLECTION AGENCY v. LEE.
(Civ. 4390.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1925. Hearing Denied by Supreme Court July 27, 1925.)

1. Appeal and error ⊜1010(1)—Finding of trial court, supported by substantial evidence, not reviewable.

Findings of fact of trial court, which are supported by substantial evidence, are not reviewable on appeal.

2. Appeal and error ⊜931(1)—All favorable inferences will be accorded finding of trial court on appeal.

In determining whether conclusion of trial court is without substantial support in the record, all favorable inferences in support of conclusion will be accorded it.

3. Contracts ⊜88—Presumption of consideration for written contract not conclusive.

Presumption that contract which is in writing is supported by consideration is not conclusive, and evidence may be introduced to rebut it.

4. Evidence ⊜462—Qualified purpose in delivery of promissory note may be shown by parol.

In action on promissory note, parol evidence that it was delivered merely as one of series of memoranda, evidencing steps taken by maker in performance of partnership duties, and did not represent a personal obligation of maker, *held* admissible in view of Civ. Code, § 3097.

5. Bills and notes ⊜519—Evidence held to support finding that promissory note was not personal obligation of maker.

In action on promissory note, finding that it did not represent personal obligation of maker, but was merely one of series of memoranda evidencing steps taken by maker in performance of partnership duties, *held* sustained under evidence.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by Allen's Collection Agency against W. K. Lee. Judgment for defendant, and plaintiff appeals. Affirmed.

⊜For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Emmons & Aldrich and T. F. Allen, all of Bakersfield, for appellant.

F. E. Borton and James Petrini, both of Bakersfield, for respondent.

CRAIG, J. A partnership agreement was executed in writing on October 7, 1918, by W. K. Lee, Louis Zimmer, and William Lingg, for the purpose of cultivating, seeding, harvesting, and marketing the products of certain agricultural lands in Kern county. The contract provided that Lee should furnish the lands, which he held under a lease from the Lerdo Land Company, and all stock, teams, and implements necessary for conducting the farming operations; Zimmer agreed to furnish all necessary seed, food for labor, and the feed and forage for live stock; and Lingg agreed to furnish his services. It was further covenanted that from the proceeds Lee should receive $25 per month per team for use of his stock; Zimmer to be reimbursed for moneys invested in the supplies mentioned; and Lingg should receive $3 per day; and after the payment of rent and payment of said allowances, it was agreed that any balance should be divided and paid, one-half to Lee, three-tenths to Zimmer, and two-tenths to Lingg.

All three of the parties entered upon the performance of their duties under the contract, but Lingg withdrew soon after the commencement of operations, and Lee and Zimmer continued to operate together during the years 1918, 1919, and 1920, under the original contract, with the single modification that Zimmer should receive one-half of the proceeds upon distribution, instead of three-tenths. Lee called upon Zimmer from time to time to advance the money with which to purchase the supplies which the latter had agreed to furnish, and each time received a memorandum in the form of a promissory note, which he signed and delivered to Zimmer, as evidence of such advance. It was testified by Zimmer that said notes were the only evidence or account that he had of moneys advanced under the terms of the partnership agreement. During the last three months of the year 1918, there was advanced, as evidenced by four notes introduced in evidence, a total of $1,250; and from January 16, 1919, to and including July 29, 1919, an aggregate of $6,000 was advanced by Zimmer, as appears from ten such notes, also introduced upon the trial of this case. Each of said notes was signed "W. K. Lee." In the month of September, 1919, two promissory notes for $1,000 each, payable to the First Bank of Kern, were signed by Zimmer and Lee.

On the 9th day of January, 1920, a promissory note for the sum of $8,000, payable to L. H. Zimmer, one year from date thereof—with 1 per cent. interest, which Zimmer testified was inserted at the suggestion of Lee, "just to make it legal"—was signed by W. K. Lee, and each of the old notes above mentioned was indorsed, "Paid Jan. 9th, 1920." Zimmer testified that this constituted a settlement of the 1919 business. There were many other transactions, consisting of sales of grain, a mortgage to Zimmer of Lee's half of the product, a bill of sale from Lee to Zimmer of a half interest in growing cotton, and some cash items, the materiality of which is incidental to the principal question presented upon this appeal.

Zimmer assigned the $8,000 note to appellant, for collection purposes only, and suit was brought thereon in 1921. Lee thereafter answered the complaint in said action, denying any indebtedness to Zimmer, and alleging that the instrument sued upon was but one of a series of promissory notes evidencing advances to the partnership by Zimmer; that on or about November 9, 1920, an agreement was made and executed between the parties "under which the affairs of said partnership were settled, and it was understood, stipulated and agreed, among other things, that the said Zimmer should have the interest of this defendant in the crop raised by said partnership, which said interest the defendant thereupon conveyed to the said Zimmer, and that this defendant should pay the rent to the Lerdo Land Company for lease on pasture, for hay on hand, and that said agreement was fully carried out and there were no other, further or different obligations to be paid or assumed by this defendant, and that all advances made by the said Zimmer, under said partnership, including the said advances evidenced by the said promissory note, were settled and discharged as to this defendant, by said agreement." It was further alleged that, "other than said agreement, no accounting of the said partnership has ever been had and no balance ever struck."

The trial court, after hearing the evidence, which consisted principally of the testimony of Zimmer and Lee, and the various documents heretofore mentioned, rendered judgment for the defendant, finding as true the allegations of defendant's answer, and that "said promissory note was not intended to evidence and did not evidence any personal obligation from the said W. K. Lee to the said L. H. Zimmer."

It is strenuously asserted by appellant that the defense that said note was given solely for the purpose of accounting and making a record of advances should not have been allowed by the lower court, for the reason that the same could be maintained only by the introduction of parol testimony tending to change or vary the terms and provisions of an instrument in writing.

There is much conflict as to whether or not the note for $8,000 represented an indebtedness of Lee to Zimmer, or whether it embodied the aggregate amount advanced by the latter to the partnership, under the provisions of the original agreement, following the set-

tlement and accounting of November 9, 1920. However, it appears that Lee used all surplus proceeds of the 1919 crop in putting in the crop for 1920, and that he later turned over to Zimmer everything of value except some small shacks; the parties met at the bank and arrived at an adjustment of their partnership affairs, and the contract of October 7, 1918, was terminated. It also appears, as we have indicated above, that the exact amount of advances in 1919 was $8,000, which was also the amount of the note in suit. It was testified by each of the parties that at the time of said settlement there was a small difference of about $214, for which Lee gave a check, and they signed a written contract declaring that the partnership was dissolved.

[1, 2] The sufficiency of evidence to establish a given fact is primarily a question for the trial court, and if there is substantial evidence to support the conclusion reached below, the finding is not open to review upon appeal. Steinberger v. Young, 175 Cal. 81, 165 P. 432. And so, the finding in question is conclusive on appeal unless this court is convinced that the conclusion reached is without substantial support in the record, bearing in mind that all inferences favorable to its support are to be accorded to it. Hassell v. Bunge, 167 Cal. 365, 139 P. 800; Hind v. Oriental Products Co. (Cal. Sup.) 235 P. 438. Hence, here, where a clear conflict of evidence exists, this court is not justified in disturbing the finding below.

[3] Therefore, accepting as we must the conclusion of the trial court that the note for $8,000 did not represent an obligation of Lee to his copartner, but that it was one of a series of memoranda merely evidencing the steps taken by Zimmer in the performance of his partnership duties, under the original contract, it is apparent that the case does not fall under the inhibitions of the rule including parol evidence. The evidence offered was not in conflict with the terms of the instrument, nor intended to contradict, vary, or add thereto. The question was not whether the date, amount, maturity, or other elements of the note were correctly stated therein, but whether it was given by Lee as evidence of a personal obligation, or merely as an acknowledgment of having received certain amounts of money in transacting the business of the joint enterprise. If it be shown that Lee owed Zimmer nothing when the note was given, one of the essentials of the instrument itself would disappear. Consideration will be presumed from the fact that a contract is in writing, but such presumption is not conclusive, and evidence may be introduced to rebut it. Raynor v. Drew, 72 Cal. 307, 13 P. 866.

[4] Section 3097 of the Civil Code expressly provides that "the delivery may be shown to have been conditional, or for a special purpose only"; and in Sayre v. Leonard, 57 Colo. 116, 140 P. 196, cited with approval by this court in Silva v. Gordo, 65 Cal. App. 486, 224 P. 759, it was held that the purposes for which an instrument was executed may be shown by parol testimony. As was held in Muir v. Hamilton, 152 Cal. 634, 93 P. 857:

"However closely the lips of the plaintiff might have been sealed under the law governing negotiable paper if his notes had passed into the hands of an innocent purchaser for value before maturity, as between the original parties to an instrument nothing is better settled than that the maker may show an original lack of consideration, or subsequent failure of consideration. * * * And it is equally well settled that such lack or failure of consideration may be shown by parol."

[5] Differences of opinion as to the weight and sufficiency of evidence are expressed in the briefs, but as we have said, these were questions lying within the province of the trial court. We think the evidence offered was clearly admissible, and upon a careful review of the record upon appeal it appears that the judgment rendered was warranted thereby.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

72 Cal. App. 773

ROLLINS v. SMITH et al. (Civ. 4445.)

(District Court of Appeal, Second District, Division 1, California. May 28, 1925. Rehearing Denied June 15, 1925. Hearing Denied by Supreme Court July 27, 1925.)

1. Assignments ⟸137—Evidence held insufficient to show unsoundness of mind on dates when assignments executed.

Evidence *held* insufficient to show that deceased was of unsound mind at any of several dates when assignments were executed, or that the delusion or hallucination from which he suffered at times effected such disposition of his property.

2. Assignments ⟸137—Proof of temporary delusions not evidence of mental incompetency to make assignments, where no contention assignments were directly influenced thereby.

Proof that the deceased was suffering from hallucination or delusions at times *held* not evidence of his mental incompetency to make assignments, where no ground for contending that such assignments were the direct result of or influenced by such delusions.

3. Insane persons ⟸2—Evidence showing weakness of mind and body insufficient to prove insanity establishing mental incompetency.

Evidence, showing that deceased was for some months prior to his death weak in mind and body, is wholly insufficient to prove insanity of such broad character as to establish mental incompetency generally.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

4. Assignments ⊂137—Wills ⊂55(7)—Proof that deceased's mind was weak and failing insufficient to establish mental incompetency for making assignments of shares of stock and mortgages.

Proof that person, old and infirm, was at times unable to recognize his friends or transact his regular business, was irritable and ill-tempered, and that his mind was weak and failing, did not establish as a fact that his mental incompetency was such that he could not make a will or dispose of property by assignments, especially where normal habits were shown to have been indulged in as well.

5. Assignments ⊂62—That deceased was suffering from senile dementia did not thereby render him incapable of executing assignments.

That deceased was suffering from senile dementia for some months prior to his death and during a period when the assignments were executed did not render him incapable of making such assignments.

6. Assignments ⊂137—Evidence held not to show undue influence.

Evidence *held* not to show undue influence by daughter or her husband upon the deceased in making assignments of shares of stock and mortgages, where the only evidence was to the effect that the husband brought deceased an assignment of mortgage for his signature, saying, "Now, Grandpa, I want you to sign this," but signature was not obtained at that time, and only about one-half deceased's property was assigned.

7. Assignments ⊂64—Pressure insufficient to overpower the mind and will of assignor held not undue influence.

Where proof of pressure brought to bear upon one making assignments is insufficient to show that his mind was overpowered and his will overcome at the time he executed the assignments or any of them, there was no undue influence exercised.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Warren K. Rollins, special administrator of the estate of Henry S. Rollins, deceased, against Austin Smith and Florence Rollins Smith. Judgment in favor of plaintiff, and defendants appeal. Reversed.

Hearing denied by Supreme Court; MYERS, C. J., and RICHARDS, J., dissenting.

HOUSER, Justice pro tem., did not participate.

See, also, 189 Cal. 392, 208 P. 280.

Clyde R. Burr and W. W. Hyams, both of Los Angeles, for appellants.

James S. Bennett, of Los Angeles, for respondent.

CURTIS, J. Henry S. Rollins was for a number of years a practicing attorney in the city of Los Angeles. Some years prior to his death he became estranged from his wife, and this estrangement resulted in a legal separation of the parties. They had four children, one son and three daughters. These children were all living at the time of his death. Probably as a result of the differences between himself and wife, the relations between him and three of his children were not of the most cordial character during the latter years of his lifetime. His daughter Florence Rollins Smith, one of the defendants, remained friendly to him during the domestic disturbances in his family, and these friendly relations continued up to the time of his death. He visited her and her family frequently, and in turn she called to see him regularly at his office. After his separation from his wife, he did not live with any member of his family. For about four years immediately prior to his death, with the exception of the last month of his life, he had his lodgings in the rooming house of Mr. and Mrs. Odell, in the city of Los Angeles. He also took some of his meals with the Odells. On March 21, 1921, at the request of Mr. Odell, Mrs. Smith, deceased's daughter, removed him from the Odell house to the county hospital. This was done on account of the enfeebled condition of his mind and body, which rendered him almost helpless and in need of constant care and attention. On account of the crowded condition of the county hospital, he was placed in its psychopathic ward, and a few days later, at the suggestion of the hospital authorities, Mrs. Smith swore to a complaint in insanity against him, and a hearing was had on this complaint on March 28, 1921. This hearing resulted in him being sent to the Glendale Sanitarium, under the immediate care of Jean G. McCracken, the psychopathic parole officer of said county. No judgment or order was made by the court upon the question of his sanity, but the proceedings were simply continued indefinitely and after his death they were dismissed. One of the reasons, and, as we gather from the record, probably the main reason, why he was sent to the Glendale Sanitarium and was not committed to a public institution, was the fact, which developed at the hearing, that he was possessed of property sufficient at least to provide him with the care and attention his condition required, at some private hospital or sanitarium. It does not clearly appear just what property he was shown to possess at that hearing, but the evidence there produced showed that he was the owner at least of a house and lot situated in said city which had been his home on some previous occasion. As far as we are able to gather from the record, it was not shown at that time that he was the owner of any other property. It afterwards developed that he was then and for some time had been the owner of fifteen shares of the capital stock of the Union Oil Company, five thou-

sand shares of the capital stock of the United Oil Company, and two mortgages, one for $5,500 and the other for $2,000, besides the real property above mentioned and other real and personal property. The whole property was of the value of about $30,000. The fact that he possessed this property was not theretofore known by his daughter Florence, or her husband, the defendants herein, or any other member of his family, and by but few, if any, of his near friends.

He was taken to the sanitarium at Glendale on the 28th day of March, 1921. His daughter Mrs. Smith visited him at the hospital, probably the next day after he was taken there, and thereafter on practically every day until the day of his death. No other member of his family visited him while he was at the hospital. On the 31st of this same month, according to the testimony of Mrs. Smith, he stated to her that he realized that he was a very sick man and asked her to stop at his office on her way back to her home and get his mail, also his private papers. He gave her directions where these papers might be found and asked her to bring them out with her the next day she came to see him. On the following day Mrs. Smith brought him the papers, and after he had received them he executed and delivered to her assignments of the fifteen shares of stock of the Union Oil Company and the five thousand shares of stock of the United Oil Company, and gave her a check for the amount of his bank account, which was something over $700. On the night of April 9, 1921, he executed, acknowledged, and delivered to her an assignment of the $5,500 mortgage, and on the 14th of the same month he executed and on the 16th he acknowledged an assignment of the $2,000 mortgage. Two days thereafter he died at the hospital.

This action was instituted by plaintiff as the special administrator of the estate of Henry S. Rollins, deceased, against Florence Rollins Smith and her husband, Austin Smith, to set aside the assignments of said certificates of stock and said mortgages, upon the ground that the said Henry S. Rollins was of unsound mind at the date of said assignments, and upon the further ground that said assignments were procured from said deceased by the exercise of undue influence over said deceased by the defendants at the time of the execution of said assignments. The court found in favor of the plaintiff upon both of these grounds and rendered judgment setting aside said assignments and directing the defendants to deliver to plaintiff the certificates of stock and said two mortgages. The defendants have appealed from this judgment, and as a ground of appeal contend that the evidence is not sufficient to justify the findings of the court that the said Rollins was mentally incompetent to make said assignments, or that defendants exercised undue influence over the said Henry S. Rollins, and as a result of said undue influence said Henry S. Rollins executed said assignments.

The evidence on behalf of respondent in support of the findings of the court that deceased was of unsound mind at the time he executed the various assignments in favor of the defendant Florence Rollins Smith is substantially as follows: Deceased was at the time of his death between 61 and 62 years of age. About a year and a half to two years prior thereto, he became careless about his personal appearance and condition of his person and clothing; he became weak in body and walked with tottering steps, and later on, and up to the time of his death, he walked with his body in a stooped position, shuffling his feet along and dragging one foot after the other. About a year before his death, he lost to some extent control of his bowels and urine. He was unable at times to feed himself and had to be assisted by others at his meals. He became irritable and swore at his food and at his fork when he was unable to properly handle it. He was unable to control his saliva, and the same ran from his mouth down upon the table so that he was forced to eat his meals alone. He either was not able or had not the inclination to undress himself on going to bed at night, and if no one volunteered to assist him he retired with his clothes on, and the next morning his clothes and person would be found in a filthy condition as a result of his inability to control his bowels and urine. He was unable to cleanse himself and had to be bathed by others. His condition was progressive, and about one month before his death the Odells, with whom he was living, were forced to request the defendant Florence Rollins Smith to remove him from the Odell home to some place where he could receive the care and attention his enfeebled condition required. Some months before his death his speech became affected and he articulated with difficulty, so that it was hard to understand him in conversation. This defect in his speech appeared to be caused by the thickening and hardening of his tongue. After being taken to the Glendale Sanitarium, he often was unable to recognize his old friends. On the other hand, he quite frequently recognized them and engaged in conversation with them and those in charge of the hospital. Mr. Odell called to see him on four different occasions. On the first two he failed to recognize Mr. Odell, but on the other two he knew him.

Mrs. Anderson, the proprietor of the Glendale Sanitarium, a witness in behalf of respondent, testified that she cared for him the first few days he was in her hospital, and that—

"He always knew me when I would go in, he would always say, 'Good morning, Mrs.

Anderson,' and call my name, and he told me two mornings what he wanted, things to eat, for the next meal. I fed him his breakfast the first two mornings he was in the hospital. The third morning he ate himself. After the second morning he fed himself as long as he remained in the ward."

He was removed from the ward to a room on April 8th. This witness also related a conversation had with deceased, when he talked with her about her little girl and about the flowers the latter had with her. She also detailed a conversation, had with him after he came to her hospital, regarding some chocolate that she had made for him, in which he expressed himself as liking the chocolate very much and wishing that she might give the recipe for making it to his daughter Mrs. Smith.

At times, while at the Glendale Sanitarium, he appeared to be holding court and was greatly angered at any noise which interrupted the proceedings. Up to a month before his death he went to his law office regularly in the city of Los Angeles, and found his way unassisted through the crowded streets. He had not, however, been able to transact any legal business for a year or more before his death. He was not able even to fill out notary papers on one occasion when a former client called for that purpose. He spent much of his time at his office lying down on an old couch in a rear room.

Mr. Emery, a witness for respondent, who took the acknowledgment of the deceased to the assignment of the Hahn mortgage on April 9th, testified in behalf of plaintiff that—

"The first thing, as near as I can recollect, that Mr. Rollins said was to request all persons except Mr. Smith and myself to leave the room. * * * He remarked to me that his signature was pretty bad. As near as I can remember the conversation that he had, he remarked that his name was not written very well and he was anxious that it be on the line. * * * He looked the paper over, he had it in his hand, and before he signed it he looked it over, and I don't remember the exact remark, but something, that he wanted to be sure it was correctly drawn; and then Mr. Smith told me that Mr. Rollins was careful because he had been an attorney. * * * I did not know any one connected with the transaction prior to that time."

This witness also stated that he observed nothing out of the way or unusual in Mr. Rollins more than that there seemed to be a slight impediment in his speech, but that he had no real difficulty in understanding him.

Two physicians testified at the trial. One of these physicians had examined him at the time of the hearing upon the insanity charge. Each of these physicians gave as his opinion that the deceased, for months prior to his death, had been suffering from senile dementia.

This evidence brings this case squarely within the rule laid down in the cases of In re Redfield, 116 Cal. 637, 48 P. 794; Estate of Chevallier, 159 Cal. 161, 113 P. 130; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Perkins (Cal. Sup.) 235 P. 45. This rule is fairly and correctly stated as follows:

"In considering the evidence it is important, preliminarily, to observe that it is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. The rule of law is not that no person who is insane may make a valid will, but that the will of no person who, by reason of insanity, is incapable of making valid testamentary disposition shall be upheld. Thus, the wills of aged and infirm people, of people sick in mind as well as in body, are always upheld, if, notwithstanding their enfeeblement, testamentary capacity is shown. So again, it may be well and perhaps soundly reasoned that all persons who commit crime and that all persons who commit suicide are aberrant, abnormal, and therefore insane. But such is not the insanity which the law has in mind. It must be an insanity of one of two forms, either insanity of such broad character as to establish mental incompetency generally, or some specific and narrower form of insanity, under which the testator is the victim of some hallucination or delusion. And, even in the latter class of cases, it would not be sufficient merely to establish that a testator was the victim of some hallucination or delusion to avoid the will. The evidence must go further and establish that the will itself was the creature or product of such hallucination or delusion, or, in other words, that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. It would thus not be sufficient, to avoid a will, to show that the testator believed that the moon was made of green cheese, but if it should be established, in addition thereto, that because of this belief he devised or bequeathed his property in a way which, saving for the belief, he would not have done, a case is presented where the abnormality of mind has a direct influence upon the testamentary act." Estate of Chevallier, supra, page 168, 113 P. 133.

In a very recent case of Estate of Perkins, supra, the same rule is stated in the following language:

"Mental derangement sufficient to invalidate a will must be insanity in one of two forms: (1) Insanity of such broad character as to establish mental incompetency generally, or (2) some specific and narrower form of insanity under which the testator is the victim of some hallucination or delusion. Even in the latter class of cases, it is not sufficient merely to establish that a testator was the victim of some hallucination or delusion. The evidence must establish that the will itself was the creature or product of such hallucination or delusion; that the hallucination or delusion bore directly upon and influenced the creation and terms of the testamentary instrument. The evidence must establish, in addition to the fact of the existence of the hallucinations or delusions, the fact that by reason of these hallucinations or

delusions the testatrix devised or bequeathed her property in a way which, except for the existence of such delusions, she would not have done. In short, the abnormality of mind must have had a direct influence upon the testamentary act."

[1, 2] Measuring the above facts set forth in this case by the rule laid down by the Supreme Court in these decisions, they come far short of establishing in a legal sense the unsoundness of the mind of the said Rollins at any of the several dates when the assignments were executed. The only delusion or hallucination under which the deceased was laboring, as shown by this evidence, was that at times he appeared to act as if he were holding court; but this delusion had absolutely no reference to or connection with the disposition of his property, or to his daughter Mrs. Smith, to whom his property was conveyed, or to any of his other children who were excluded from this property. There is no ground for contending that the assignments of stock and mortgages were the creatures of this delusion, or that such assignments were the direct result of, or that they were in any manner prompted, suggested, or influenced by said delusions. That being true, proof that the deceased was suffering from such delusions would not be any evidence of his mental incompetency to make said assignments.

[3, 4] While this evidence shows that deceased for some months immediately prior to his death was weak in mind and body, it is wholly insufficient to prove "insanity of such a broad character as to establish mental incompetency generally." Proof that a person old and infirm was at times unable to recognize his friends; that he was unable to transact his regular business; that his habits were filthy; that he was irritable and ill-tempered; and that in other ways, as shown by the above evidence in this case, his mind was weak and failing—does not establish as a fact that his mental incompetency was such that he could not make a will or otherwise dispose of his property. Especially is this true when the evidence further shows that he often did recognize his old friends and new ones also, greeting them and calling them by name, and engaged in intelligent conversations with them; that up to a month prior to his death he went to his office regularly, and found his way without assistance through the streets of a crowded city; and that in executing one of the assignments, which it was sought to have set aside, he examined it critically before executing it, stating that he wanted to be sure it was correct, and that after signing it he expressed regret that he had not signed his name on the line provided for that purpose, and remarked that his name was not written very well.

"The amount of intelligence requisite for a man to know what he wants to do with his property, or to understand satisfactorily the state of his family and his affairs, is not great. Such an amount of knowledge is presumably not inconsistent with the existence of great feebleness of mind, considerable loss of memory, and even with some insane delusions. In old age all these conditions may exist, and yet a man may know enough, in the eyes of the law, to be able to make a will." Wharton and Stille's Medical Jurisprudence, vol. 1, § 991.

"Extreme stinginess, repulsive or filthy personal habits, ill temper, jealousy, a dictatorial and disagreeable disposition, and a propensity to drive hard bargains do not constitute insanity or unsoundness of mind." Estate of Collins, supra, 669, 164 P. 1112.

[5] It is true that the two physcians who testified in favor of the respondent testified that the deceased was suffering from senile dementia for some months prior to his death, and during the period when the assignments were executed, but it is the well-settled law of this state that persons so afflicted are not invariably rendered incapable of executing conveyances of their property and of transacting business.

"The medical profession may describe such a condition as senile dementia and declare such a person mentally unsound, but it does not constitute the sort of incompetency or insanity which, in the estimation of law and of men of ordinary sagacity and prudence, renders a person incapable of executing contracts or making a will." Estate of Purcell, supra, p. 306, 128 P. 935.

It is our conclusion, therefore, that the evidence is insufficient to justify the finding of unsoundness of mind.

[6, 7] As to the finding that the assignments were the result of undue influence exercised by the appellants over the deceased, the evidence in the case is even less satisfying. While the deceased was, at the date the assignments were executed, weak in mind and body, and therefore much more susceptible to the influence of others than he would have been had he been a strong and vigorous person, yet we find no evidence whatever that the appellants or either of them, or any person in their behalf, ever exercised or attempted to exercise any influence over him to induce him to execute the assignments. He did not convey to Mrs. Smith all of his property by the assignments he executed in her favor, only about one-half. The court found the Union Oil stock to be worth $2,370 and the United Oil stock $4,200. Assuming that the mortgages were worth their face, and that the bank deposit was $700, the amount of property conveyed by the deceased to Mrs. Smith was $14,770. He had frequently said prior to his death that he intended that Mrs. Smith should have a larger portion of his property than his other children for the reason that she was the only one of his children who remained friendly to him. The evidence fails to show that any of his other children had called upon

him or manifested any interest in him for at least four years prior to his death. None of his children, with the exception of Mrs. Smith, even attended his funeral, although they were all living in the city of Los Angeles at the time of his death. Under these conditions, it is not strange nor unusual that he should make a preference in favor of Mrs. Smith over his other children in the final disposition of his property. He evidently intended to make a will, as on one occasion while at the Glendale Hospital he stated that Mr. Lewis, an attorney with whom he had been associated in some legal matters, would be out on the following day to draw his will. Mr. Lewis was at the hospital the next day, which was Sunday, April 3d, and Mr. Rollins said to him:

"I wanted you to attend to making my will, but I don't want to make it up now; there are too many people around here."

It does not appear that any further reference was ever made by him to the making of his will. He died intestate, and the property belonging to his estate, the value of which was in the neighborhood of $15,000, exclusive of that conveyed to Mrs. Smith, would go equally to all his children. Respondent has called to our attention the case of Weakley v. Melton, 189 Cal. 44, 207 P. 523, where the court, without any showing that all of the property of the plaintiff was involved, sustained a judgment setting aside a conveyance to her son upon the ground of undue influence, and claims that the present action falls within the rule declared therein. The facts of that case, however, are entirely different from those in the present action. In that case, the son repeatedly urged the mother to make the conveyance in his favor. Upon her refusal to comply with the request, he patted his mother on the shoulder and said:

"It is all right, Mother; it is just to keep Pearl from making any trouble or getting it after you are through with it."

The trial court found that the mother, in an extremely agitated and nervous condition, and through the exercise of undue influence over her by her son, executed the conveyance, and the Supreme Court sustained the judgment. While there was no proof that the property involved in said action was all of the property of the mother, there was positive and convincing testimony that the son had exercised undue influence over his mother, and that the conveyance made by her was the result of such undue influence. This case was decided, not upon the theory that undue influence would be presumed from the confidential relations existing between the mother and her son, but upon direct evidence that such undue influence had been exercised by the son over the mother, and that she was thereby induced to execute the conveyance. In the present case we have no such direct evidence. In fact, we have no evidence whatever that defendants unduly persuaded Rollins to transfer the stock and mortgages to Mrs. Smith. The only evidence in the case that either of the defendants ever requested Rollins to execute any of the assignments is that given by Mrs. Burger, the nurse, who testified that Mr. Smith said to Mr. Rollins on the occasion when Mr. Smith brought to Mr. Rollins for his signature an assignment of mortgage, probably the Berg mortgage, "Now, Grandpa, I want you to sign this." In attempting to sign the instrument, however, Mr. Rollins apparently failed to properly sign his name, and Mr. Smith said: "Oh, you have spoiled it. I will have to make another copy." The attempt to obtain his signature was thereupon abandoned for the time. This was on April 11th or 12th. The assignment of the Berg mortgage was signed on April 14th. Mrs. Burger was not present when this assignment was executed. She was present two days later when Rollins' acknowledgment was taken to this assignment by the notary Bryant. But even conceding that Rollins signed any of the instruments only after Smith had stated to him that he wanted him to sign it, yet there is no evidence that Smith did any more than make this request or that he accompanied his request with any efforts of compulsion. We think there was an utter lack of proof of any pressure brought to bear upon Rollins by the defendants, or either of them, which overpowered the mind of the latter and overcame his will at the time he executed the assignments or any of them. Unless the proof amounts to this, it is absolutely insufficient to show undue influence. Estate of Ricks, 160 Cal. 450, 462, 117 P. 532; Estate of Perkins, supra, p. 374.

"The presumption of undue influence is not raised by proof of interest and opportunity alone. In order to set aside a will for undue influence, there must be substantial proof of a pressure which overpowered the volition of the testator at the time the will was made. * * * In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such undue influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires." Estate of Nelson, 132 Cal. 182, 194, 64 P. 294, 299.

The evidence being insufficient to justify the findings of the court, either that Rollins was incompetent at the time of his execution of the four assignments in favor of Mrs. Smith, or that said assignments were executed by reason of undue influence, the judgment should be reversed, and it is so ordered.

We concur: CONREY, P. J.; HOUSER, J.

73 Cal. App. 44

SHELLEY v. BYERS, Sheriff. (Civ. 4887.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1925.)

1. Appeal and error ⟹110—Order denying new trial not appealable.

Order denying motion for new trial is not appealable.

2. Chattel mortgages ⟹129—Pledges ⟹21—Mortgagees and pledgees of personal property do not obtain legal title.

Under Civ. Code, § 2888, neither mortgagee nor pledgee in possession of personal property, being practically the same under sections 2924 and 2987, obtain legal title, but merely right to possession for purpose of security.

3. Sales ⟹6—Whether transaction is sale or pledge determined by circumstances of each case.

Where property is delivered with right reserved by grantor to repurchase at stipulated price within given time, whether transaction constitutes sale or pledge must be determined by the peculiar circumstances of each case.

4. Evidence ⟹452—Parol evidence admissible to explain latent ambiguity in written instrument or real intention of parties if in doubt.

Where written instrument contains latent ambiguity or admits of more than one interpretation, or intention of parties is in doubt, parol evidence of circumstances and situation of parties may be considered to ascertain true intention.

5. Sales ⟹53(1)—Whether unambiguous written agreement is a sale or pledge is for court.

Where written contract is free from ambiguity or uncertainty, whether it constitutes a pledge or sale with right of repurchase reserved to vendor is a question of law for court.

6. Usury ⟹31—Contract providing for transfer of property with option of repurchase at larger figure held to provide for "bonus" rather than usurious interest.

Where agreement provided for transfer of property for $140,000 with an option to repurchase within four months for $150,000, the difference would be interpreted as a bonus for services, where such interpretation was possible, rather than as usurious interest, which would make the parties subject to punishment under Gen. Laws, Act 3757; "bonus" meaning good, or a sum paid for services in excess of what ordinarily would be given.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Bonus.]

7. Payment ⟹1(2)—Agreement to "advance" money purports loan.

Agreement to "advance" money for personal property implies a loan with property as pledge, rather than payment of purchase money in sale.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Advance—Advances.]

8. Evidence ⟹397(2)—Written document apparently complete presumed to contain entire agreement.

Written document appearing upon its face to be complete expression of whole agreement is presumed to include every material item and term of agreement.

9. Sales ⟹6—Agreement to transfer property with option of repurchase held pledge rather than sale.

Written agreement for transfer of bankrupt's property in consideration of advances up to $140,000 for composition of creditors, including option of repurchase within four months after transferee had taken possession by payment of $150,000 to transferee, *held* a pledge rather than sale with option of repurchase, notwithstanding there was no personal liability on transferors for sum advanced, in view of Civ. Code, § 2890.

10. Fraudulent conveyances ⟹47—Transfer by pledgor of interest in stock of goods without compliance with Bulk Sales Law held void.

Where partners had pledged stock of goods to secure advances for composition of creditors and pledgee had taken possession, transfer by partners of their interest without compliance with Civ. Code, § 3440, *held* fraudulent and void as to their creditors, notwithstanding they had no possession of property at time of transfer of interest.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Action by George Shelley against J. C. Byers, individually and as Sheriff of San Diego County, to recover seized personal property. Judgment for plaintiff, a new trial was denied, and defendant appeals. Appeal from order denying new trial dismissed. Judgment reversed.

Joseph Kirk, of San Francisco, and Treadwell, Tompkins & Clark, of San Diego (Joseph A. Pritchard, of San Francisco, of counsel), for appellant.

Gordon Gray, of San Diego, and Walter Ames (C. C. Carleton, of Sacramento, of counsel), for respondent.

FINLAYSON, P. J. [1] This is an action to recover personal property seized by defendant, the sheriff of San Diego county, under a writ of attachment issued in an action against plaintiff's assignors. The complaint alleges that plaintiff is the owner and entitled to the possession of the property. The answer denies this allegation. Whether plaintiff is the owner is the prime question in the case. The court found for plaintiff and entered judgment for him accordingly. Defendant appeals from the judgment and likewise from an order denying his motion for a new trial. The latter order is not appealable, and the appeal therefrom must be dismissed.

The facts necessary to an understanding of the case are substantially these: On and prior to February 4, 1922, plaintiff's three sons, Louis Shelley, Benjamin Shelley, and Abe Shelley (hereafter referred to as the "Shelley boys"), were copartners doing business in San Diego at a place known as the Army Department Store, where they were engaged in selling merchandise consisting of groceries, tobacco, shoes, sport goods, men's furnishings, toys, and dry goods. On the date last mentioned, the Shelley boys instituted a voluntary proceeding in bankruptcy in the United States court, and thereafter were adjudged to be voluntary bankrupts. On March 22, 1922, Julius Gollober and I. Rosenberg, residents of San Francisco, and the three Shelley boys, the former as the parties of the first part and the latter as the parties of the second part, executed a written instrument upon the face of which there was what purported to be a "sale" by the Shelley boys to Gollober and Rosenberg of certain property, including all of the stock in trade in the Army Department Store, with a right to repurchase reserved to the Shelley boys. The goods seized by defendant, 1,813 pairs of shoes, were a part of the stock in trade referred to in that instrument. The pivotal point in the case involves the construction of this contract, appellant claiming that it was a pledge to Gollober and Rosenberg of the personal property mentioned therein, and respondent claiming that it was a sale to Gollober and Rosenberg with an optional right to repurchase reserved to the Shelley boys. It will be necessary, therefore, to state the provisions of the contract with some detail.

The instrument in question commences by reciting that the Shelley boys, the parties of the second part, had been adjudicated bankrupts, that they had offered to their creditors a certain composition, and that the parties of the first part, Gollober and Rosenberg, had agreed to advance a sum of money, up to $140,000, to effect such composition. The essential features following such recitals are these: The parties of the first part agree that they "will advance, as soon as required by the referee in bankruptcy to effect said composition, a sufficient amount of money, up to the sum of one hundred forty thousand ($140,000) dollars, as will be necessary to effect said composition. Should any further sum be required for the purpose of making said composition the parties of the second part agree to pay said sum." The parties of the second part "hereby sell, transfer, assign, grant and set over unto the parties of the first part all of the following described property, to wit:" [Then follows a description of the stock in trade in the Army Department Store, certain other personal property, including certain choses in action, and certain real property.] The parties of the second part agree to "execute any and all agreements, papers, deeds or bills of sale that may be necessary to transfer any of said property to the parties of the first part." The parties of the first part "do hereby agree to sell the parties of the second part all of the said property * * * for the consideration of one hundred and fifty thousand ($150,000) dollars, which is to be paid by the parties of the second part to the parties of the first part in the following manner: * * * Immediately upon the confirmation of the composition * * * between the parties of the second part and their creditors, the parties of the first part will at once enter into and take possession of all of the said partnership property," or so much thereof as may be delivered to them by the receiver in bankruptcy upon the confirmation of said composition, and they "will sell to the best advantage all of the said property hereinbefore referred to and transferred to them, excepting all of the merchandise, fixtures and lease of the said store in the Arcade Building known as the Army Department Store, and will apply the receipts from such sales upon the purchase price of $150,000 hereinbefore referred to." The parties of the first part "will, as soon as practicable, reopen said Army Department Store, and conduct a sale therein of the merchandise therein situated, together with such other merchandise as may be placed therein pursuant to the terms of this agreement and operate said store," and they "will advance a further sum of money up to $15,000 for the purpose of replenishing and filling in the stock of merchandise in said store, which said sum shall be paid to said parties of the first part in addition to the said sum of $150,000 before the parties of the second part shall be entitled to delivery of said store, fixtures, merchandise, etc. The parties of the first part shall have the sole control and custody of said business and the exclusive management thereof free from any interference" by the parties of the second part. From the proceeds of the business there shall be deducted: (1) The expenses of operating the business; (2) so much of the balance of said proceeds, not exceeding 25 per cent., as may be necessary to replenish the stock of merchandise; and (3) the balance of such proceeds "shall be retained by the parties of the first part to apply on the purchase price of said store, fixtures and lease [i. e., to apply on the $150,000, upon the receipt of which by the parties of the first part they undertook to resell the property on hand to the parties of the second part]." The parties of the first part "will keep a correct account of the sales, expenses and disbursements of said business, and the parties of the second part shall have full access to all books and records of said business at all reasonable times, and shall receive weekly statements of the business done in said store." Upon the payment to the parties of the first part "of the said

purchase price of one hundred and fifty thousand ($150,000) dollars, in the manner hereinbefore provided, from the sale of said property, or from the operation of said business or otherwise and the payment of all moneys advanced by said parties of the first part for the replenishment of stock of merchandise for said Army Department Store, the parties of the first part immediately will sell, assign, transfer and set over unto the parties of the second part all of the said property hereinbefore described then remaining in the hands of said parties of the first part, together with all additional merchandise or property that may have been purchased by said parties of the first part for the replenishment of said stock of merchandise in said store, * * * and will execute any and all notices, papers, agreements, bills of sale and documents that may be necessary to effect said transfer." The parties of the second part "shall have four months from the date said parties of the first part receive possession of said property within which to complete the payments of said purchase price." If at the termination of the four months the parties of the second part shall have failed to pay the above-mentioned purchase price, or if the parties of the first part shall have failed to receive the same from the net proceeds of sales, then and in that event the parties of the first part shall be under no obligation to sell or transfer the merchandise and fixtures or other property to the said parties of the second part, and the agreement shall ipso facto terminate and be annulled, "and said parties of the first part shall retain all moneys taken and received from the sales of said merchandise, stock in trade, fixtures, etc., and said parties of the second part shall have no claims of any kind or character against said parties of the first part for any transfer or sale of said merchandise and fixtures and property or any part thereof." Time is made "of the essence of this agreement."

Though the document states that the Shelley boys "hereby sell, transfer, assign, grant and set over" unto Gollober and Rosenberg the merchandise and other property described therein, the transfer, whatever be its character, was not a transfer in præsenti. Its consummation as a present transfer was dependent upon the receiver's confirmation of the proposed composition with the Shelley boys' creditors. Without doubt, the receiver, at some time, did confirm the composition with the creditors; but it does not appear from the record when it was that the confirmation was made. Until the proposed composition was confirmed by the receiver, there was no consummated sale or consummated pledge or consummated transfer of any character from the Shelley boys to Gollober and Rosenberg, and until such confirmation the latter had no right of possession whatever. The evidence upon the subject of delivery to Gollober and Rosenberg is not very clear. Their manager seems to have taken possession for them on April 14, 1922. At any rate, the parties seem to have treated that date as the commencement of the four months' period mentioned in their written contract. On April 6, 1922, they caused to be recorded in the county recorder's office a notice that on April 14, 1922, the Shelley boys intended to sell to Gollober and Rosenberg the merchandise referred to in the above-mentioned contract. This notice was given pursuant to the Bulk Sales Law, found in section 3440 of the Civil Code. It is probable that the date mentioned in the notice was the approximate date of the receiver's confirmation of the composition with the creditors, and that it therefore was the date when the transfer to Gollober and Rosenberg, whatever be its character, was consummated. Be that as it may, without undertaking to fix the date when the composition with the creditors was confirmed, we shall assume, for the purpose of this decision, that the transfer to Gollober and Rosenberg, when consummated by the receiver's confirmation, was accompanied by an immediate delivery and was followed by an actual and continued change of possession.

Upon several occasions during the four months mentioned in the contract, plaintiff advanced for his three sons certain sums of money to enable them to repay some of the amount which had been advanced for them by Gollober and Rosenberg to pay the claims of creditors. The sums so advanced by plaintiff aggregated about $30,000. On August 14, 1922, the last day of the four months' period, there remained of the $150,000 a balance of about $30,000 uncollected by and unpaid to Gollober and Rosenberg. On that date plaintiff, his three sons, and Gollober met in the store at San Diego. Gollober, on behalf of himself and Rosenberg, in consideration of the sum of $1,000 paid to him by plaintiff, agreed to extend for about six weeks the four months' period within which the Shelley boys might exercise their right to repurchase the property. Thereupon plaintiff orally agreed with his three sons that if he paid to Gollober and Rosenberg the $30,000 necessary to entitle his sons to repurchase, he would own the store and its contents and they would assign it to him. The next day the Shelley boys signed and caused to be mailed to Gollober and Rosenberg a letter as follows:

"San Diego, Cal., Aug. 15, 1922.

"Messrs. Rosenberg & Gollober, San Francisco, California—Gentlemen: When we have complied with our contract with you, concerning the repayment to you for our account in the reorganization of our business enterprise at San Diego, California, known as Army Department Store, you are directed and hereby authorized to make and deliver bill of sale for all goods, wares and merchandise in and belong-

ing to said store and business to George Shelley at Sacramento, California. This letter shall be our full and complete authority for making bill of sale as above directed and vesting title to such personal property in the said Geo. Shelley. Very truly yours, Louis Shelley, Benj. Shelley, Abe Shelley."

Plaintiff never received any bill of sale or other written memorial, either from Gollober and Rosenberg or from his three sons. However, on or about September 25, 1922, he paid Gollober and Rosenberg the balance of the $150,000, and on that date took possession of the store and of the merchandise therein pursuant to the oral agreement which he had made with his sons on August 14, 1922.

On September 26, 1922, plaintiff caused a notice to be recorded in the office of the recorder of San Diego county to the effect that he intended to purchase from Gollober and Rosenberg, and that the latter intended to sell to him, at the Army Department Store, on October 3, 1922, the stock of goods in the store and the accounts, notes, and bills receivable of the business; and on October 2, 1922, Gollober and Rosenberg caused a similar notice to be recorded, stating that they intended to sell to plaintiff, on October 10, 1922, all the stock of goods, merchandise, fixtures, and furnishings of the Army Department Store. It was on October 2, 1922, that defendant, as sheriff, levied upon the shoes under the writ of attachment in the action brought against the Shelly boys by one of their creditors. The plaintiff in that action was a creditor of the Shelley boys at the time when the latter entered into their contract with Gollober and Rosenberg on March 22, 1922.

No notice of the oral assignment which the Shelley boys made to their father on August 14, 1922, was ever recorded in the county recorder's office. Appellant claims that this assignment is within the purview of the Bulk Sales Law, and that since no notice thereof was recorded, respondent acquired no title to the property as against the attaching creditor—that as to such creditor the transfer to respondent is conclusively presumed to be fraudulent and void.

The Bulk Sales Law, found in section 3440 of the Civil Code, provides that the sale, transfer, or assignment of a stock in trade, in bulk or in any manner otherwise than in the ordinary course of trade and in the regular and usual practice and method of business of the vendor, transferor or assignor, will be conclusively presumed to be fraudulent and void as against the existing creditors of the vendor, transferor, or assignor, unless at least seven days before the consummation of the sale, transfer, or assignment the vendor, transferor, or assignor, or the intended vendee, transferee, or assignee, shall record in the office of the county recorder in the county or counties in which the stock in trade is situated a notice of the intended sale, transfer, or assignment, stating the name and address of the intended vendor, transferor, or assignor and the name and address of the intended vendee, transferee, or assignee, together with a general statement of the character of the merchandise or property intended to be sold, transferred, or assigned, and the date when and the place where the purchase price or consideration, if any there be, is to be paid.

Appellant's theory of the case is this: In entering into their written agreement of March 22, 1922, it was the intention of the Shelley boys and of their transferees, Gollober and Rosenberg, that the stock in trade, as well as the other property mentioned in their contract, should be taken by Gollober and Rosenberg as security to insure the repayment to them of the amounts which they agreed to "advance" to pay the Shelley boys' creditors; also, that it was intended that the property should be security to insure the payment to the transferees of an additional sum, $10,000, as a bonus to compensate them for their services in reorganizing the business. Adopting this theory of the transaction, appellant contends that it was a pledge, and that, therefore, the legal title to the merchandise remained in the Shelley boys as pledgors. Hence it is claimed that the Shelley boys' assignment to their father on August 14, 1922, was the "sale" of stock in trade in bulk, within the meaning of the Bulk Sales Law, and was therefore void as to the attaching creditor; no recorded notice of such intended sale having been given. It is contended by respondent, on the other hand, that by the terms of their written contract with Gollober and Rosenberg the Shelley boys incurred no personal obligation to repay any of the moneys which might be advanced by their transferees to pay their creditors; that, therefore, there was no subsisting indebtedness due or to become due from the Shelley boys to their transferees to be secured by a transfer of the property; and that hence the transfer was not a pledge—that it was a sale with an optional right reserved to the vendors to repurchase, if they chose to do so within the stipulated time. Wherefore respondent claims that his three sons transferred to him no more than a mere optional right to purchase the property from Gollober and Rosenberg, and that the transfer of a right of that character is not within the purview of the Bulk Sales Law. The prime question in the case, then, is this: Was the stock in trade, of which the seized shoes formed a part, pledged to Gollober and Rosenberg, or was it sold to them?

[2] Under our statute a mortgagee of personal property in possession and a pledgee are practically, if not identically, the same. Civ. Code, §§ 2924, 2987. No legal title passes in either case, but merely the right of pos-

session for the purposes of security. Civ. Code, § 2888.

[3] It often is difficult to determine whether a particular transaction constitutes a pledge or a sale in which the right is reserved to the vendor to repurchase the property at a stipulated price within a given time. Whether it be one or the other must be determined by a consideration of the peculiar circumstances of each case. "A glance at the numerous adjudications in controversies of this kind," says the court in Cornell v. Hall, 22 Mich. 383, "will suffice to show that each case must be decided in view of the peculiar circumstances which belong to it and mark its character, and that the only safe criterion is the intention of the parties, to be ascertained by considering their situation and the surrounding facts, as well as the written memorials of the transaction."

[4, 5] Though the agreement of the parties be reduced to writing, if there be a latent ambiguity therein, or if the language of the writing will admit of more than one interpretation, or if the intention of the parties is left in doubt from a reading of the document, parol evidence of the circumstances and of the situation of the parties may be considered in order to ascertain their true intention; and in this manner an issue of fact may be presented to the trial court for its determination. But where the language of the written contract is free from ambiguity or uncertainty, the determination of the intent of the parties, and hence a determination of the true character of the transaction, i. e., whether it is a pledge or a sale with the right of repurchase reserved to the vendor, presents a question of law for the court and not a question of fact. Palmer v. Gurnsey, 7 Wend. (N. Y.) 248. The Supreme Court of Vermont, in a case involving the question whether a deed and a bond given contemporaneously therewith by the grantees to the grantor created the relation of mortgagor and mortgagees, expresses itself thus:

"To ascertain the intent of the parties in entering into a contract or agreement, in a case where that intent upon the face of the instrument is doubtful, or the language used by them will admit of more than one interpretation, the court will look at the situation and motives of the parties making the contract or agreement, its subject-matter, and the object to be attained by it, and will allow these circumstances to be shown by parol evidence notwithstanding the contract itself is in writing. [Citing authorities.] But we discover no ambiguity in the terms of this bond, and no necessity to resort to parol evidence of extraneous facts for a proper understanding of its provisions; and, in such cases instruments of this character should always be construed according to the intentions of the parties, to be derived from the instrument itself." Wing v. Cooper, 37 Vt. 169, 178–179.

[6] With but one exception, presently to be noted, we can discern no ambiguity or uncertainty in the terms of the written contract between Gollober and Rosenberg and the Shelley boys. Therefore, save as to that one exception there can be no necessity to resort to parol evidence of extraneous facts for a proper understanding of the intention of the parties. The exception to which we refer relates to the difference in amount between the maximum sum which Gollober and Rosenberg agreed to advance for the Shelley boys in order to effect the composition with creditors, viz., $140,000, and the sum which was to be collected by or to be paid to Gollober and Rosenberg to entitle the Shelley boys to a reconveyance, viz., $150,000. The difference between these two sums is $10,000. There are four different possible purposes any one of which this $10,000 may have been intended to accomplish. That is to say, it is possible, for aught that appears upon the face of the instrument, that it was the intention of the parties that the $10,000 should represent: (1) An advance in the price over and above that paid by Gollober and Rosenberg, thus making a total purchase price of $150,000 to be received by the latter to entitle their vendors to repurchase; (2) interest on the sums which Gollober and Rosenberg obligated themselves to advance for the benefit of their tranferors in settling the claims of creditors; (3) a bonus to compensate Gollober and Rosenberg for their efforts in reorganizing the business; or (4) a bonus to cover both legal interest and compensation for reorganizing the business. The uncontradicted evidence in the case is sufficient to exclude the first of these possible purposes. A witness for respondent, a bookkeeper who made the first entries in the books opened by Gollober and Rosenberg when the latter took possession of the store, testified that when "setting up" the books under Rosenberg's direction he was told that the amount which Gollober and Rosenberg were "to get back" included "an item of bonus of $10,000." That the $10,000 was regarded as a "bonus" seems to be undisputed. In its strict sense, "bonus" means good. In its popular sense is has several meanings. One of them is that a bonus is a sum paid for services, in addition to or in excess of what ordinarily would be given—an advantage or benefit given in return for a benefit received. Another meaning is that it is a premium paid for a loan. 9 C. J. pp. 135, 136. Whatever meaning be given the word as used by the witness in this case, the expression "bonus" seems clearly to exclude the idea that the $10,000 was intended to represent an advance over and above any purchase price paid by Gollober and Rosenberg for the property. It seems equally clear that it was not the intention of the parties that the $10,000 should represent a premium to be paid by the Shelley boys by way of interest on the sums to be advanced by their transferees to pay their creditors. If

that were the purpose of the arrangement concerning the $10,000, it would violate the usury law of this state and would subject Gollober and Rosenberg to punishment for a misdemeanor. Gen. Laws of Calif., Act 3757, p. 1384. An interpretation which would make the lawbreakers of the parties to the transaction should be rejected if there be another possible and reasonable interpretation, as there unquestionably is. Either the third or the fourth of the above-mentioned possible purposes for the arrangement will reasonably explain why it was that the parties added the sum of $10,000 to the $140,000 so as to make $150,000 the amount to be collected by or paid to Gollober and Rosenberg as a condition precedent to a retransfer by them. As between the third and fourth possible purposes for this difference of $10,000, we think the latter is the one which probably represents the real intent of the parties. That is to say, from the testimony of respondent's own witness, the bookkeeper, as well as from the circumstances disclosed by the writing itself, we are of the opinion that the $10,000 was intended as a bonus to cover both compensation to Gollober and Rosenberg for their business sagacity and trouble in reorganizing the business and interest at the legal rate on the sums which they agreed to advance for the benefit of their transferors.

[7, 8] Gollober and Rosenberg agreed to "advance" a sufficient amount of money, up to $140,000, to effect the composition with the Shelley boys' creditors. This word "advance," when used in relation to advances of money by one person for the benefit of another, usually implies a loan. 2 C. J. 32. "The import of the word 'advance' " says the court in Morrow v. Turney, 35 Ala. 131, 137, "is such as rather to indicate that there was a loan, than a payment of purchase money." Since the money paid to the creditors by Gollober and Rosenberg was money advanced by them for the benefit of the Shelley boys, a promise on the part of the latter to repay the sums so advanced, with legal interest thereon, as well as a promise to pay Gollober and Rosenberg for the services performed by them in operating the store and in reorganizing the business, would be implied in fact as well as in law, and they would be personally liable therefor (Couts v. Winston, 153 Cal. 686, 691, 96 P. 357; Todd v. Todd, 164 Cal. 255, 258, 128 P. 413), provided such personal liability is not excluded by the terms of their written contract.

The writing executed by the Shelley boys and Gollober and Rosenberg is silent with respect to the assumption by the former of any personal obligation to repay the advances made on their behalf by the latter. The instrument also is silent as to any compensation, eo nomine, to be paid to Gollober and Rosenberg for their services in operating the store and in reorganizing the business. The document appears upon its face to be a complete expression of the whole agreement between the parties. This being the case, it is to be presumed that the parties introduced into their writing every material item and term of their contract. Harrison v. McCormick, 89 Cal. 327, 330, 26 P. 830, 23 Am. St. Rep. 469. We shall assume, therefore, for the purpose of this decision, that no personal obligation rested upon the Shelley boys to repay any part of the $150,000 upon the receipt of which by Gollober and Rosenberg the latter undertook to reconvey so much of the property as then remained on hand.

[9] The fact that the Shelley boys incurred no personal obligation to pay the $150,000, or any part thereof, is the main prop to respondent's argument that the transaction was a sale and not a pledge. Without doubt, the absence of such personal liability is a circumstance of no inconsiderable importance in settling that question, but it is by no means a determinative circumstance. It is of course true, as respondent claims, that if there be no debt there can be no pledge or mortgage. At all events, it is well settled that the existence of a pledge or of a mortgage implies an obligation to be secured thereby; but what the remedies may be for enforcing it is quite another question. There may be a debt quoad the security, but not in respect to any personal remedy for its enforcement. That is to say, while the essential feature necessary to create a pledge or a mortgage is that the property pledged or mortgaged should be intended as security, personal liability on the part of the pledgor or mortgagor for the debt or other obligation secured by the pledge or mortgage is not an indispensable requisite. Wing v. Cooper, supra; Pioneer Gold Min. Co. v. Baker (C. C.) 10 Sawy. 539, 23 F. 258; Mobile Building & L. Ass'n v. Robertson, 65 Ala. 382, 389; Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859; Matthews v. Sheehan, 69 N. Y. 585; Brown v. Dewey, 1 Sandf. Ch. R. 56, reversed in 2 Barb. 28, not upon the law but upon the facts, as is stated in Matthews v. Sheehan, supra; Mills v. Darling, 43 Me. 565; Fisk v. Stewart, 24 Minn. 97; Rice v. Rice, 4 Pick. (Mass.) 349; Campbell v. Dearborn, 109 Mass. 130, 12 Am. Rep. 671; Cook v. Johnson, 165 Mass. 245, 43 N. E. 96; note on pp. 390 et seq. L. R. A. 1916B; note to Wells v. Flynn, 17 A. L. R. 718. It is expressly declared in this state by statutory enactment that—

"The creation of a lien does not of itself imply that any person is bound to perform the act for which the lien is a security." Civ. Code, § 2890.

The rule is expressed in Wing v. Cooper, supra, as follows:

"It is said, on the part of the defendants, that there was no debt existing from Briggs to them; but there was a debt which was capable of being enforced against the property

which Briggs conveyed to them, and the absence of any personal liability on the part of Briggs to pay the money advanced or to be advanced by them in satisfaction of the levies is not a conclusive test whether the conveyance was intended to be absolute, or a security merely. It was not necessary that there should be a liability on the part of Briggs to pay, as well as on the part of his grantees to release or reconvey on being paid, to constitute the transaction a mortgage; yet the want of this mutuality is proper to be considered in determining whether the transaction was a mortgage or not, though it is not of itself decisive. If a debt capable of being enforced in any way against either the person *or the property* [italics ours] of Briggs was purposely kept on foot, and if the conveyance by him was intended to secure the payment of that debt, the transaction was in fact a mortgage, and the estate was defeasible and redeemable, although there was no covenant or other personal obligation on his part to pay the money."

In Pioneer Gold Min. Co. v. Baker, supra, Judge Sabin, speaking of a situation somewhat analogous to that presented here, said:

"* * * A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien—is looked to solely by the mortgagee out of which to make his lien; in the other, he has the additional security of the personal obligation of the mortgagor. A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded. And this is exactly the security taken by Baker in 1874, when he sold this mine for the balance of the purchase money, $125,000."

The law on this subject is well stated by Judge Parker in Kraemer v. Adelsberger, supra. He says:

"In determining whether a contract is to be treated as a mortgage, or a conditional sale, or a conveyance in fee, courts have commented upon the presence or absence of a various particulars which commonly accompany mortgages, but the essential feature necessary to create a mortgage is that it should be a conveyance intended as a security. Such evidently was the purpose of the contract before us, but the plaintiff calls attention to the absence of a covenant to pay the amount of the indebtedness. It was agreed that interest should be paid on the full amount; that after sales should be made, the proceeds should be applied in reduction of the amount of the then existing obligation, and that the firm would pay the difference if any should remain. So that, while there was not an agreement in terms to pay the entire indebtedness, such may be said to have been the purpose and effect of the agreement; *but in any event the absence of such a covenant is not conclusive, but is a circumstance to be considered in construing the contract.*" (Italics ours.)

The same learned jurist, in Hughes v. Harlam, 166 N. Y. 427, 60 N. E. 22, employed this language:

"That the agreement expresses an intent to transfer the property absolutely to Harlam upon Hughes' death without paying the loan is unquestionably true, but that fact, considered with the other provisions of the agreement, does not necessarily give to the entire agreement the character of a conditional sale, for a sale by the one party and a purchase by the other was not the leading object of the transaction. Indeed, the agreement clearly indicates that the one did not intend to buy, nor the other to sell, unless it should turn out that the borrower should not be able to pay the loan before his death. * * * It seems to us that the main purpose of the parties to the agreement, as manifested by its terms, was on the one part to procure a loan of money and on the other to assure its repayment, and it has been a long established rule in equity that the 'court looks beyond the terms of the instrument to the real transaction, and when that is shown to be one of security, and not of sale, it will give effect to the actual contract of the parties.' * * * So while it is true, as counsel for the appellant so ably argues, that this agreement contains elements of both mortgage and conditional sale, still, as the *leading purpose* of the instrument [italics ours] is that of security, it must be governed by those principles which courts of equity have long applied to agreements for security."

The cases cited by respondent present no conflict with these views. Take, for example, Henley v. Hotaling, 41 Cal. 22—a case upon which respondent places much reliance. That was a case where the evidence clearly and conclusively disclosed a deliberate intention on the part of both parties to the transaction that it should be a sale and not a mortgage. No such situation exists here.

If, now, the writing which was executed by Gollober and Rosenberg and the three Shelley boys on March 22, 1922, be examined in the light of the foregoing, it will, we think, clearly appear that the parties intended that the arrangement should operate as a pledge of the personal property. It doubtless is true that the document contains elements of both a pledge and a sale. But a careful consideration of all its terms leads the mind irresistibly to the conclusion that the leading purpose of the paries, as manifested by their writing, was, on the part of the Shelley boys, to enjoy the benefit of certain sums of money to be advanced for them in satisfying the demands of their creditors, and, on the part of Gollober and Rosenberg, to assure the repayment to them of an amount which would reimburse them for the sums they were to advance to pay the creditors, and at the same time to compensate them for their services in operating the store and in reorganizing the business.

That the parties intended the property to be held by Gollober and Rosenberg as se-

curity is unmistakably disclosed by certain strongly marked features shown on the face of the writing itself. In the first place, the transaction had its inception in a negotiation for a loan, or for what is the equivalent of a loan, to the Shelley boys, even if the latter did not become personally liable therefor. This is one of the principal indicia of a pledge. "As a general rule," says the court in Holmes v. Grant, 8 Paige (N. Y.) 258, "where the contract and conveyance are made upon an application for the loan of money, this court for the purpose of preventing usury and extortion will construe it to be a mortgage, whenever the person to whom the application for the loan is made agrees to receive back the money advanced, with legal interest, *or a larger amount* [italics ours], and to reconvey the property within a specified time thereafter, whatever may be the form of the written contract; if it is apparent that the real transaction was a loan of money." In Turner v. Wilkinson, 72 Ala. 361 (cited with approval in Douglass v. Moody, 80 Ala. 61, and Daniels v. Lowery, 92 Ala. 519, 8 So. 352), the court in considering the tests to determine the true character of such contracts, says:

"Although it is difficult to establish fixed rules, by which to determine whether a particular transaction is a mortgage or a conditional sale, there are some facts which are regarded as of controlling importance in determining the question. Did the relation of debtor and creditor exist, before and at the the time of the transaction? *or, if not, did the transaction commence in a negotiation for a loan of money?* Was there great disparity between the value of the property, and the consideration passing for it? Is there a debt continuing, for the payment of which the vendor is liable? If *any* one of these facts is found to exist, in a doubtful case, it will go far to show a mortgage was intended." (Italics ours.)

Another circumstance which lends much strength to the view that the property was transferred to Gollober and Rosenberg to be held by them as "security" is the fact that the transfer to them lacks the leading and characteristic element of the usual sale, i. e., a definite amount agreed upon by the parties as a price to be paid by Gollober and Rosenberg. Those gentlemen did not bind themselves to advance $140,000 in any event. Their agreement was to advance to the creditors of the Shelley boys a sufficient amount to effect the composition "up to the sum of $140,000." That is to say, while they were not obliged to advance more than a maximum of $140,000, their obligation would be fulfilled upon their paying to the creditors an amount sufficient to effect the composition, though it should turn out to be less than $140,000. Indeed, the bookkeeper's testimony tends to show that, all told, Gollober and Rosenberg advanced to the creditors but $68,000.

Another circumstance which very materially strengthens the view that the transaction was a pledge is the fact that Gollober and Rosenberg obligated themselves to apply the proceeds of the business to the payment of the expenses incurred in its operation. If the transaction were a sale, the proceeds of the business would belong to Gollober and Rosenberg, to do with as they pleased. Another circumstance is this: Under the terms of the contract Gollober and Rosenberg were to retain all moneys received by them from the sales of merchandise only in the event that they did not collect, or were not paid, the stipulated amount, $150,000, within the agreed time. As a corollary to this provision, it necessarily follows that if Gollober and Rosenberg did succeed in collecting, or were in fact paid, the full amount within the agreed time, then the other parties to the contract, the Shelley boys, were to receive the avails then on hand of all property and merchandise previously sold by Gollober and Rosenberg. This circumstance shows that it was not the intention of the Shelley boys to part with any more of their interest in the property than might be sufficient to satisfy the amount due Gollober and Rosenberg for the advances made by them in liquidating the claims of creditors, plus the "bonus" of $10,000. Palmer v. Gurnsey, supra. There are other circumstances disclosed by the written contract which point unerringly to a pledge and not a sale, but we do not find it necessary further to advert to them.

Thus far we have confined ourselves to a consideration of the terms of the written instrument itself, aided only by such oral evidence as tends to explain why it was that Gollober and Rosenberg, though agreeing to make advances up to $140,000, were to receive $150,000. But if we were to consider all of the oral testimony bearing upon the question of intention—and that testimony is very meager—we still would be compelled to arrive at the conclusion that it was the intention of the parties that the property transferred to Gollober and Rosenberg should be held by them for the purpose of security, and that as to the personal property the transaction was a pledge. Respondent testified that on August 14, 1922, when a balance of about $30,000 remained uncollected by and unpaid to Gollober and Rosenberg, his three sons told him that "the store was small security for that $30,000 which they owed Gollober." Asked if on August 14, 1922, he considered that his three sons owned the store subject to a "lien" of Gollober and Rosenberg for the $30,000, together with such amount as his sons owed him, respondent answered, "I believe yes, they would be." True, respondent and his three sons seem to have thought that if the $150,000 were not collected by or paid to Gollober and Rosenberg before the expiration of the stipulated time the latter would own the property. But on

the other hand, respondent and his three sons seem to have thought that immediately upon the $150,000 being collected by or paid to Gollober and Rosenberg, within the agreed time, respondent, as the transferee of his sons, was entitled to take possession and claim the property without any action whatever on the part of Gollober and Rosenberg, such as the execution to him of a bill of sale by the latter. However, we do not think that much significance should be attached to any of these circumstances. It is the intention of the parties at the inception of the transaction which is to determine its character, and that intention is to be ascertained from the language of their instrument, aided, if need be, by the then existing circumstances. "The intention of the parties," says the court in Mobile Building & L. Ass'n v. Robertson, supra, "at the inception and consummation of the transaction—the relation it was contemplated they should bear to each other—is the criterion by which the character of the contract must be determined. There is much evidence introduced, having a tendency to show that the transaction was regarded in the one light by the association, and in the other by the appellee. To this evidence, but little, if any importance, can be attached. It is not the intention of the one party, dissociated from the intention of the other, which is to be ascertained. It is their concurring intention, when the transaction ripened into the contract, which must be ascertained, and which must prevail." And in Williams v. Chadwick, 74 Conn. 252, 50 A. 720, the court says:

"Whether or not the parties intended a particular transfer of property to be a mortgage is to be determined by the character and language of the instruments intentionally executed by them, and by the surrounding facts, rather than by the belief of the parties as to the effect of their acts."

[10] Concluding, as we do, that it must be held as a matter of law, from the face of the instrument itself, that the transaction was a pledge and not a sale, and that as a consequence the legal title remained all the while in the Shelley boys, we come now to another point presented to us for consideration. It is claimed by respondent that even if the ownership did remain in his three sons, their transfer to him is not within the purview of the Bulk Sales Law because the property was not at that time in their possession or under their control. We are unable to agree with this contention. Section 3440, which declares what transfers are deemed to be constructively fraudulent, deals with two major classes of conveyances. The first class includes those transfers of personal property which are conclusively presumed to be fraudulent because not "accompanied by an immediate delivery and followed by actual and continued change of possession." As to such transfers the statute expressly declares that the presumption of fraud attaches "if" the transfer is "made by a person having at the time the possession or control of the property." This language implies, as a necessary corollary, the proposition that the transfers dealt with in the first part of the section are not presumptively fraudulent or void if made by persons not having at the time the possession or control of the property. The second major class of transfers which the section declares to be constructively fraudulent are sales and transfers of "a stock in trade in bulk." It is this latter class of transfers which is covered by what is commonly known as the Bulk Sales Law, adopted in 1903 when the Legislature amended section 3440 by adding the provisions relative to the sale of "stock in trade in bulk." Unlike the restrictions found in the first part of the section, those added in 1903 do not exempt from their operation bulk sales of stock in trade of which the vendor has not the possession or control. That is to say, the language of the Bulk Sales Law is broad enough to include every sale, transfer, or assignment of stock in trade in bulk, regardless of whether the vendor has or has not the possession or control of the property. An interpretation which would read into this part of the section a provision that every sale in bulk made without the requisite statutory notice is nevertheless valid as against existing creditors if the vendor, transferor, or assignor has not at the time the actual possession or control of the stock in trade, regardless of what the other circumstances might be, not only would overturn the Bulk Sales Law as it is written, but would leave creditors helpless; for in the main such creditors could not protect themselves against an arrangement which although secret was lawful. No one could safely give credit on the faith of the debtor's title to his property, however valuable that title might be; as, for example, where the value of a pledgor's merchandise exceeds the amount of the debt secured by the pledge. A door to fraud would be opened and many would enter, to the injury of credit and the confusion of business.

No case directly in point has been called to our attention. The only one which we have been able to discover that even remotely approaches the point is Krower v. Martin (Tex. Civ. App.) 184 S. W. 511. In that case, however, not only was possession delivered to the mortgagees, but the articles were completely segregated from the mortgagor's "stock of merchandise." The articles remained with the mortgagees until the mortgagor sold them to the appellee. Never after they were mortgaged did they become a part of the stock of goods from which they were taken, and never thereafter were they exposed to sale. As a consequence, they were no part of a merchant's stock in trade or stock of merchandise at the date of the sale to the appellee, and hence that sale was not within

the terms of the Bulk Sales Law. No such situation exists in the case now before us. It has been said that the scope and purpose of these laws is to regulate the sale in bulk of such articles as constitute the "stock in trade" or "stock of merchandise" which is kept by a merchant for sale in the ordinary course of business. Here the articles to which respondent acquired the pledgors' title continued to be the "stock in trade" of the pledgors as well after as before their transfer to the pledgees. There was no segregation of the stock in trade when it was pledged to Gollober and Rosenberg. It remained in the Army Department Store, and the Shelley boys continued to be the owners thereof, subject only to he lien and the right of possession held by Gollober and Rosenberg as pledgees. The store and its contents were delivered into the possession of Gollober and Rosenberg not only to protect their rights as pledgees, but also to enable them to reorganize the business for the benefit of the pledgors in case the property should be redeemed from the pledge. This is indicated by many circumstances in the case, among which is the significant language of the pledgors in their letter of August 15, 1922, to the pledgees, in which they say:

"When we have complied with our contract with you concerning the repayment to you for our account in the reorganization of our business at San Diego," etc.

Save that the store was managed by the pledgees under the personal direction of their own manager, sent by them from San Francisco to take possession of the store and to operate it, the business continued as before without any radical outward sign of change.

In view of the circumstances above narrated, the purpose of the Bulk Sales Law to protect existing creditors would be entirely frustrated if it should receive an interpretation that would uphold the Shelley boys' transfer to their father of their title to this stock in trade, in the absence of any recorded notice thereof. That this is so will be seen from a consideration of the following: The attaching creditor is conclusively presumed to have had notice of his debtors' transfer of the property to Gollober and Rosenberg as pledgees; for notice of that intended transfer was given in the manner required by the Bulk Sales Law. Though charged with notice of that transfer—in reality a pledge—the creditor took no steps to attach the property before the consummation of the transfer to Gollober and Rosenberg. It is quite possible that his failure to do so at that time was due to a belief on his part that the transferees would successfully reorganize the business, realize from their sales of the real property and from their conduct of the business the $150,000 upon the receipt of which they were to reconvey the property on hand to the Shelley boys, that the latter would thus become reinvested with an unincumbered title at the end of the four months, and that, as a consequence, his position, as a creditor of the Shelley boys, would be as good as, if not better than, it was before the transfer to Gollober and Rosenberg and the reorganization of the business by them. Having refrained from attaching the property prior to the consummation of that transfer, the attaching creditor would now be the victim of a grave injustice if he should lose his right to question the validity of the transfer to respondent merely because his debtors, instead of retaking the manual possession and the personal control of the stock in trade, saw fit to divert that possession and control from a channel leading toward themselves to one which led to their father, the respondent here.

It follows from what we have said that the attempted transfer of the personal property to respondent is conclusively presumed to be fraudulent, and therefore void as against nonconsenting creditors. There was therefore nothing in the transaction which militated against the right of appellant as sheriff to seize the property under the writ of attachment which had been placed in his hands.

The appeal from the order denying the motion for a new trial is dismissed. The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

196 Cal. 547

In re JOLLY'S ESTATE.

CAVANAUGH et al. v. REA et al.

(L. A. 8290.)

(Supreme Court of California. July 30, 1925. Rehearing Denied Aug. 27, 1925.)

1. Appeal and error ⟸989—To determine whether wife's estate was community property, consideration must be given to well-established presumptions of law in weighing evidence.

In weighing evidence on appeal from order directing distribution of wife's estate as community property, consideration must be given to all presumptions of law affecting acquisition or possession of property by spouse during coverture, and increase thereof, as well as property found in possession of survivor, in the light of attendant circumstances.

2. Husband and wife ⟸262(1)—Presumption that property acquired after marriage is community property, unless controverted, is binding upon the court or jury.

The presumption raised by Civ. Code, § 164, that property acquired after marriage by either husband or wife, or both, is community property, is a form of evidence under Code Civ. Proc. § 1957, and may be controverted by other evidence, direct or indirect; but, unless so controverted, the court or jury is bound to find according to the presumption.

3. Husband and wife ⟸262(1)—Presumption of community interest in property overcome only by clear and satisfactory proof to contrary.

The presumption that property acquired after marriage is community property can be overcome only by the production of clear and satisfactory proof that the property in question was separate property of one spouse.

4. Husband and wife ⟸264—Evidence held to warrant inference of fact that wife's estate accumulated during coverture.

Evidence *held* to support inference of fact that deceased wife's estate was accumulated during coverture.

5. Husband and wife ⟸264—Finding that wife's estate was not community property held unwarranted.

Property in possession of one of the spouses must be presumed to be community, unless a better right can be established by the one claiming it to be his or her separate property, and therefore, in an appeal from an order distributing deceased wife's estate, evidence *held* not to warrant a finding that deceased wife's estate was not community property, for failure to prove affirmatively that same was acquired as her separate estate.

6. Husband and wife ⟸254—Real property acquired after husband's death held community property, where purchased with community funds.

Where the evidence showed that the wife possessed no separate property before or at the time of marriage or acquired any after marriage, *held*, that certain real property purchased by wife after husband's death was so purchased with community funds, and was therefore community property.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

In the matter of the estate of Margaret Jolly, deceased, contested by Catherine Cavanaugh and others against Sarah Rea and others. From an order directing distribution in favor of the contestees, contestants appeal. Reversed.

F. L. Richardson, of San Diego, for appellants.

Sweet, Stearns & Forward, Hamilton & Lindley, and Richard M. Kew, all of San Diego, for respondents.

SEAWELL, J. This is a contest between the heirs at law of John Jolly and Margaret Jolly, husband and wife, both deceased, as to whether the property, real and personal, ordered distributed, was the separate property of Margaret Jolly or was the community property of John Jolly and his said wife, Margaret. No children were born as the issue of the marriage. The judge of the probate court found that John Jolly died on or about the 11th day of February, 1912, leaving no estate whatever, and that Margaret Jolly died intestate on April 4, 1922, leaving as her separate estate, the property in controversy, consisting of real property of the value of $9,000 and money in bank and other personal property of the value of about $19,418.90, and accordingly ordered that distribution of the whole of said estate be made to the heirs at law of said Margaret Jolly to the exclusion of the heirs of said predeceased husband, John Jolly. The appeal is taken from that order. It is the claim of appellants that the estate is the community property of said marriage, and one half thereof should be distributed to the heirs at law of John Jolly, and the other half to the heirs of Margaret Jolly, as provided by section 1386, subd. 8, Civil Code.

The evidence in the case as to many of the material facts ordinarily provable in this class of cases was not as fully developed as might be desired, and therefore the determination of the issue must rest largely upon legal presumptions and inferences arising from the uncontradicted facts of the case. No evidence was offered by respondents tending to impeach the claim of the heirs at law of John Jolly, except two deeds of real property conveying certain lots in the city of San Diego to Margaret Jolly, executed in the years 1918 and 1922, respectively. These conveyances were made a number of years after the death of the husband, John Jolly, and

within 4 and 2 years, respectively, prior to the death of Margaret.

The depositions of Peter Jolly and Mary Duffy, brother and sister, respectively, of John Jolly, deceased, were received in evidence. These depositions furnish some assistance in determining the question as to the period in which the property inventoried as the separate property of the estate of Margaret Jolly was acquired. A determination of the issue is also aided by the law of presumptions as defined by sections 163, 164, Civil Code. The history of the marriage of John Jolly and his wife (formerly Margaret Downey) and the situation of said parties at the time of and subsequent to said marriage, as detailed by the two witnesses at the hearing, is necessary for the application of the rules of law which we think must control the decision.

The evidence shows that the parents of both spouses were near neighbors, residing at Cleator Moor, England, where John Jolly and Margaret Downey spent their earlier years. Margaret's father died in her early girlhood, leaving the mother, apparently, as the breadwinner. Some mention is made of a sister and a brother, but the evidence indicates that the two last referred to were not permanently residing with Margaret and the mother. The mother conducted a jerry which received the patronage of the miners working in the nearby districts. The patronage was small. A jerry is described as a beer or ale inn. The evidence would indicate that the family was not in prosperous circumstances. Neither the mother nor daughter owned any real property or possessed any money or personal property aside from household effects of humble character. John Jolly, then a young man, resided with his parents. His father's family consisted of a number of children, male and female, in addition to the heads of the family. John was a young miner, doing contract work in conjunction with his father and a brother, in the mines of the neighborhood, and was earning a comfortable wage. He was also interested with his sister in conducting a hostelry. The evidence would not support an inference that either he or the family owned property of great value. John and other members of the family visited Margaret and her mother at the jerry where, it would seem, occasional social dances were given. A long story may be shortened by the statement that the tryst made at Cleator Moor, England, was consummated by marriage in America. At the time Margaret and her mother departed from Cleator Moor, the former was of the age of about 24 years. She and her mother located at or near Philadelphia, Pennsylvania. A check-up of events would fix their arrival in America on a day within the year 1870. John Jolly followed her to this country about one year thereafter. They were joined in wedlock at Philadelphia shortly following his arrival.

The only evidence to be found in the record on the subject tends to show that John was a man of unusual earning ability, and that he was sturdy and frugal in his habits, industrious, a good and dependable workman, and had saved quite a sum of money before he left England for this country. The couple resided for a time at or near Johnstown, Pa. John was engaged in working in the mining districts of Pennsylvania. Afterwards they went to Illinois, then to Virginia City, Nev. He arrived at Virginia City in the early '70's. At that time the gold-mining industry was at its height. He worked as foreman and miner in the Comstock gold mines of Nevada for a period of about 20 years. He commanded good wages, receiving as much as $9 per day. Peter Jolly, whose deposition was read at the hearing, was a brother of John and his junior by 13 years. He came to this country 9 years after John's arrival, and visited the brother's wife, Mrs. Margaret Jolly, at Virginia City, in 1882. He, too, was a miner. John was at this time mining near Hawthorne, about 100 miles from Virginia City. The wife told him that John sent her his pay check each month. She also stated that all she had was his earnings; that John was working steady, and they were getting along, as he was making "big money" as a miner. Peter did not see his brother John, as the wife advised him not to go to Hawthorne, as her husband was then working but one man in the mine, and it would be unwise for him to make the trip. The inference is that she did not wish to have the brothers meet. She gave him $80 when he departed, after sojourning at Virginia City for about 6 weeks.

John and Peter met for the last time in 1911, at which time Peter visited him at San Diego, California. John was residing there with his wife. They owned their home and were comfortably situated. Peter did not make any inquiries into their financial affairs, but testified that his brother was then retired and was living comfortably and had the appearance of being in easy circumstances. He and his wife discussed in his presence the advisability of making a loan on certain real property. The amount of the mortgage was not named in the conversation. John Jolly died the following year, February 11, 1912. The record is silent as to what property he owned at the time of his death, or what disposition was made of his estate at the time of or prior to his demise. The widow died 10 years thereafter, April 4, 1922, leaving in her own name the estate in controversy, all of which was personal property, except a few parcels of realty, situated in San Diego, acquired by her August 8, 1918, and January 11, 1922, respectively, aggregating $9,000. The entire estate was appraised at $28,418.95.

Counsel in the case stipulated as follows:

"* * * At the time of his [John Jolly's] death, he and Margaret Jolly were husband and wife, and after his death Margaret Jolly did not engage in any occupation, and was in a poor condition of health from the date of the death of John Jolly until her own death, and not able to work."

The record contains affirmative evidence to the effect that Margaret Jolly had at no time, before or after marriage, ever engaged in any business or occupation or performed any duties, except household or domestic duties in her mother's family and in her marital relation. It does not appear that she ever owned or possessed a separate estate or an independent income from any source whatsoever, or that she had acquired any property by gift, devise, bequest, or descent.

After John Jolly's arrival in this country, he seldom communicated with his parents, who later followed the children to this country, or with his brothers and sisters. But a few letters passed between him and the other members of his father's family. Peter and Mrs. Duffy account for this dearth of correspondence on the theory that letters mailed to John were intercepted by the wife and did not reach him. According to their testimony she was not inclined to establish intimate relations with other members of the family.

[1] The probate court found from the facts herein narrated that it was not true, as claimed by the heirs of John Jolly, that the property ordered distributed was accumulated subsequent to the marriage of the said parties, or that it was community property, but, on the contrary, found that the said John Jolly left no estate whatever at the time of his death, and that there was no community property belonging to either spouse at the time of his death, and that all of the property owned by the said Margaret Jolly or found in her possession at the time of her death was her separate property and estate. The question, therefore, is whether the evidence sustains the conclusion reached by the probate court, to wit, that all of said property was the separate estate of Margaret Jolly. In weighing the evidence, consideration must be given to all of the well-established presumptions of law affecting the acquisition or the possession of real and personal property by the spouse during coverture, and the increase thereof, as well as property found in the possession of the survivor, in the light of the circumstances appearing in each particular case. That portion of section 164, Civil Code, which prescribes the rules of presumptions in community property cases, provides as follows:

"All other property acquired after marriage by either husband or wife, or both, * * * is community property."

[2] "The disputable presumption raised by section 164, Civil Code, is a form of evidence under section 1957, Code Civ. Proc. It may be controverted by other evidence, direct or indirect; but, unless so controverted, the court or jury is bound to find according to the presumption." Stafford v. Martinoni, 192 Cal. 724, 221 P. 919. "The community [property] generically embraces all property belonging to the spouses, except such as the statute specifically removes from its operation. Community property is the rule, separate property the exception thereto. Hence the presumption * * * follows. * * * Ballinger on Community Property, p. 213.

[3] "No evidence of sufficient strength was adduced at the trial to overcome the presumption created by section 164 of the Civil Code. * * * The presumption of the wife's community interest in property acquired after marriage can be overcome only by the production of clear and satisfactory proof that the property in question was the separate property of the husband." Estate of Rolls, 193 Cal. 594, 226 P. 608; Dimmick v. Dimmick, 95 Cal. 326, 30 P. 547; Rowe v. Hibernia Sav. & Loan Soc., 134 Cal. 403, 66 P. 569; Freese v. Hibernia Sav. & Loan Soc., 139 Cal. 392, 73 P. 172; 5 Cal. Jur. 311, 312, 313.

[4, 5] It will be remembered that every possible method or means by which the property in question could have been acquired by the wife since the husband's death has been stipulated out of the case, except the bare possibility of gift, devise, bequest, or descent. There is no evidence tending to show or presumption of law tending to support a claim that she acquired any property in the four ways or means last above mentioned, and from the situation of the parties before marriage an inference of fact arises that the wife did not possess or own any property whatever before or at the time of marriage, and that the estate was therefore accumulated during coverture. Any other inference would be untenable under the uncontradicted evidence in the case. John Jolly and his wife, Margaret, enjoyed a matrimonial companionship for a period of about 40 years. They had no children, and the husband was an industrious, capable miner of economical habits, and as before stated it nowhere appears that the wife possessed or owned any separate estate before or after marriage. The fact would seem to be that she and the mother were in poor circumstances. Valuable property was found in her possession at the close of a span of life of about 75 years in duration, 40 years of which was passed in the marital state, and the last 10 years in widowhood, broken in health. Admittedly she engaged in no occupation during the latter period of her life.

Under the affirmative evidence of the case, aided by the usual presumptions of law, and with no evidence offered to overcome said presumptions, we must conclude that the estate ordered distributed to the heirs of Mar-

garet Jolly as her separate property was the community property of said Margaret Jolly and her predeceased husband. The rule dominating the situation before us is well stated by the text in 31 C. J. 47, as follows:

"Since the very basic conception of the community property system is that it is a species of partnership between a husband and wife, whereby they are to share equally in the benefit and enjoyment of the results of their joint or separate industry, labor, and earning capacity, and accordingly 'separate property' is defined in terms necessarily making it an exception to the usual estate held by the members of the community, every inquiry as to whether particular property belongs to the community, or to the separate estate of one or the other members thereof, begins with a prima facie presumption that it belongs to the former, especially where the matrimonial union has continued for a considerable length of time. * * * The burden of overcoming the general presumption in favor of the community is upon the party asserting separate ownership. * * *"

Respondents insist that there is no evidence showing that the property was acquired during coverture. Admitting that there is no direct evidence on the question, but indirect or circumstantial only, this does not strengthen the weakness of respondent's position, as there is neither evidence of any kind or presumptions or inferences to support the conclusion that the property was acquired as separate property. The property in the possession of one of the spouses at the close of a long marital relation must be presumed to be community, unless a better right can be established by the spouse claiming it to be his or her separate property.

Respondents take the position that, in order for the presumption of section 164, Civil Code, to apply, it must be shown by direct evidence that the property was acquired during coverture; that is to say, it is not sufficient, in the absence of any evidence whatever as to the character of the property, to show merely that it was in the possession of the spouse during marriage, unless the circumstances of its possession are such as to definitely indicate the character of the property upon the death of the other. Our attention has been called to no case in this state where this precise question has been passed upon. "Acquired" and "possessed" are used rather interchangeably in many of the decisions of this court. It must be admitted, however, that in all the cases of this state in which the word "possession" was used as synonymous with "acquired" the facts were that the property actually came to either spouse during coverture. Estate of Bollinger, 170 Cal. 381, 149 P. 995, presents such an example. See, also, 5 Cal. Jur. 311, 312.

While the law strongly favors the indulgence of the presumption of community interest under ordinary circumstances of coverture, we do not think it necessary to extend the presumption prescribed by section 164, Civil Code, beyond the language of the section for the reason that the conclusion compelled in the instant case by the process of elimination and by the force of indirect evidence, forecloses any other conclusion but the sole one that the estate is not shown to be the separate estate of either spouse, and must for the reasons herein assigned be regarded as community property. The respondents failed to meet the burden of proof which the law casts upon them.

[6] Respondents place emphasis on the fact that certain real property was purchased by the wife in 1918 and 1922. The grantee in those conveyances was the wife, the husband having been dead some years prior to the execution of said conveyances. This is not such a transaction as is dealt with in Fanning v. Green, 156 Cal. 279, 104 P. 308, or other cases in which one of the spouses deeded to the other, or where one is made the grantee by a third party during coverture. Here there was but one surviving spouse; therefore the rule announced in those cases cannot be applied to the facts of the present case. From what we have said as to the character of the property, it must follow that the realty purchased by the wife since the death of the husband must have been purchased with community funds. The fact that community property is sold and other property bought with the proceeds, or that such property is exchanged for other property, does not change the original character of the property; its character is determined by reference to the nature of the funds with which it is purchased, and so long as its source can be traced it retains the character of that source. 5 Cal. Jur. 294. The funds or property that purchased the realty in question can only be traced to a community source.

The order distributing the whole of the estate to the heirs of Margaret Jolly is hereby reversed.

We concur: MYERS, C. J.; SHENK, J.; RICHARDS, J.; WASTE, J.; LAWLOR, J.; LENNON, J.

196 Cal. 439

PROTHERO v. SUPERIOR COURT OF ORANGE COUNTY et al. (L. A. 8502.)

(Supreme Court of California. July 16, 1925.)

1. Judgment ⊜397—Entry in minutes that judgment entered on certain day is judgment of court, where no judgment had, in fact, been entered on such day, held not to constitute judgment.

Entry, by court, in minutes, that "judgment is entered by the court on 15th day of October, 1924, is a judgment in this action," where no judgment had, in fact, been entered on such date, *held* not entry of new judgment, within requirements of Code Civ. Proc. § 663.

2. Judgment ⊜22—Order for judgment does not constitute a judgment.

Order for judgment does not constitute a judgment.

3. Judgment ⊜256(1)—Written findings of fact and conclusions of law constitute decision of court, and judgment must be entered in accordance therewith.

Written findings of fact, when not waived, and conclusions of law, constitute decision of court, and judgment must be entered in accordance therewith.

4. Judgment ⊜527—Minute orders of judge preceding judgment are merged in, and controlled by, judgment.

Minute orders of judge preceding judgment are merged in, and controlled by, judgment.

5. Trial ⊜393(1)—Judgment constitutes conclusions of law, upon which mandate of judgment may depend.

Though conclusions of law are not appended to findings of fact, judgment in legal effect constitutes conclusions of law, upon which mandate of judgment may properly depend.

6. Mandamus ⊜176—Plaintiff held not entitled to judgment of Supreme Court annulling proceeding of lower court.

Where, in action to quiet title to certain real property, judgment had been entered for plaintiff, and void order had been entered setting aside judgment, *held*, plaintiff was not entitled to judgment of Supreme Court annulling proceedings of lower court to such extent that plaintiff's judgment would then stand unaffected by proceedings of defendant, under Code Civ. Proc. § 663, to annul this judgment and enter new one, since motion to vacate plaintiff's judgment and enter new one for defendant was still undisposed of by court.

7. Judgment ⊜276—Defendant held to have waived written notice or entry of judgment by filing motion to vacate such judgment.

In action to quiet title to real property, defendant *held* to have waived written notice of entry of judgment by filing notice of motion to vacate and set aside such judgment.

8. New trial ⊜½—New trial proceedings are statutory, and provisions of statute must be strictly followed.

New trial proceedings are statutory, and provisions of statute must be strictly followed.

9. New trial ⊜153—Notice of motion for new trial held to have been filed too late.

Notice of motion for new trial, in action to quiet title, filed 8 days after expiration of 10-day period allowed for filing such notice, under Code Civ. Proc. § 659, *held* filed too late.

In Bank.

Action by E. L. Prothero against John F. Boose and others. Application by plaintiff for writ of mandate to be directed to Superior Court of Orange County to compel entry of new judgment. Granted.

Otto Sanaker, of Santa Ana, for petitioner.

Arthur E. Koepsel, of Santa Ana, for respondents.

SHENK, J. The petitioner commenced an action in the respondent court against John F. Boose and others to quiet his title to certain real property and for injunctive relief. The defendants filed an answer wherein affirmative relief was sought. At the conclusion of the trial on October 15, 1924, the court made an order from the bench denying relief to both parties and caused an entry thereof to be made in the minutes as follows:

"Argument opened and closed. Judgment of the court that both sides take nothing."

No findings of fact, conclusions of law, or judgment were made or entered pursuant to said order and findings were not waived. Thereafter, following an informal conference at which counsel for the respective parties were present, the court requested counsel for petitioner to prepare findings in favor of the plaintiff in said action. Findings so prepared were signed and filed by the judge on November 6, 1924, and judgment thereon in favor of the plaintiff was entered the following day. On November 17, 1924, the defendants in said action served and filed a notice of motion to set aside and vacate the judgment, and to enter a new and different judgment on numerous grounds, including those mentioned in paragraph 1 of section 663, Code of Civil Procedure. On November 21st the court granted said motion. As a memorial of its action in that behalf, the minutes of the court were caused to state:

"Motion to vacate judgment granted."

On December 5th the defendants served and filed a notice of motion for a new trial, designating therein December 12th as the date on which the motion would be made. On the day thus noticed the court filed a written order granting the motion of the defendants to set aside and vacate the said judgment and enter a new and different judgment, and included in said written order the following:

"It is hereby ordered, adjudged, and decreed that said judgment so entered on the 7th day of

November, 1924, was inadvertently entered, and was not the judgment of this court, and the same is hereby annulled and set aside, and the judgment as entered by the court on the 15th day of October, 1924, is the judgment in this action."

The court continued the hearing of the motion for new trial to December 19th, on which date the said motion was granted, and the cause was set down for retrial on January 2, 1925. No new and different or other judgment was made or entered by the court following its order granting the motion to set aside the judgment entered November 7th.

[1] Pursuant to the prayer of the petition for the issuance of a writ or writs appropriate to the foregoing facts, an alternative writ of mandate was issued, requiring the respondent court to enter a new and different judgment in said action or show cause why it had not done so. A writ of review was also issued, requiring the respondent court to certify its record in the matter of the new trial ordered by the court, and further new trial proceedings were stayed pending the determination hereof. These writs were served as required by law and notice of time and place of hearing thereon was duly served and filed. No return has been made to the alternative writ of mandate, but there is on file a return to the writ of review, setting forth the record, and showing the facts as above outlined. From a consideration of those facts, it is clear that the respondent court, to properly grant said motion, should have made and entered another and different judgment pursuant to the requirements of section 663, Code of Civil Procedure. Its failure to enter such a judgment rendered its action on said motion, not merely erroneous, but void. Dolan v. Superior Court, 47 Cal. App. 235, 190 P. 469.

[2] There is nothing in the record to warrant the conclusion that the judgment entered November 7th was inadvertently entered, or that said judgment was not the judgment of the court. The order of the court filed December 12, 1924, providing that "the judgment as entered by the court on the 15th day of October, 1924, is the judgment in this action," although perhaps so intended, did not constitute the entry of another and different judgment. Assuming that the court could effectively render a judgment by reference to another judgment, a question which is not now decided, still the only order of the court made or entered on October 15th with reference to a judgment was a minute order that both sides take nothing. Such order was no more than an order for judgment and an order for judgment is not a judgment. Canadian, etc., Co. v. Clarita, etc., Co., 140 Cal. 672, 74 P. 301; Cuneo v. Cuneo, 40 Cal. App. 564, 181 P. 229; United Taxpayers' Co. v. San Francisco, 55 Cal. App. 239, 203 P. 120.

[3-5] Unless findings are waived, and they were not waived in the present case, the written findings of fact and conclusions of law constitute the decision of the court, and judgment must be entered in accordance therewith. Sections 632, 633, Code Civ. Proc.; Brownell v. Superior Court, 157 Cal. 703, 109 P. 91; Hoover v. Lester, 16 Cal. App. 151, 116 P. 382. Opinions of the judge or minute orders preceding such decision and judgment were merged in or controlled by the judgment. Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 77 P. 1113; Wadleigh v. Phelps, 149 Cal. 627, 87 P. 93; De Cou v. Howell, 190 Cal. 741, 214 P. 444; McClellan v. Lewis, 35 Cal. App. 133, 169 P. 438. Although conclusions of law were not appended to the findings of fact in said action, the language of the judgment, which was signed and filed in legal effect, constituted conclusions of law upon which the mandate of the judgment could properly depend. Takekawa v. Hole, 170 Cal. 323, 149 P. 593.

[6] The petitioner insists that, since the order of the court setting aside said judgment and leaving the case undetermined was a void order (Dolan v. Superior Court, supra), he is now entitled to the judgment of this court annulling the proceedings of the respondent court to such an extent that the judgment entered November 7th would then stand as a judgment in his favor unaffected by the proceedings instituted by the defendants under said section 663. We cannot so conclude. Under the facts shown by the record, the motion to set aside and vacate the judgment and enter another and different judgment is still pending and undetermined. Until that motion is properly disposed of, the action of the court thereon as contemplated by the statute has not taken place.

[7-9] Petitioner also contends that the proceedings for a new trial were and are beyond the power of the court to entertain, for the reason that they were not initiated within the statutory time. The judgment was entered November 7th. No notice of the entry of judgment appears to have been served on the defendants. However, on November 17th, the defendants served and filed their notice of motion to vacate and set aside said judgment, particularly referring in that document to the judgment entered November 7th. By filing this notice of motion in the records and files of said action, the defendants revealed the fact that they had actual knowledge of the entry of said judgment. Under such circumstances the written notice of the entry thereof was waived. Thorne v. Finn, 69 Cal. 251, 10 P. 414; Timmons v. Coonley, 39 Cal. App. 35, 179 P. 429; 20 Cal. Jur. p. 176, and cases cited. On December 5th the defendants served and filed their notice of motion for a new trial. No notice of inten-

tion to move for a new trial or other step looking to the initiation of new trial proceedings was taken prior to December 5th. The notice of motion served and filed on that date was therefore served and filed 8 days after the expiration of the 10-day period provided by section 659, Code of Civil Procedure. New trial proceedings are statutory and the provisions of the statute must be strictly followed in order that the rights of the litigant may be preserved and the court have jurisdiction to entertain such proceedings and enter valid orders and judgments thereon. Cal. Imp. Co. v. Baroteau, 116 Cal. 136, 47 P. 1018; Whiting-Mead Com. Co. v. Bayside Land Co., 178 Cal. 93, 172 P. 598; Ransome-Crummey Co. v. Superior Court, 188 Cal. 393, 205 P. 446; Diamond v. Superior Court, 189 Cal. 732, 210 P. 36. It is clear that on the record here presented the respondent court could not, on a retrial of the action initiated pursuant to the belated notice, render a valid judgment for either party.

It is therefore ordered that all proceedings of the respondent court in said action subsequent to the filing therein on November 17, 1924, of defendants' notice of motion to vacate the judgment and enter another and different judgment, be and the same are hereby annulled, and that a peremptory writ of mandate issue, requiring the respondent court, on proper notice, to entertain and determine the said motion as required by law.

We concur: MYERS, C. J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.; WASTE, J.; LAWLOR, J.

---

196 Cal. 515

Ex parte WILSON. (Cr. 2764.)

(Supreme Court of California. July 29, 1925.)

1. Habeas corpus ⟸96—Sufficiency of information charging offense held not subject to inquiry on habeas corpus.

Sufficiency of information charging an offense denounced by Pen. Code, § 464, *held* not subject to inquiry on habeas corpus, regardless of fact whether plea of "guilty" or "not guilty" has been entered.

2. Burglary ⟸18—Information held to charge crime of burglary with explosives, "with intent to commit crime."

Information based on Pen. Code § 464, reading that accused willfully, unlawfully, feloniously, and burglariously entered a certain designated store building, and opened a certain safe therein by the use of nitroglycerine or other explosive, "with the intent to commit larceny, * * *" *held* sufficiently to charge the offense of the crime of burglary with explosives, denounced in section 464; the phrase in that section, "with intent to commit crime," not referring to a crime separate from the opening of the safe and the stealing of the contents thereof.

3. Burglary ⟸49—Statute held to prescribe felony punishable by imprisonment in state penitentiary.

Pen. Code, § 464, prohibiting the crime of burglary with explosives, *held* to prescribe a felony punishable by imprisonment in the state penitentiary for not less than 25 nor more than 40 years, despite failure of section to declare the offense a felony, or expressly provide for imprisonment in state penitentiary for its violation, in view of sections 4, 459–461, 463, 464, and despite section 17, and Const. art. 1, § 6.

4. Criminal law ⟸161—Constitutional guaranty against twice being put in jeopardy does not apply to service of sentence.

Constitutional guaranty against twice being put in jeopardy does not apply to service of sentence, but applies only to twice being put upon trial for the same offense.

5. Habeas corpus ⟸92(1)—That misconception of law resulted in interruption of execution of judgment held matter, not for court, but for state board of prison directors.

That misconception of law resulted in interruption of execution of judgment *held* matter, not for court, but for state board of prison directors.

In Bank.

Original application by William Wilson for writ of habeas corpus, to be directed to the Sheriff of Kings County, to secure petitioner's release from custody. Writ discharged.

William Wilson, in pro. per.

Wm. R. McKay, Dist. Atty., and Sidney J. W. Sharp, Deputy Dist. Atty., both of Hanford, for respondent.

LAWLOR, J. On habeas corpus. Petitioner was charged by information in the county of Kings with a violation of section 464 of the Penal Code, namely, with the crime of burglary with explosives. On February 21, 1922, he pleaded guilty. For the said offense petitioner was sentenced to confinement in the state prison at San Quentin. About March 1, 1922, he was transferred from said penitentiary to the state prison at Folsom. On or about December 29, 1924, he was ordered returned to the superior court of Kings county for resentence, upon the claim that the original sentence to the state prison was void, as burglary with explosives was construed to be a misdemeanor rather than a felony. Accordingly, he was, on the 31st day of December, 1924, resentenced by the superior court to be confined in the county jail of Kings for 25 years.

The offense, as already indicated, is prescribed by section 464 of the Penal Code, quoted elsewhere, and deals with the opening of a safe or other secure place by the

use of explosives with intent to commit crime.

Several grounds are urged in support of the petition which, in effect, may be stated as follows: (1) That the information fails to state a public offense, for it does not follow the language of the statute, and neglects to charge a "breaking" in addition to an "entering." (2) That it fails to state a public offense, in that it does not specify "what crime the defendant intended to commit when he entered the building, and before he dynamited the safe therein." (3) That he "has been once in jeopardy, by reason of his illegal confinement in a state prison for a substantial portion of his term on a void judgment." (4) That his confinement in the county jail constitutes cruel and unusual punishment, in violation of section 6, article 1, of the Constitution.

Respondent's position is thus set forth:

"(1) The information under which respondent was convicted of the offense of burglary with explosives states a public offense.

"(2) Petitioner has not been once in jeopardy by reason of his imprisonment in state's prison prior to his resentence to the county jail.

"(3) Burglary with explosives, by reason of the nature of the action which constitutes said offense, must be denominated a felony per se, and the omission in the statute of the place of confinement as a punishment therefor, or the failure to denominate the same as a felony, is without moment in the present instance.

"(4) The imprisonment of the defendant in the county jail is not cruel and unusual punishment under section 6 of article 1 of the Constitution of the state of California."

[1] 1. As to the sufficiency of the information, we quote from 13 Cal. Juris. page. 232, section 14:

"The scope of inquiry upon habeas corpus into the sufficiency of an indictment or information is limited, for, although the petitioner may be discharged if the pleading totally fails to charge an offense known to the law, if there is attempted to be stated an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into."

It was declared in Re Kavanaugh, 180 Cal. 181, 182, 180 P. 533:

"The information in the superior court upon which the judgment against petitioner is based clearly attempted to charge the felony defined by section 476a of the Penal Code. Whether the specific facts alleged as constituting the particular offense failed to sufficiently show the public offense attempted to be charged is a question which cannot be considered on habeas corpus under the well-settled rule of this jurisdiction. Matter of Ruef, 150 Cal. 665 (89 P. 605); * * * Ex parte Greenall, 153 Cal. 770 (96 P. 804)."

In the application of this rule no distinction is drawn between cases where a plea of "not guilty" and cases where a plea of "guilty" is entered. In re Cook, 13 Cal. App. 399, 403, 110 P. 352, 354, declares:

"We do not intend to be understood as saying that, if the only offense sought to be charged against the prisoner was that of an attempt to escape from a prison, the indictment would not have been compelled to yield to the claims of a demurrer; but there was no demurrer, and, therefore, whatever defects might characterize the statement of the offense to which the prisoner *pleaded guilty* were waived by said plea. His plea, in other words, amounted to an admission that the offense of which he thus confessed his guilt was within the language of the indictment. As is said in In re Myrtle, 2 Cal. App. 383 [84 P. 335], the indictment, taken with the plea of the prisoner, establishes a case of attempt to escape from a prison as completely as if it had in fact been specifically alleged in the indictment that the prisoner had made an attempt to escape." (Italics added.)

The information filed herein comes clearly within this rule, and its sufficiency cannot now be questioned or gone into on habeas corpus. Moreover, it is significant to note that the information incorporated by reference the code section that defines and describes the offense of burglary with explosives.

[2] 2. We perceive no merit in petitioner's second contention, for the information clearly charged, among other things, that petitioner was actuated by an intent to commit larceny. The information reads, in part:

"The said defendant * * * did then and there willfully, unlawfully, feloniously, and burglariously enter that certain store building * * * and open a certain safe therein by the use of nitroglycerine or other explosives, with the intent to commit larceny. * * *"

In our view, it is immaterial whether or not "the phrase, 'with the intent to commit larceny' must be read with the previous sentence" of the information, for the charging part of the information expressly alleges that the petitioner, "with the intent to commit larceny," entered the building and opened the safe with an explosive. The allegation with intent to commit larceny would include grand or petit larceny. This allegation, in our opinion, was a sufficient compliance with the provisions of section 464, which require, among other things, an opening or attempt to open a safe by the use of explosives with "intent to commit crime." We do not deem it essential, as contended by petitioner, that the intended or motivating crime should be completely and entirely separate from and unconnected with the opening of the safe; undoubtedly, the Legislature had in mind primarily an intended or motivating crime that would follow the opening of the safe—that is, a looting of the safe subsequent to the opening thereof by the employment of explosives. An examination of the section satisfies us that there is no

warrant for petitioner's argument that the phrase, "with intent to commit crime," refers to a crime "separate and disconnected from the opening of the safe" and the stealing of the contents thereof.

Another answer to this contention is the one considered under the preceding point—that if the pleading purports to charge a known crime its sufficiency cannot be gone into on habeas corpus.

[3] 3. The real question in controversy is discussed in the third contention of petitioner, and that question is, Does the failure of section 464 to expressly declare the offense therein defined a felony, or to expressly provide that the punishment for a violation thereof shall be imprisonment, for the prescribed period, in a state prison, bring the offense within that class of crimes commonly designated "misdemeanors," or, in the face of either or both of these omissions, may said offense nevertheless be held to be a felony?

The District Court of Appeal, First Appellate District, Division 2, in the Matter of the Application of Charles Schiaffino for a Writ of Habeas Corpus, 232 P. 719, has passed upon this identical question, and held the offense defined by section 464 to be a misdemeanor. The decision was based upon section 17, Penal Code, which reads, "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor; * * *" and Matter of Humphrey, 64 Cal. App. 572, 222 P. 366, and cases therein cited. The District Court of Appeal in the Matter of Schiaffino, supra, however, stated:

"Though it seems an absurdity that one convicted of a crime which is punishable by imprisonment for not less than 25 years should be confined in a county jail rather than in the state prison, the language of the section does not permit any other interpretation."

In view of the express terms of section 17 of the Penal Code, it may be conceded that under a statute omitting to declare the offense therein defined to be a felony, and which does not provide that the punishment to be inflicted shall be incarceration in a state prison, only misdemeanor punishment can be imposed. But, it is clear to us that, reading together the provisions of chapter 2, title 13, part 1, of the Penal Code (sections 459–464), section 464 must be held to prescribe for a violation of its terms punishment by imprisonment in a state prison.

Sections 459, 460, 461, 463, and 464 read as follows:

"459. *'Burglary' Defined.* Every person who enters any house, room, apartment, tenement, shop, warehouse, store, mill, barn, stable, outhouse or other building, tent, vessel, railroad car, mine, or any underground portion thereof, with intent to commit grand or petit larceny or any felony is guilty of burglary.

"460. *Burglary Defined.* 1. Every burglary of an inhabited dwelling-house or building committed in the nighttime, and every burglary whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who while in the commission of such burglary arms himself with a deadly weapon, or who while in the commission of such burglary assaults any person, is burglary of the first degree.

"2. All other kinds of burglary are of the second degree.

"3. This section shall not be construed to supersede or affect section four hundred sixty-four of the Penal Code.

"461. *Punishment for Burglary.* Burglary is punishable by imprisonment in the state prison as follows:

"1. Burglary in the first degree for not less than five years.

"2. Burglary in the second degree for not less than one or more than fifteen years.

"3. Burglary in the third degree for not more than five years."

"463. *'Nighttime' Defined.* The phrase 'nighttime,' as used in this chapter, means the period between sunset and sunrise.

"464. *Burglary with Explosives.* (1) Any person who, with intent to commit crime, breaks and enters, either by day or night, any building, whether inhabited or not, and opens or attempts to open any vault, safe or other secure place by use of nitroglycerine, dynamite, gunpowder or any other explosive, shall be deemed guilty of burglary with explosives.

"2. Penalty. Any person duly convicted of burglary with explosives shall be punished by imprisonment for a term not less than twenty-five nor more than forty years."

Prior to the adoption of section 464 (Stats. 1917, p. 273), section 460 divided burglary into two degrees—burglary of the first and burglary of the second degree. In the introductory sentence of section 461, it is provided that "burglary is punishable by imprisonment in the state prison." Then follows the punishment for burglary of three degrees, first, second, and third, but as to the latter degree we have nowhere found it to be defined as a crime. Section 464 creates a new form of burglary in addition to the forms defined and made punishable by sections 460 and 461, respectively, namely, "burglary with explosives." If, for instance, the measure of punishment prescribed for the latter form of burglary appeared in place of or following subdivision 3 of section 461, there could be no question that the kind of punishment would be the same as that prescribed in the introductory sentence of that section—imprisonment in the state prison. In other words, the kind of punishment for each of the forms of burglary would be found exclusively in the introductory language of section 461. The question then arises whether the fact that burglary by explosives appears in a separate and distinct section, which omits to prescribe the kind of punishment, would preclude the application of the introductory language of section 461 to

section 464 in determining the kind of punishment to be imposed under the latter section. In our view, each section of the chapter should be read with the others, and all of them construed as though constituting a single section (People v. Pryal, 25 Cal. App. 779, 147 P. 114, 115). Thus construed the kind of punishment under section 464 would be imprisonment in the state prison.

It is said in Bishop on Statutory Crimes, page 61:

"While plainly, where the division is only made by an editor, it can have no effect on the interpretation, it is believed not to be greatly different where it is the work of the draughtsman, and is retained in the statute as passed. In other connections and from various cases we see that, while our courts sometimes speak of the sections as though the distinction had something to do with the interpretation, at other times nothing is perceptible from which such inference could be drawn. On the whole, little depends on this matter, beyond mere convenience of citation."

Any other construction of the chapter would be opposed to the provisions of section 4 of the Penal Code, which read:

"The rule of the common law, that penal statutes are to be strictly construed, has no application to this code. All its provisions are to be construed according to the fair import of their terms, with a view to effect its objects and to promote justice." Snell v. Bradbury, 139 Cal. 379, 73 P. 150; People v. Soto, 49 Cal. 67, 70.

It is apparent that the criminal act defined in section 464 is more aggravated in character than those enumerated in the preceding sections, for the use of explosives would conceivably be attended with greater risk to life, bodily safety, and property. Moreover, while the Legislature has complete authority within the constitutional limitation (article 1, section 6, Const.) to fix the kind and quantity of punishment, in the absence of a clear and unequivocal expression the court would hesitate to hold that it was intended to prescribe for so grave an offense a misdemeanor punishment having a minimum of 25, and a maximum of 40, years. For to do so would be to impute to the Legislature a purpose entirely novel—the quantum of punishment bearing no natural nor reasonable relation to the kind of punishment contended for. And in our opinion such considerations properly enter into the question of the intention of the Legislature.

The cases relied upon in support of In re Charles Schiaffino for a Writ of Habeas Corpus (Cal. App.) 232 P. 719, are Union Ice Co. v. Rose, 11 Cal. App. 357, 360, 104 P. 1006, and In re Humphrey, 64 Cal. App. 572, 222 P. 366. Union Ice Co. v. Rose, supra, involved a prosecution for a violation of the Cartwright Act. St. 1907, p. 984. The court, after citing section 17, Penal Code, declared:

"The law does not define misdemeanors as those offenses punishable by fine or imprisonment in the county or city jail, but as those for which the penalty imposed, whatsoever it may be, is other than death or imprisonment in the state prison. The conclusion would therefore seem irresistible that, since the offense is clearly a crime for which a penalty is imposed, the punishment for which, however, is not that prescribed for a felony, it must necessarily and logically follow that it is a misdemeanor. As said in Pillsbury v. Brown, 47 Cal. 480: 'A misdemeanor is an act or omission for which a punishment, other than death or imprisonment in the state prison, is denounced by law.'"

In re Humphrey, supra, involved a violation of the Wright Act (St. 1921, p. 79), which adopted by reference certain provisions of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138¼ et seq.). There also, the court properly held, in effect, that the act, in omitting to declare the offense a felony in terms, or making the punishment imprisonment in the state prison, under section 17 the crime was only punishable as a misdemeanor.

These authorities are clearly distinguishable from the case at bar. The respective acts in those cases stood entirely alone and unrelated to any other provision which in terms prescribed the kind of punishment, and hence resort was necessarily had to the omnibus provisions of section 17; while in the case at bar it is held that the chapter of which section 464 is a part, taken in its entirety, does in terms prescribe the kind of punishment, and therefore section 17 has no application.

Section 464 is, therefore, held to prescribe a felony, punishable by imprisonment in the state penitentiary for not less than 25 nor more than 40 years. It follows that In re Charles Schiaffino for a Writ of Habeas Corpus, supra, must be and is overruled.

[4, 5] With respect to the claim of petitioner that because he was confined for a time in the penitentiary under the judgment of conviction he has been once in jeopardy, this may be said: First, the constitutional guarantee has no application to the service of a sentence, but applies only to twice being put upon trial for the same offense. In re Harron, 191 Cal. 457, 466, 217 P. 728; 7 Cal. Jur. 943. And, second, the effect of this decision is that the incarceration in the state prison was proper. It is true that a misconception of the law has resulted in the execution of the judgment being interrupted, but that is a circumstance which the state board of prison directors may consider.

4. In view of the conclusion that the sentence must be served in the penitentiary, it will not be necessary to discuss petitioner's final contention that his confinement in the county jail constitutes cruel and unusual punishment within the meaning of the con-

stitutional inhibition. We quote section 1493 of the Penal Code as bearing on the judgment to be pronounced on the writ. The section reads:

"In cases where any party is held under illegal restraint or custody, or any other person is entitled to the restraint or custody of such party, the judge or court may order such party to be committed to the restraint or custody of such person as is by law entitled thereto."

Accordingly, the writ is discharged, and the petitioner remanded to the custody of the respondent sheriff; and the superior court of the county of Kings is hereby ordered to vacate and set aside the judgment heretofore pronounced and entered to the effect that petitioner be imprisoned in the county jail of said county, and that a new judgment be pronounced and entered against petitioner according to law and the views herein expressed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; SHENK, J.; LENNON, J.

---

196 Cal. 404

PEOPLE v. QUAREZ. (Cr. 2756.)

(Supreme Court of California. July 15, 1925. Rehearing Denied August 13, 1925.)

1. Aliens ⟸17—Essential elements of offense of unlawful possession of revolver stated.

The essential elements of the offense of unlawful possession of a revolver, as denounced by St. 1923, p. 696, § 2, are, first, the ownership or possession or custody or control of the weapon of the prohibited type, and the fact of foreign birth and unnaturalization of accused.

2. Criminal law ⟸517(4)—Corpus delicti must be established by independent evidence before extrajudicial statements, admissions, or confession are admissible.

The extrajudicial statements, admissions, or confession of an accused cannot be used to establish any necessary element of the corpus delicti, and the latter must be established by independent evidence before such extrajudicial statements are admissible, notwithstanding rule that burden of producing evidence should be placed on party best able to sustain it.

3. Criminal law ⟸517(4)—Evidence of accused's extrajudicial statements as to fact of foreign birth, unsupported by evidence independent of such statements, held insufficient to establish corpus delicti of offense of unlawful possession of revolver.

Evidence of accused's extrajudicial statements as to fact of foreign birth, unsupported by evidence independent of such statements, *held* insufficient to establish corpus delicti of offense of unlawful possession of revolver denounced by St. 1923, p. 696, § 2.

In Bank.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

D. Quarez, who asserts his true name to be D. Juarez, was convicted of the unlawful possession of a revolver, and he appeals. Reversed.

Thomas Ashby, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LAWLOR, J. An information, filed by the district attorney of Sacramento county, charged the defendant herein with having, on the 12th day of July, 1924, in his possession and under his custody and control, in the city of Sacramento, a 32.20 Colt's revolver, less than 12 inches in length, and capable of being concealed on his person, and being, at the time, a foreign-born person, and not a naturalized citizen of the United States. He was tried and convicted of the offense charged, the verdict reading:

"We, the jury in the above-entitled cause, find the defendant D. Quarez, true name D. Juarez guilty of the crime of carrying a concealed weapon, and being at the time an unnaturalized foreigner, as charged in the information."

In due course a motion for a new trial was interposed by the defendant and denied. The defendant appeals from the order denying his said motion for a new trial and from the judgment of conviction.

Section 2 of the act under which appellant was prosecuted (Stats. 1923, c. 339, p. 696) reads as follows:

"Sec. 2. On and after the date upon which this act takes effect, no unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another or against the government of the United States or of the state of California or of any political subdivision thereof shall own or have in his possession or under his custody or control any pistol, revolver or other firearm capable of being concealed upon the person. The terms 'pistol,' 'revolver,' and 'firearms capable of being concealed upon the person' as used in this act shall be construed to apply to and include all firearms having a barrel less than twelve inches in length. Any person who shall violate the provisions of this section shall be guilty of a felony and upon conviction thereof shall be punishable by imprisonment in a state prison for not less than one year nor more than five years."

There is no dispute that, on the evening of July 12, 1924, the arresting officers, while cruising about the city of Sacramento in their automobile, saw the appellant and another person in an alley situated in the vicinity of Seventh and O streets; that upon the officers flashing their light on the two persons the

latter fled, the officers following in pursuit; that the appellant was located in an old shed close by; that before his discovery in the shed he had thrown off his mackinaw; that the mackinaw lay at his feet, and under and covered by it was the weapon above described. It is not contended that this evidence is insufficient to establish that appellant had "in his possession or under his custody or control" a weapon capable of being concealed upon the person. The only testimony other than that going to such possession was his extrajudicial statement to the arresting officers and the statement made at the preliminary examination in the police court, through an interpreter, to the effect that he was born in Mexico.

The principal contention on appeal is that this latter evidence was inadmissible, and therefore the element of foreign birth and nonnaturalization were not proved. We quote from appellant's brief:

"The principal question involved in this case centers on the admissibility of these very statements of the police officers relied upon by the prosecution as establishing the fact of foreign birth, namely, that appellant had admitted to them he was born in Mexico. To assume that these statements proved this fact is of course to assume the fact in issue. * * *

"In the case at bar there is absolutely no evidence except appellant's extrajudicial statements which in any way tends to show foreign birth."

[1] It is insisted by appellant that foreign birth is an essential part of the corpus delicti of the offense defined by the statute, and therefore the extrajudicial statements of the appellant are not admissible as proof of such element of the crime. In other words "that the fact of his being a foreign-born citizen, if established, is a fact which must co-exist with the act of possession of a weapon before any unlawful act is shown to have been committed, and that it therefore constitutes a part of the corpus delicti; that therefore the declarations of the appellant alone were not sufficient to establish the fact of foreign birth; and, there being no other testimony on that subject, the evidence is insufficient to support the verdict."

In support of this contention the case of People v. Chadwick, 4 Cal. App. 63, 87 P. 384, 389, among others, is cited, wherein it is declared:

"The rule is clearly established in this state that the extrajudicial statements or admissions of a defendant, in the absence of other evidence of the commission of the crime charged against him, are insufficient to establish his guilt (People v. Jones, 31 Cal. 565; People v. Simonsen, 107 Cal. 345 [40 P. 440]); and they are equally insufficient to establish the existence of any substantive or essential element of a crime charged against the defendant. * * *"

Elsewhere it is contended that—

"It follows that it is as necessary to the proof of a violation of the statute that the defendant be shown to belong to the proscribed class as it is that he committed the forbidden act. This fact being one essential element of the crime, it constitutes a part of the corpus delicti and must be proved as such. The corpus delicti consists of the elements of the crime. People v. Tapia, 131 Cal. 647 [63 P. 1001]; People v. Simonsen, 107 Cal. 346 [40 P. 440]; People v. Vertrees, 169 Cal. 404 [146 P. 890]."

The people cite many authorities to the effect that a slight amount of proof is only necessary to satisfy the law when proving a negative, in a case where a fact is peculiarly within the knowledge of the other party; and other authorities to the effect that, having proven by competent evidence the foreign birth of the appellant, the allegation of the information that he had never been naturalized must be taken as true in the absence of proof to the contrary.

It is readily apparent that section 2, quoted above, prohibits and makes punishable the carrying of concealed weapons under circumstances described therein. A reading of section 2 of the act indicates, so far as it is applicable to the instant case, that the Legislature prescribed two elements for conviction thereunder, namely: (1) The possession of a concealed weapon of the type described therein; (2) by a foreign-born and unnaturalized person. That is, if the proof of the prosecution under this section were to stop with a showing that the person charged had carried, possessed, or had under his custody or control a weapon of the prohibited type, no offense would be proven. In addition to this proof the prosecution has the burden of establishing that the offender was an alien, and, having proven this element of the offense, it is indicated by the authorities that "this status continues until the contrary is shown." Or, stated differently, "it was therefore unnecessary for the prosecution, after showing that the defendant was foreign-born, to further show that he had never been naturalized." People v. Velasquez (Cal. App.) 233 P. 359.

[2] The corpus delicti of the offense defined in section 2 consists, as we have shown, of two elements—the second being the foreign nativity and nonnaturalization of the appellant. The rule is well settled, and the authorities numerous in this state, that the extrajudicial statements, admissions, or confession of a defendant cannot be used to establish any necessary element of the corpus delicti of the crime charged. The corpus delicti must be established by independent evidence before the extrajudicial statements, admissions, or confession of a defendant are admissible. People v. Jones, 31 Cal. 565; People v. Simonsen, 107 Cal. 345, 40 P. 440; People v. Johnson (Cal. App.) 238 P. 814. We are not to be understood as holding that, if the evidence of the statements, admissions, or confession of a defendant had been re-

ceived in advance of a full measure of proof of the corpus delicti, which was later supplied, the mere inversion of the order of proof would be prejudicial to the defendant. People v. Besold, 154 Cal. 363, 368, 97 P. 871.

Nor are we unmindful of the rule stated by respondent, and commonly known as the "rule of convenience." It is thus stated in 22 Corpus Juris, at page 81, section 24:

"In the administration of justice it is often wise to place the burden of producing evidence on the party best able to sustain it, and ambiguity, concealment, or evasion react with peculiar force on a pleader who asserts a fact and fails to produce the evidence, which if his assertion were true, would be in his possession. Hence it is very generally held that, where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within his control, the burden rests on him to produce the evidence, although he is obliged to go no further than necessity requires. * * *"

Again in 16 Corpus Juris, p. 530, § 998, it is said:

"Where the subject-matter of a negative averment in the indictment, or a fact relied upon by defendant as a justification or excuse, relates to him personally or otherwise lies peculiarly within his knowledge, the general rule is that the burden of proof as to such averment or fact is on him."

The case of People v. Boo Doo Hong, 122 Cal. 606, 55 P. 402, is cited in each of these sections, and also by respondent in support of its contention. An examination of that case discloses that the defendant therein was charged by information with the crime of willfully and unlawfully practicing medicine without having first procured a certificate to so practice, as required by law. The trial court in its instructions, in effect, told the jury that the burden was on the defendant to prove that he had a certificate to practice, and that in the absence of such proof it must be taken as true he had not procured one. The court declared:

"It is contended for appellant that the said instruction was erroneous and misleading, and that the verdict was not justified by the evidence, because in a criminal action the defendant is presumed to be innocent until he is proved guilty beyond a reasonable doubt, and this presumption continues through the entire trial, and the burden is upon the people to establish his guilt by proving every material allegation of the information; and that as the information charged that defendant had practiced medicine without having a certificate to do so, it devolved upon the people to prove that fact, and having entirely failed to offer any such proof he ought not to have been convicted, and his motion for new trial should have been granted.

"The general rule is undoubtedly as above stated, but there is a well recognized exception to the rule, where there is a negative averment of a fact which is peculiarly within the knowledge of the defendant.

"Mr. Greenleaf, in his work on Evidence, volume 1, section 79, under the heading 'Negative Allegations,' says: 'But when the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party. Such is the case in civil or criminal prosecutions for a penalty for doing an act which the statutes do not permit to be done by any persons, except those who are duly licensed therefor; as, for selling liquors, exercising a trade or profession, and the like. Here the party, if licensed, can immediately show it without the least inconvenience; whereas, if proof of the negative were required, the inconvenience would be very great,' citing a large number of cases. See, also, 3 Rice on Evidence, § 260, where the same rule is declared.

"In 1 Jones' Law of Evidence, section 179, under the heading 'Burden as to particular facts lying peculiarly within knowledge of a party,' it is said: 'This is often illustrated in prosecutions for selling liquors or doing other acts without the license required by law. By a few authorities the rule is prescribed that in such cases the prosecution must offer some slight proof of the fact that no license has been granted, for example, by producing the book in which licenses are recorded; and, if the book fails to show that a license has been granted, the burden is shifted upon the defendant to prove the fact claimed by him; but the greater number of authorities hold that where a license would be a complete defense the burden is upon the defendant to prove the fact so clearly within his own knowledge,' citing cases.

"We think the rule upon this subject generally recognized and followed the correct one, and therefore conclude that the court did not err in giving the instruction complained of, and that the verdict was justified by the evidence."

There is no doubt that the above case enunciates the correct principle, and that it has been consistently followed in this state in those cases involving the unlawful practice of medicine without a license. People v. Fortch, 13 Cal. App. 770, 775, 110 P. 823; People v. Wong Lee Wing, 47 Cal. App. 327, 331, 190 P. 643; People v. Goscinsky, 52 Cal. App. 62, 64, 198 P. 40; People v. Saunders, 61 Cal. App. 341, 345, 215 P. 120. It has also been extended to the case where the defendant was charged by information with the offense of carrying a concealed weapon upon his person in violation of section 3 of the act of 1917 (Stats. 1917, p. 221). This section, which is really the counterpart of section 5 of the act of 1923, made it a misdemeanor for any one without a license to carry such a weapon concealed upon his person. It was declared in People v. Ross, 60 Cal. App. 163, 166, 167, 212 P. 627, 628:

"It was not incumbent upon the prosecution to show that no license had been issued to appellant. The clause of the statute which exempts from its penal provisions those persons

who have been licensed to carry firearms is so incorporated into and made such a substantial part of the definition of the offense that it doubtless was necessary to allege in the information that appellant was without a license to carry the pistol. There is such an allegation in the information, but it presents a negative which the prosecution was not called upon to prove, for the truth or falsity of the averment lay more immediately within the knowledge of the defendant himself. It is a well settled rule of law that where the negative of an issue does not permit of direct proof, or where the facts come more immediately within the knowledge of the defendant, the onus probandi rests upon him. This doctrine is illustrated in cases of practicing medicine without a license or of selling spirituous liquors without a license."

But this exception to the general rule has, in this state, been confined to that particular line of cases where it becomes necessary, in order to constitute the offense charged, for the prosecution to prove the nonexistence of a license required by law. The burden of the issue is put on the defendant in such cases because it is easy for him to meet it. But the rule should not be applied so as to make less imperative, in the enforcement of the law, the duty of the prosecution to establish the charge. In other words, any deviation from the general rule should be strictly confined to the principle of 'ab inconvenienti." That this exception to the general rule is not of universal application in this state to criminal cases is recognized in People v. Frey, 165 Cal. 140, 145, 131 P. 127. In that case the defendant was charged with a violation of section 476a of the Penal Code in drawing and issuing a draft upon a bank without having sufficient funds therein to meet it; the only evidence of the insufficiency of the funds was the extrajudicial confession of the defendant. In holding that the corpus delicti was not established, the court declared:

"We are fully mindful of the importance of the argument ab inconvenienti, but since the Legislature has seen fit to make proof of a negative proposition—namely, the nonexistence of funds or credit, an essential element of a crime, we cannot see our way to a conclusion authorizing hearsay evidence to establish that constituent part of the offense. If practical difficulties are involved, that is a matter for legislative adjustment. 'The rule is well established that a conviction cannot be had upon the extrajudicial confession of the defendant, unless corroborated by proof aliunde of the corpus delicti.' People v. Jones, 123 Cal. 68 [55 P. 698]. We are aware of the fact that many cases properly hold very slight proof of the corpus delicti to be sufficient basis for the admission of defendant's confession, but we know of none which sustains proof of the corpus delicti upon purely hearsay testimony. * * *

"Nor does this case come within the rule that negative allegations regarding matters peculiarly within the knowledge of the defendant need not be proven. *That is a special rule applicable to such prosecutions as those for practicing some profession or following some calling without the license provided therefor by law.*" Italics added.

In People v. Whiteman, 114 Cal. 338, 344, 46 P. 99, 101, which involved an alleged forgery, the court declared:

"Suppose that he had admitted that he drew the Dixon check, and claimed that he had authority from Dixon to draw it, would this admission have put the burden upon him to show such authority?

"It would be a new departure in criminal law. It arises from a difficulty which is inherent in our system. We have inherited the idea, which we carefully place in all our constitutions, that an accused person must be confronted by his witnesses in court. State process cannot cross state borders, and hence justice is sometimes defeated. The courts have not created the difficulty, and cannot provide a remedy by depriving a defendant of the presumption of innocence and putting the burden upon him."

[3] Epitomized, the legal situation is this: Appellant was convicted under section 2 of the act of 1923. That section, so far as is applicable to this case, contains two essential elements necessary to be proved before the corpus delicti of the offense is established, namely: (1) The fact that appellant owned or had in his possession or under his custody or control a weapon of the prohibited type; and (2) the fact that appellant was a foreign-born and unnaturalized person. If the fact of alienage had been proved by competent evidence, under the authorities, as we have shown, this status would be presumed to have continued, unless the contrary was proved by the accused. And the foreign nativity, being an essential element of the corpus delicti, should have been established by evidence independent of the extrajudicial statements, admissions, or confession of the accused, which the prosecution did not furnish; and, this fact of foreign birth not coming within the rule of "ab inconvenienti," it follows that the evidence adduced is insufficient to establish the corpus delicti of the offense defined in section 2 of the act. The judgment and order are reversed and a new trial ordered.

We concur: MYERS, C. J.; LENNON, J.; RICHARDS, J.; SHENK, J.; WASTE, J.; SEAWELL, J.

196 Cal. 784

PEOPLE, Plaintiff and Respondent, v. M. GARCIA, Defendant and Appellant.

(Cr. 2777.)

(Supreme Court of California. July 15, 1925. Rehearing Denied August 13, 1925.)

In Bank.

Appeal from Superior Court, Sacramento County; John F. Pullen, Judge.

Price & Price, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

LAWLOR, J. The defendant, following his arrest with one D. Juarez, was charged by information, filed by the district attorney of Sacramento county, with having, on the 12th day of July, 1924, "in his possession, under his custody and control," a .38 Colt's revolver, less than 12 inches in length, and capable of being concealed upon the person, and being a foreign-born person and not a naturalized citizen of the United States. He was tried and convicted of the charge—the alleged offense constituting a violation of the act of 1923 (Stats. 1923, c. 339, p. 695)—a motion for a new trial was interposed and denied, whereupon defendant was sentenced to the penitentiary. He has appealed from the order denying his motion for a new trial and from the judgment of conviction.

The same points are urged for a reversal of the judgment and order as in the case of People v. Quarez, this day decided by this court, 238 P. 363. A weapon of the prohibited type was also found in the possession of appellant herein. What we have said touching the questions presented in the Juarez Case is hereby adopted and made a part hereof. For the reasons therein stated the judgment and order appealed from are hereby reversed and a new trial ordered.

We concur: MYERS, C. J., LENNON, J.; RICHARDS, J.; SHENK, J.; WASTE, J.; SEAWELL, J.

---

196 Cal. 525

In re DILLINGHAM'S ESTATE.

RILEY, State Controller, v. PLATZ et al.

(L. A. 8224.)

(Supreme Court of California. July 30, 1925.)

1. Taxation ⟸895(3)—Evidence held not to support finding that certificates of stock held in trust were not received by executor.

On hearing on objections to report of inheritance tax appraiser, evidence *held* not to support finding that executors did not, subsequent to decedent's death, take possession of shares of stock held in trust during decedent's lifetime, or the certificates representing them.

2. Taxation ⟸864 — "Possessed" in Inheritance Tax Act held to refer to character of ownership falling short of seizin.

"Possessed," as used in the St. 1921, p. 1500, § 2, stating what transfers shall be subject to inheritance tax, *held* to refer to a character of ownership falling short of seizin and not to mere corporal having.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Possess.]

3. Taxation ⟸866—Property, held temporarily in trust for exclusive use and benefit of deceased, is not exempt from inheritance tax.

Property of deceased, held temporarily in trust by another for exclusive use and benefit of deceased, is not exempt from inheritance tax.

4. Taxation ⟸856—Theory upon which inheritance tax is imposed, stated.

Theory upon which inheritance tax is imposed is that state which confers privilege of succeeding to property may attach thereto condition that a portion of the property shall be contributed to that state.

5. Taxation ⟸866—Undistributed trust fund held subject to inheritance tax.

Where resident testatrix created trust subject to her revocation, whereby nonresident trustee was to pay income to testatrix during her life, and after her death convey undistributed trust fund to her executor or administrator, and the property held in trust was bequeathed in her will, such property was subject to inheritance tax under St. 1921, p. 1500, § 2.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Proceeding to fix inheritance tax on estate of Caroline Frances Dillingham, deceased, in which Wilhelmina Platz and others filed objections. From the decree, Ray L. Riley, as State Controller, appeals. Reversed.

Ralph W. Smith, State Inheritance Tax Atty., of Sacramento, and Adrian C. Stanton, Erwin P. Werner, and George S. Dennison, Asst. Inheritance Tax Attys., all of Los Angeles, for appellant.

J. W. Morin, of Pasadena, and James S. Bennett, of Los Angeles, for respondents.

LENNON, J. Caroline Frances Dillingham died testate on January 30, 1922, a resident of Los Angeles county, state of California. On or about the 21st day of February, 1921, and while she was residing in said county she created a trust, the corpus of which consisted of 900 shares of the preferred capital stock and 2 shares of the common capital stock of the Dillingham Manufacturing Company, a Wisconsin company. The certificates of stock were turned over to the First Wisconsin Trust Company, a Wisconsin corporation, as trustee, and held by it subject to the terms and conditions of the trust instrument duly executed by her.

The provisions of the trust instrument pertinent to the point presented in support of the appeal are as follows:

"The trustee shall at convenient intervals remit to the donor the net income of said trust over and above its charges and expenses, so long as she shall live.

* * * * * * *

"Donor reserves the right to revoke this trust and to secure an accounting from the trustees and a reconveyance to her of the corpus and undistributed income of the trust after deduction of trustee's credits, by notice in writing of said revocation. The trustee shall have a reasonable time to prepare and render its account to the donor and to reconvey the assets of the trust, including the corpus and undistributed income over and above its credits, to the donor. In the meantime during the lifetime of the donor and while this trust is unrevoked, the only right, title or interest of the donor in the property, the subject matter of this trust, is the right to receive such net income as shall be derived therefrom and a right to an accounting from time to time from the trustee.

* * * * * * *

"Upon the death of the donor the trust hereby created and defined shall terminate and be closed. The trustee shall distribute and convey the trust fund and any undistributed income thereof after its deductions, to the executor or administrator of the said donor, appointed and duly qualified."

This trust was never revoked by Caroline Frances Dillingham during her lifetime. It continued in existence up to the time of her death, and the stock, which was the corpus thereof, was at the time of her death held by the First Wisconsin Trust Company, as trustee under said trust. On March 7, 1922, the last will and testament of Caroline Frances Dillingham, together with three codicils thereto, were admitted to probate in said county, and letters testamentary were on said day issued to the First Trust & Savings Bank of Pasadena, which said institution was appointed executor of the last will and testament of said deceased. In the third codicil to her last will and testament the testatrix disposed of the Dillingham Manufacturing Company stock, held subject to the Wisconsin trust, share by share.

The inheritance tax appraiser, in her "Report of Inheritance Tax Appraiser," filed in the estate proceeding, taxed the persons receiving the Dillingham Manufacturing Company stock upon the value of the amount or number of shares of stock received by each. Objections to the report of the inheritance tax appraiser were filed, and a hearing was had thereon. Upon said hearing the court found that at the death of Caroline Frances Dillingham the said First Wisconsin Trust Company of Milwaukee, and not Caroline Frances Dillingham, was seized and possessed of the preferred capital stock, and 2 shares of the common capital stock of said Dillingham Manufacturing Company. The court further found that—

"Said beneficial interest in the trust of said First Wisconsin Trust Company of Milwaukee, Wis., was not property of which Caroline Frances Dillingham, was seized or possessed at the time of her death, and was not property within the state of California, at the time of the death of said decedent, and did not pass to said legatees mentioned in her last will and testament and the codicils thereto or any of them under the laws of the state of California, but passed to said legatees under the laws of the state of Wisconsin, and by the transfer to them of said shares of stock by said First Wisconsin Trust Company of Milwaukee in the state of Wisconsin."

Pursuant to said findings, the court decreed as follows:

"That a decree fixing inheritance tax be made, wherein it is ordered, adjudged, and decreed that the transfer of said shares of stock from said trustee to the beneficiaries named in the last will and testament of said Caroline Frances Dillingham is not a taxable transfer under the laws of the state of California, and more particularly the Inheritance Tax Act of the state of California (chapter 821, Statutes 1921)."

This appeal is taken from the decree made and entered by said court determining the amount of inheritance tax on the shares or interest in said estate, and ordering a refund of the $4,855.91 paid by the executor of the estate, in the course of administration, as inheritance tax upon the transfer of the aforesaid shares of stock.

[1] Upon the hearing of the objections to the report of the inheritance tax appraiser in the lower court, no oral evidence whatever was offered or received, but all of the files, records, and papers in the estate were introduced in evidence. A search of the record before us fails to reveal any evidence to support the finding of the court to the effect that the said shares continued to be owned by and to stand in the name of said First Wisconsin Trust Company of Milwaukee, until the same were transferred by said company to the order of the persons designated in the codicil of the last will and testament of said Caroline Frances Dillingham. Nor is there to be found any evidence supporting the finding of the court below that the executors of the last will and testament of Caroline Frances Dillingham did not at any time take possession of the said shares of stock, or the certificates representing the same. The only evidence contained in the record upon this phase of the case is contrary to the findings. It is found in the "First and Final Account, Report and Petition for Distribution," in which the First Trust & Savings Bank of Pasadena, Cal., as executor of the estate of Caroline Frances Dillingham, deceased, represents itself as chargeable with the shares of the preferred and common capital stock of the Dillingham Manufacturing Company "issued in the name of First Trust & Savings Bank of Pasadena, Cal., executor of the estate of Caroline Frances Dillingham, deceased." It would seem, therefore, that the finding upon this particular phase of the case is not supported by the evidence adduced upon the

hearing of the objections to the report of the inheritance tax appraiser, and that the evidence does show that the certificates of stock in question were, subsequent to the death of Caroline Frances Dillingham, and during the course of the administration of her estate, indorsed over, by the First Wisconsin Trust Company, to the First Trust & Savings Bank of Pasadena, Cal., executor of the estate of Caroline Frances Dillingham, deceased, and new stock certificates issued to and in the name of said executor.

The question presented here for determination is whether Caroline Frances Dillingham, under the facts hereinbefore stated, was "seized or possessed" of the 900 shares of the preferred capital stock and 2 shares of the common capital stock of the Dillingham Manufacturing Company, held by the First Wisconsin Trust Company subject to the trust created by her, and did transfer the same by her last will and testament to the persons therein designated, within the meaning of section 2 and subdivision 1 of the Inheritance Tax Act of 1921. Stats. 1921, c. 821, p. 1500. Said section and subdivision read as follows:

"Sec. 2. A tax shall be and is hereby imposed upon the transfer of any property, real, personal or mixed, or of any interest therein or income therefrom in trust or otherwise, to persons, institutions or corporations, not hereinafter exempted, to be paid to the treasurer of the proper county, as hereinafter directed, for the use of the state, said taxes to be upon the market value of such property at the rates hereinafter prescribed and only upon the excess over the exemptions hereinafter granted, in the following cases:

"(1) When the transfer is by will or by the intestate or homestead laws of this state, from any person dying seized or possessed of the property while a resident of the state. * * *"

It is conceded at the outset by appellant that during the period of the trust the legal title to the property was in the trustee, and that at the time of the death of Caroline Frances Dillingham she was not "seized" of the trust property within the meaning of the above provision of the California law. Appellant maintains, however, that Caroline Frances Dillingham was "possessed" of the property, within the meaning of said provision, because she owned the entire beneficial interest in the property which was the corpus of the trust—the right to receive the income thereon, until the trust was terminated, the right to terminate the trust at pleasure, and in addition the right to dispose of the corpus by will, which right she exercised and accomplished through the third codicil to her last will and testament. In this behalf appellant argues that immediately upon the death of the testatrix, when the will took effect and the trust terminated, the beneficial interest, transmitted and transferred by her, ripened into a perfect legal title to the property in question by reason of the fact that at that moment the trust terminated and the legal title no longer stood in the trustee, and that the actual transfer under the third codicil of the will of decedent's beneficial interest in and to the trust property carried with it the legal title to the property; the trust having been terminated thereby and the trustee divested of the legal title to said property.

The words "seized" and "possessed," as used in the provision of the Inheritance Tax Act of 1921 governing and controlling in the instant case, are used disjunctively and not conjunctively; the act reading "seized or possessed." The transfer is therefore liable for taxation if the testatrix died "possessed" of the property, regardless of whether or not she died "seized" of the property. It is to be noted that the transfer which is subject to the tax is not only the transfer of the legal title to the property, but also "any interest therein."

[2] "Possessed" is a variable term, and has different meanings as it is used in different circumstances. It may, for example, imply no more than a corporal having. On the other hand, it is commonly employed to indicate ownership of any kind of property. Having in mind the nature and purpose of the statute under discussion, the word "possessed" could not have been used in the sense of mere "corporal having," for obviously no tax could have been intended to be levied on a mere transfer of actual physical possession. Webster's New International Dictionary gives the definition of the verb "possess" as "to have and to hold as property; to have a just right; to be master of, to own. * * *" It was in this sense, we think, that the word "possessed" was used in the instant case, with the intent to indicate a character of ownership falling short of seizin. Used in that sense, there can be no escape from the conclusion, it seems to us, that Caroline Frances Dillingham, at the time of her death, was possessed of an interest in the property transferred by her will. She owned exclusively every beneficial interest therein, immediate and prospective. She had the control over the whole beneficial interest. She had the absolute right of ownership, both legal and beneficial, if she chose to revoke the trust. In short, she had not only an interest in the income from the property, but she, as creator of the trust with a reservation of the right of revocation, had a beneficial interest in the corpus of the trust itself.

[3] It was not, we think, the intention of the Legislature to tax merely the transfer of property to which the transferor had legal title and exempt from taxation property which was temporarily held in trust by another for his exclusive use and benefit. Such a construction would open up an easy way for the evasion of taxes and prevent the collection of any inheritance tax by the state. Such a construction would lead to the illogical result that property which the transferor

owned and had in actual possession would be liable to a tax in the hands of the transferee, regardless of the fact that the transferor might have incumbered such transfer by trust provisions and the transferee be entitled only to a beneficial interest in the property, whereas property of the transferor held subject to a trust for his exclusive use and benefit is not liable for the tax in the hands of a transferee, who by the transfer became entitled, not only to a beneficial interest, but to the legal interest as well.

[4, 5] The theory upon which the inheritance tax is imposed and sustained is that the state which confers the privilege of succeeding to property may attach thereto the condition that a portion of the property shall be contributed to that state. Estate of Bowditch, 189 Cal. 377, 379, 208 P. 282, 23 A. L. R. 735; In re Wilmerding, 117 Cal. 281, 284, 49 P. 181. There can be no question in the instant case but that the transfer was accomplished through the third codicil to the testatrix's last will and testament. Indeed, it is conceded by respondents that "the property passed to the beneficiaries by a clause of the codicil." The testatrix, by the instrument of trust, designated her will, or in the case of her intestacy, the laws of succession of the state of California, as the source of title for the transferees. This was clearly the intent and purpose of the provision that, unless previously revoked by her, upon her death the trustee shall "distribute and convey the trust fund and any undistributed income thereof after its deduction, to the executor or administrator of the said donor." There is, therefore, in existence no other instrument other than the will passing or purporting to pass the interest of the testatrix to the transferees. There can be no question, it seems to us, therefore, but that the transfer of the property was accomplished by the will, the efficacy of which depended upon the authority of the state of California. In the ultimate analysis a necessary incident to the transfer of the interest depended for its efficacy upon the laws of the state of California, and was for that reason liable for the imposition by the state of a tax upon said transfer. Bullen v. Wisconsin, 240 U. S. 625, 36 S. Ct. 473, 60 L. Ed. 830.

The case at bar is distinguishable from the case of Estate of Bowditch, supra, cited by respondents in support of their contention. In the Bowditch Case, one J. Ingersoll Bowditch died a resident of the state of Massachusetts, where his will was admitted to probate and his estate distributed. By his will certain personal property was bequeathed to Massachusetts trustees in trust, to pay the net income derived therefrom to Charlotte Bowditch during her life, and upon her death to convey the corpus and remainder of said property to such person or persons in such way or manner as said Charlotte Bowditch should direct in and by her last will and testament. The trustees, in accordance with this direction, paid the income from the property to Charlotte Bowditch during her lifetime, and, upon her death in California, where she had established her residence, transferred the property to certain persons named in her last will and testament. The court in that case held that, inasmuch as the imposition of the inheritance tax was predicated upon the theory that the state required a compensation in the form of an inheritance tax for the privilege which it conferred of succeeding to the property, and no necessary incident of transfer depended for its efficacy upon the laws of California in that particular situation, the transfer made by Charlotte Bowditch was not taxable in California. As we have before indicated, the transfer in this case was dependent upon the laws of the state of California. In the Bowditch Case the interest of the transferees was derived from the will of J. Ingersoll Bowditch, probated in Massachusetts. The will made by Charlotte Bowditch merely designated those entitled to take under the will of J. Ingersoll Bowditch. As pointed out in that case, had the will of J. Ingersoll Bowditch designated some other method of appointment or had specified, for instance, a will invalid under the laws of California, nevertheless the interest would have been transferred. In that situation it could not rightly be said that the transfer of interest was dependent upon the laws of the state of California.

In short, the distinction between the two cases rests upon the fundamental reasons for the imposition of an inheritance tax, a resort to the sovereignty of the state for a transfer of an interest. In the Bowditch Case no such resort was had, and no tax could be imposed. In the instant case resort to the sovereignty of the state is necessary, and a tax is therefore proper and permissible.

Judgment reversed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; WASTE, J.; SHENK, J.

73 Cal. App. 157

FIRST NAT. BANK OF CARUTHERS v. CLIFTON. (Civ. 5144.)

(District Court of Appeal, First District, Division 2, California. June 8, 1925. Hearing Denied by Supreme Court Aug. 6, 1925.)

1. Bills and notes ⟸227—Defendant liable in damages, where breaching promise to indorse note of another.

Defendant, who promised to indorse note of another in consideration of a renewal of a loan by plaintiff to such other, was liable in damages on breach of such promise.

2. Bills and notes ⟸227—Immaterial that defendant did not accept plaintiff's offer, where plaintiff accepted defendant's offer to indorse note with another.

Where plaintiff asked defendant to indorse note, offering to extend loan, and defendant replied that he would indorse "with H.," that defendant did not accept plaintiff's offer was immaterial, where plaintiff accepted defendant's offer within a reasonable time and before its withdrawal by extending loan, making new note, which H. indorsed, and presenting it to defendant for indorsement.

3. Bills and notes ⟸227—Prospective indorser on note held not prejudiced because coindorser appended his name thereto as guarantor.

Where defendant promised to indorse a note with another, that such other appended his name to note as guarantor, *held* not prejudicial to defendant, in view of Civ. Code, §§ 2807, 3147, where both maker of note and such other were insolvent, and note could not be collected from either of them.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by the First National Bank of Caruthers against U. J. Clifton. Judgment for plaintiff, and defendant appeals. Affirmed.

Arthur Allyn, of Fresno, for appellant.

Milton M. Dearing, of Fresno, and Robert M. Thomas, of Berkeley, for respondent.

LANGDON, P. J. Defendant has appealed from a judgment against him in an action brought by the plaintiff to recover damages for breach of a contract by which defendant promised to indorse the note of the Bethel Vineyard Company in consideration of a renewal of a loan by the plaintiff bank to said company.

The trial court has found that on the 24th day of November, 1922, Bethel Vineyard Company was indebted to plaintiff in the sum of $1,000 upon two promissory notes; that at the time Bethel Vineyard Company was a vendee under a contract to purchase from defendant certain real property in the county of Fresno; that said Bethel Vineyard Company upon said day applied to plaintiff for an extension of said loan for one year; that plaintiff was unwilling to grant such extension of said loan in the form in which said loan then stood and upon the security plaintiff then had, but said Vineyard Company represented to plaintiff that, if it would grant such extension of said loan, said company would give to plaintiff a new note for said loan, and that one K. Horita and the defendant, U. J. Clifton, would indorse such new note, and that said Vineyard Company would give to plaintiff for the purpose of securing said note a crop order on the Raisin Growers' Association for 40 per cent. of the proceeds of the raisin crop produced upon the land during the year 1923, and that said defendant would indorse said order; that plaintiff agreed to extend said loan for one year upon the same conditions, and thereupon, and on the same day, plaintiff addressed and mailed to defendant the following letter:

"We are informed that you are the owner of the land which is being operated by the Bethel Vineyard Company. They owe us at the present time $1,000, and do not seem to have received crop sufficient to liquidate the loan this year and ask for an extension. We do not feel justified in carrying this another year under the present security, as they are only purchasing it under contract, and understand that they still owe you $13,000 and interest. Therefore, we have agreed to renew the loan for another year, if you will indorse the note with a crop order on the 1923 crop for the 40% they are to receive, as we feel that you are amply protected in the matter, as you have it under your thumb, so as to speak, that they will have to pay over the money.

"Mr. Horita was in today and I agreed to renew the loan with that understanding, while we must say that we are reluctant about renewing it, as $700 has now matured the second fall."

A few days later the foregoing letter was returned to plaintiff by defendant with the following statement, signed by defendant, written on the back of said letter:

"I will indorse the note with a crop order for the 40% of the crop of 1923 with Mr. Horita."

It was further found that upon receipt of this communication from defendant plaintiff extended said loan for one year, and made out a new note therefor, and said Horita indorsed the new note, which is set forth in the findings; that in extending the loan plaintiff relied upon defendant's agreement to indorse the note, and the extension was made within a reasonable time after defendant's said promise to indorse the note, and before any notice of the withdrawal of defendant's agreement had been received by plaintiff, and that within a reasonable time thereafter plaintiff presented a new note to defendant, and requested defendant to indorse said note; that defendant failed and refused to indorse said note in any manner or form, and still fails and refuses to do so; that said note has never been paid, and

the Bethel Vineyard Company and Horita are insolvent, and the note cannot be collected from either of them; that in August, 1923, defendant brought an action against the Bethel Vineyard Company to quiet his title to said property, and took possession of the crops upon said land, and delivered them to the Sun Maid Raisin Company, and has collected all the proceeds of said crops.

[1-3] Appellant admits that there is ample authority fixing liability for damages upon one who breaches his promise to indorse a negotiable instrument, if his promise be supported by a sufficient consideration. In the instant case defendant promised to indorse the note as a consideration for the extension of the loan. He wrote, agreeing to do so "with Mr. Horita." Acting upon this offer, the bank renewed the loan, canceling the old notes and accepting a new note of the company upon which appears the signature of K. Horita. This note was presented to defendant for his signature. According to his own testimony, he refused either to "indorse or guarantee or sign it in any way." Later, when defendant called at the bank and was asked by one of its officers to indorse the note, he refused again, and the court has found that defendant refused to indorse said note in any manner and form. These facts are so simple that there scarcely seems to be a basis for argument about many of the matters discussed in the brief for appellant. It is strenuously contended that, since plaintiff asked defendant to indorse the note, and he replied that he would indorse "with Mr. Horita," he did not accept plaintiff's offer. Conceding this, it is nevertheless true that, after defendant agreed to indorse "with Horita," the bank accepted this offer by acting upon it within a reasonable time and before its withdrawal, according to the findings. It is next contended that Horita did not indorse the note; that his signature was appended to the note as a guarantor. Horita's signature appears on the note after the following statement:

"For value received, I hereby guarantee payment of the within note at maturity, or at any time hereafter, with interest at the rate of eight per cent. per annum until paid, waiving demand, notice of nonpayment and protest."

Defendant's complaint seems to be that Horita assumed even a larger responsibility than he would have assumed as an indorser, all of which was to the benefit of defendant. As a general indorser, Horita would have engaged that on due presentment the instrument should be accepted and paid, and that, if it was dishonored, and the necessary proceedings on dishonor were duly taken, he would pay the amount thereof to the holder. Section 3147, Civ. Code. But Horita signed a contract, making himself liable immediately upon default of the principle, and without demand or notice. Section 2807, Civ. Code. The greater liability must include the lesser, and in the contract of guaranty every liability of an indorser was included and some of an indorser's privileges abrogated.

If it be contended that the contract could not be varied in any particular, even to the advantage of the defendant, we are faced with a situation where no prejudice resulted to defendant by treating Horita's guaranty as a general indorsement upon the note, because the court has found that both the maker of the note and Horita are insolvent, and that the note cannot be collected from either of them. Therefore defendant has not been prejudiced by reason of the fact that Horita was not, strictly speaking, an indorser. Defendant had as much right against Horita as a guarantor as he would have had against him as a prior indorser, and neither right had any value when he was insolvent. In other words, since Horita was insolvent, whether he was a prior indorser or a guarantor, defendant would have been called upon to pay the note had he fulfilled his contract and indorsed the same. The judgment awards to plaintiff, as damages for breaching this contract, the amount of the note and interest which plaintiff has been unable to collect either from the maker or the guarantor.

There are no other matters requiring discussion, and the judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

73 Cal. App. 330

PEOPLE v. SANDERS. (Cr. 1254.)

(District Court of Appeal, First District, Division 2, California. June 23, 1925.)

1. Assault and battery ⟸91—Robbery ⟸24(1)—Evidence held sufficient to sustain conviction for aiding and abetting robbery and assault.

Evidence *held* sufficient to sustain conviction for aiding and abetting in crime of robbery and assault.

2. Criminal law ⟸1169(2)—Evidence in prosecution for robbery and assault as to means employed by police in locating guilty persons, though hearsay, held not prejudicial.

Where, in prosecution for robbery and assault in taxicab, witness testified as to number of taxicab, and police testified to finding such taxicab with blood upon the floor, running board, and fenders, and on a bar therein, testimony of town marshal that another person reported to him the number of the taxicab which prosecuting witness had given such person, though hearsay, was not prejudicial.

3. Criminal law ⊂⊃1036(1)—Objection to admission of testimony not considered when no objection made below.

Objection to admission of testimony will not be considered on appeal, when no objection was made in the lower court.

Appeal from Superior Court, San Mateo County; George H. Buck, Judge.

Elizabeth Sanders was convicted of robbery and assault, and she appeals. Affirmed.

Philip M. Zwerin and Frank J. Hennessy, both of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

LANGDON, P. J. The defendant appeals from a judgment entered upon a verdict of a jury finding her guilty of the crimes of robbery and assault.

The prosecuting witness, W. R. Brookes, lived in Downieville, Cal. He came to San Francisco and met defendant about a week before the date of the commission of the crimes charged, which was October 20, 1924. On said date, he had breakfast with her at a restaurant in San Francisco, and while there wrote out a check for $200. He then called for a taxicab, and defendant asked that No. 102 of the Checker Taxicab Company be called. This taxicab arrived, driven by Jack O'Connor, who was also charged with assaulting and robbing Brookes. Defendant and Brookes were driven to the bank, where defendant cashed his check. That afternoon Brookes and the defendant went to the theater together, and then went on a shopping tour in the taxicab driven by O'Connor, and then to a restaurant for dinner and to the apartment of the defendant. O'Connor was invited into the apartment also, and the trio drank intoxicating liquor. Later, Brookes was driven by O'Connor to a club where more intoxicating liquor was consumed by them, and then Brookes was driven to his hotel. He testified that he dismissed the taxicab and prepared to leave the hotel and return to his home. Before he had completed his arrangements for departure, the defendant in the taxicab called for him again, and asked him to go for a ride with her, and he consented. Driven by O'Connor, they went to the beach, where O'Connor purchased some whisky. Brookes said that several times he asked to be taken back to his hotel so that he might return to his home, and that O'Connor always replied, "On the way, Chief" The defendant urged Brookes to go to the Sixteen-Mile House, and he objected. O'Connor continued driving away from San Francisco, and when they were in San Mateo county near the Tanforan racetrack, Brookes became conscious that defendant had her hand in his pocket. He protested, and, in his own language, "started to bawl her out." He stated that, upon his protests, O'Connor suddenly stopped the taxicab; that Brookes attempted to get out of it, and O'Connor hit him over the head with something; that he struck him several times until he became unconscious, and the next thing he was conscious of was of being in the hospital. He stated that he had about $180 and three gold nuggets in his possession and also certain papers at the time he was struck by O'Connor. When he was picked up along the road by a passing automobile, these articles had been taken from him. The hospital records show Brookes was admitted there at 1:15 a. m. on October 21st, suffering from several cuts in his head. The next morning, the police officers located the taxicab. They arrested O'Connor and took him to the apartment of the defendant. She refused to admit them, and they were compelled to force an entrance. They found her in bed. She had over $80 in her purse; and in the garbage container in her apartment was found a torn labor claim with reference to work at Brookes' mine, and bearing his name, which he stated he had with him in the taxicab on the night of the assault. O'Connor and defendant were taken to the police station in an automobile, and when they left this vehicle two gold nuggets were found hidden under the seat which they had occupied during the ride.

[1] There are other circumstances in the case all indicating the guilt of the defendant. We have only recited the outstanding facts, and they are sufficient to convict the defendant of aiding and abetting the felony, and she is punishable as a principal. Section 971, Pen. Code.

[2] The only other point made upon the appeal is that error was committed in the admission of certain hearsay testimony. This testimony was given by the marshal of the town of San Bruno. He testified that he sent his "night man" to the hospital to see Brookes, and that the "night man" reported to him a number of a taxicab which Brookes had given him and that he (the marshal) telephoned that number to the detective bureau in San Francisco. It is contended that this testimony is hearsay. Conceding that it was not admissible, it is, nevertheless, not prejudicial. It is not necessary in the record to sustain the conviction. Brookes testified at the trial that the taxicab in which he was riding was No. 102. The police testified to finding that taxicab the morning after the assault, with blood upon the floor, running board and fenders; that in the taxicab was also found a bar about a foot long, which was covered with blood, and also a bottle of whisky; that one of the windows was broken. It was unnecessary for the state to prove how the police followed the trail of the crime and located the taxicab

and the guilty persons, and therefore the testimony that Brookes gave the number to the marshal's assistant, and that he repeated it to the marshal, etc., was immaterial and could not have been prejudicial.

The story of Brookes alone sustains the conviction, and the other evidence in the case is merely corroborative of that story. He positively identified the defendant, and she admitted being in the taxicab with him at the time of the assault, but denied she had put her hands into his pockets or that she had received any part of the spoils. She said she was frightened and helpless, and that after O'Connor had injured Brookes and put him out of the taxicab, she had asked to be driven to her home, and that she had no part in the crime. From all the facts and circumstances, the jury disbelieved her, and there is nothing in the record which warrants the interference of this court without its verdict.

[3] The other objections of appellant to the admission of testimony are without merit. There was no objection made at the trial to the testimony of which complaint is made.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

73 Cal. App. 13

PEOPLE v. BLACK et al. (Cr. 1154.)

(District Court of Appeal, Second District, Division 2, California. May 29, 1925.)

1. Criminal law ⟸1144(12)—Confessions will be presumed properly admitted, where evidence as to coercion is conflicting.

Admission, in evidence, of confessions claimed to have been secured by coercion, will be assumed proper on appeal, where evidence upon coercion is in conflict.

2. Criminal law ⟸736(2)—Whether confessions voluntary decided by court before admission, but jury not bound thereby.

Before admitting confession for consideration of jury, judge must determine whether it was free and voluntary, but, when admitted, the jury is not bound by such determination, but may determine that it was not voluntary, and therefore refuse to consider it.

3. Criminal law ⟸781(5)—Refusal of instruction that jury must believe confessions were voluntarily made error.

Where confessions of accused had been introduced over his objection that they were secured by coercion, on determination of trial court that they were free and voluntary, though evidence thereof was conflicting, refusal to instruct jury that, before that body could consider confessions, they must believe that they were voluntarily made, and explaining what was meant by voluntarily, *held* error.

4. Criminal law ⟸763, 764(19)—Instruction that jury were not to consider whether confession was voluntary or not held error.

Where confession of accused had been admitted over objection that it was not voluntary, instructions to jury that question whether it was made voluntarily was one to be passed on by the court, and that court had decided that the confession was voluntary, *held* error.

5. Criminal law ⟸1137(3)—Accused may not object to instruction which he has requested.

Accused may not object to an instruction which he has requested.

6. Criminal law ⟸1038(2)—Accused held not to have waived objection to refusal to allow jury to consider whether confession was free or voluntary.

Although, throughout trial, counsel for accused assumed that determination as to whether confession was voluntary was for trial court, and not for jury, where he requested an instruction requiring jury to find confession voluntary before considering it, he was entitled to complain of its refusal.

7. Criminal law ⟸535(2)—Corpus delicti must be proved aside from confession.

The corpus delicti in every criminal case must be proven by evidence aside from any confession or admission of accused.

8. Burglary ⟸10—Facts held not to show burglary in first degree.

Where property burglarized was not inhabited, it being merely a dry goods store, and evidence did not show that burglary was committed during the night, or that burglars were armed with a deadly weapon, but only that it was committed between seven in the evening and 10 or 11 the next morning, and that burglars took certain guns found in safe in store, conviction for burglary in first degree was unwarranted, under Pen. Code, § 460.

9. Criminal law ⟸317—To allow jury to draw inferences from silence of witness, who refused to answer because he might incriminate himself, held error.

Where building was burglarized through hole in floor of hotel room, and occupant, who was under arrest, but not on trial, refused to testify on ground that it might incriminate himself, though questioned at considerable length, court's statements that jury might draw inferences from such refusal, and refusal to admonish jury that district attorney's remark to that effect was erroneous, *held* error.

10. Criminal law ⟸814(1)—Instruction allowing jury to consider opportunity of another to commit crime, and his proximity to place of commission, properly refused.

In burglary prosecution, requested instruction that, in determining whether evidence pointed to guilt of another as strongly as to accused, jury could consider that such other was near place of commission, and could consider whether he did not have same oppor-

tunity to commit crime, *held* properly refused; it being incorrect to embark jury upon inquiry as to whether another was near where crime was committed, or had same opportunity to commit it as accused had.

11. Criminal law ⟸830—Instruction, partially incorrect, is properly refused.

An instruction, not correct in its entirety exactly as requested, is properly refused.

12. Criminal law ⟸1186(4)—Refusal to allow jury to consider whether confession was voluntary held prejudicial.

In prosecution for burglary, over refusal of court to allow jury to consider question of coercion, in procuring confession, *held* prejudicial, within Const. art. 6, § 4½, in view of seeming credibility of accused's testimony as to coercion and fact that confession constituted bulk of evidence.

13. Criminal law ⟸1186(4)—Errors of court in permitting jury to draw inferences from refusal of witness to testify prejudicial.

In prosecution for burglary error of trial court, in permitting jury to draw inference against accused from refusal of witness to answer questions because they might incriminate himself, *held* prejudicial error as to one count, notwithstanding Const. art. 6, § 4½.

14. Criminal law ⟸1186(4)—Errors of trial court concerning rulings on evidence not reversible, where conviction would have been reached on other evidence.

In prosecution for burglary on three counts, evidence as to one count *held* to require conviction, so that errors of trial court as to rulings on evidence did not require reversal, in view of Const. art. 6, § 4½.

15. Criminal law ⟸1186(4)—District attorneys and trial judges should conduct trial without relying on constitutional provision, saving conviction where errors would not have changed result.

District attorneys and trial judges, in prosecuting cases, should conduct them as faithfully and diligently as if Const. art. 6, § 4½, saving conviction where errors at trial would probably not have changed result, did not exist, and should not depend upon saving grace of that section.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Jack Black and Homer France were convicted of burglary on three counts. From the judgment of conviction, and from an order denying motion for new trial, they appeal. Judgment and order under first and third counts reversed. Judgment and order under second count affirmed.

Harold Ide Cruzan, of Los Angeles, for appellants.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and J. L. Flynn, of Los Angeles, for the People.

WORKS, J. Defendants were charged with the crime of "burglary with explosives" under an information in three counts. The designated crime is thus defined and denounced:

"Any person who, with intent to commit crime, breaks and enters, either by day or night, any building, whether inhabited or not, and opens or attempts to open any vault, safe or other secure place by use of nitroglycerine, dynamite, gunpowder or any other explosive, shall be deemed guilty of burglary with explosives." Pen. Code, § 464.

The first count of the information charged an entry into a store, building, or room of one Solomon, the second count related to an entry into property of a similar character of one Tarter, and the third count charged the offense by way of entry into like premises of one Fares. These several charges will hereafter be referred to, respectively, as the Solomon count, the Tarter count, and the Fares count. Defendants were found guilty as charged under the Solomon and Tarter counts. Upon the Fares count the verdict as to each of the defendants reads:

That the jury finds him "guilty of burglary, a felony, a lesser offense contained within the charge of burglary with explosives as charged in count 3 of the information, and find it to be burglary of the first degree."

As one of the points made for a reversal of the judgment of conviction renders necessary an examination of the statute defining burglary of the first degree, we here set it forth:

"Every burglary of an inhabited dwelling house or building committed in the nighttime, and every burglary, whether in the daytime or nighttime, committed by a person armed with a deadly weapon, or who, while in the commission of such burglary, arms himself with a deadly weapon, or who, while in the commission of such burglary assaults any person, is burglary of the first degree." Pen. Code, § 460.

The defendants appeal from the whole of the judgment of conviction, and from an order of the trial court denying their motion for a new trial.

[1] The trial court received in evidence certain confessions made by appellants. It is contended that these confessions should not have been received, that they were not free and voluntary, in fact, that they were secured through duress and coercion. There was much testimony by appellants, it is true, upon which the trial judge might justly have reached the conclusion that the confessions were not free and voluntary, and he might therefore justly have excluded them, but there was evidence directly to the contrary, and in our opinion the whole question resolves itself into one merely of con-

flicting evidence; the determination of the result of the conflict resting finally in the trial court. Both appellants testified upon the point. The alleged coercion was said by them to have arisen from the claim by officers of the law that France had committed a murder at Deming, in the state of New Mexico, and was being sought for extradition upon a charge in that regard. It was also said that the officers had insisted that Black had knowledge of the Deming affair, or was in some complicity concerning it. France testified:

"I asked them [the officers], if I signed a confession to that job on Spring street [involved in one of the charges here], that would I get out of it. They said they would clear me up on Deming, if I would sign a confession in this one, and I said, 'Well, that would be all right with me.' That was all that was said. I gave that statement to keep out of [New] Mexico; that was all."

Black testified that one of the officers said they had evidence against France in the case at Deming, and asked:

"Would you rather go back there and stand trial for murder or take a few years here, and we will have that dropped?"

He also said:

That one of the officers "said he would drop that murder charge and they would have it fixed up so it would only be one charge come into court."

The testimony of both the appellants was controverted by the officers. They admitted that the Deming affair was mentioned in conversations they had with appellants, but they denied that any inducements whatever were held out to appellants in connection with that event. The evidence upon the point being in conflict, it must be assumed that the confessions were properly admitted. People v. Castello (Cal. Sup.) 229 P. 855.

[2] Notwithstanding the fact that the ruling of the trial judge in admitting the confessions must be upheld, there yet remains to be discussed a question of great moment in connection with the same matter. Throughout the trial the judge evinced an incorrect understanding of the respective functions of judge and jury then dealing with evidence touching the question whether confessions are free and voluntary; but, upon the heels of this declaration, attention must be drawn to the fact that counsel for appellant long labored under the same misapprehension, and encouraged, aided, and abetted the judge in perpetuating it. Before we exhibit the state of the record upon this situation, it may be well to state the rule which regulates the respective functions of judge and jury when the question of the admissibility of a confession arises in a criminal case. The judge must determine, first, and as a matter of course, whether the confession was free and voluntary, and whether, therefore, it is to be heard by the jury. Notwithstanding, however, the settlement of this question, which is merely preliminary, and which bears solely upon the matter of the admissibility of the confession, as already indicated, there is yet a function to be exercised by the jury concerning it. In allowing the confession to go to the jury, the judge has ruled, it is true, that it was freely and voluntarily made, but the ruling in no way binds the jury. That body, now considering the matter substantively, may disregard the view of the judge made evident by his permitting the confession to be heard, and may, as the trier of all final questions of fact in the case, conclude that the confession was not free and voluntary, and may therefore refuse to consider it. We may therefore have this situation when a confession is sought to be used in a criminal prosecution: The judge may decide that the confession was freely and voluntarily made and, if he does, will allow it to be received in evidence; but the jury may, upon the same evidence, determine that it was not so made, and may refuse to consider it. Without going into the list of earlier cases on the subject, the rule is sufficiently indicated in People v. Zarate, 54 Cal. App. 372, 201 P. 955, and People v. Fouts, 61 Cal. App. 242, 214 P. 657, in which latter case we said:

That the jury "is always to determine in the last analysis whether a confession is freely and voluntarily made."

[3] We now come to a statement of those portions of the record showing not only the extent to which the trial judge departed from this well-settled rule, but the degree in which appellants aided him in the fault. Early in the trial the question arose as to the circumstances under which the confessions had been given. A police officer testified that appellant France had made a statement to him at a certain time and place. The officer said that the statement was free and voluntary, and that it was not induced by threats or violence, or by offers of reward or immunity. He was next asked to state his conversation with France. Then the following transpired:

"Mr. Cruzan [of counsel for appellants]: One moment. * * * Now in that matter * * * we ask that the statements—that your honor has the right to take the testimony as to any statements out of the hearing of the jury, to ascertain whether or not they were free and voluntary, and the proper foundation first has to be laid, and we ask * * * that the jury be excluded to take testimony * * * as to any and all purported statements on behalf of the defendants, or on the part of the defendants, so that we can determine right now as to the admissibility of any statements."

The jury was then excluded, not for the purpose of taking testimony on the question whether France's statement was freely and voluntarily made, but for the consideration of argument upon counsel's request for their exclusion for that purpose. In the midst of the discussion upon the merits of the request the following occurred:

"Mr. Cruzan: * * * The question as to whether or not any threats or duress or any thing of that kind was urged against the defendant is absolutely a matter within the discretion of the trial court.

"The Court: I think that is correct.

"Mr. Cruzan: The trial court takes the evidence as to the admissibility of the testimony.

"The Court: In the absence of the jury?

"Mr. Cruzan: He can do that, because there is a matter for your honor to decide, and that is the question that your honor has to try. It is an issue of law.

"The Court: Well, I would like to see the authorities on that, because I believe that that is a good, sound principle. * * *

"Mr. Cruzan: * * * That this purported confession was obtained by threatening to take these two boys back to [New] Mexico and try them for a charge of murder. Now, to bring that out before the jury would be most damaging, * * * it being a matter strictly within the province of the trial court, and the trial court being the only one to pass upon the matter, there is no question about it, that it should be heard out of the presence of the jury. * * * The jury is excluded time and again on motions, in order to give counsel particular latitude to argue points, so that statements that are made do not go in the untrained mind of the juror as evidence.

"The Court: I do not think there is any controversy that it is the province of the trial court to determine the admissibility of that confession."

This last statement of the judge, proper enough when considered alone, was improper when viewed in the light of the context leading up to it. Nevertheless, the district attorney did not come to the relief of the judge, for the following immediately took place:

"Mr. Ryan [deputy district attorney]: If the court please, before your honor determines that, we are not asking for the admissibility of anything that is particular or certain. We have asked for a conversation; we have not asked for a confession; we have not asked for an admission."

It had been contended by Mr. Cruzan during the argument that the people had not laid a sufficient foundation for the conversation by merely showing by the statement of the officer that France's statements were free and voluntary, and not induced by threats or violence, or by promise of immunity or reward. It was said that these statements were but conclusions, and that the prosecution must go further and show everything that had transpired between the officers and that defendant so that the judge himself might draw therefrom the proper conclusions. After the remark above quoted from him, Mr. Ryan proceeded with an answer to this argument contending that the foundation laid by the testimony of the officer was sufficient, and that the burden was upon the defense to show specific occurrences tending to prove that France's statements were not free and voluntary. At the end of Mr. Ryan's remarks, the judge thus expressed himself:

"The Court: Now, the question to determine is whether or not that should be done in the presence of the jury or out of the hearing of the jury. I personally would welcome a rule that would enable us to exclude it from the jury until the court has determined whether or not it is admissible; but I do not know whether that is the rule or not."

Following this statement, the district attorney made the following remark:

"Mr. Ryan: It is clear in my mind that this is the testimony that comes within the case. It is not on a question of law; it is a question of fact for the jury to consider."

Taking the complete record, however, it is evident that the prosecuting officer had not in mind the entire rule governing such a situation as was then under consideration. He evidently did not intend to dispute the view that the question was one solely for the judge. He apparently, judging from the whole record, intended only to insist that the judge could not hear the evidence in the absence of the jury. Surely, nowhere in the record did he state clearly the actual rule on the subject under consideration. Not only he, but counsel for the defendants as well, seem to have been afflicted with the same delusion which possessed the judge. This delusion long persisted, as the sequel will show, and the judge, while holding, with the assent of all concerned, that the evidence preliminary to the receipt in evidence of the confession was for his ear alone, determined that he could not hear that evidence in the absence of the jury and called the body back to the jury box.

Evidence was then offered by both sides upon the issue whether the confessions of the two appellants were free and voluntary. We must state various occurrences during the taking of the testimony on the subject, for the purpose of showing the continued attitude of the court concerning the question involved, as well as the manner in which the counsel for appellants comported himself toward it. After some testimony had been taken, the following occurred:

"Mr. Cruzan: * * * So that the record may be complete, we ask that the examination be conducted in the absence of the jury; it being strictly a matter in the discretion of the trial court, being only for the trial court to pass on.

"Mr. Ryan: We resist any such contention and refuse to let the witness testify upon voir dire if it is not conducted within the presence of the jury.

"The Court: The motion is denied. Proceed."

A little later Mr. Cruzan announced that he was about to call one of the defendants to the witness stand for the sole purpose of testifying to facts bearing on the question whether the confessions were free and voluntary. To this the court responded that the prosecution would have the right to cross-examine within the lines laid by the direct examination. Then this occurred:

"Mr. Cruzan: Only as to the issue of law that we are now trying before your honor.

"The Court: Is there any question about that, gentlemen? If there is—

"Mr. Ryan: Yes; the statement that this is an issue of law; this is an issue of fact.

"The Court: This is an issue of fact which is for the court, however, and not for the jury.

"Mr. Cruzan: It is clearly for the court to determine."

Again, while the same question was yet before the court, it was contended that one of the defendants had been deprived of sleep, while in jail, for the purpose of inducing a confession, by the slamming of a door and by the shooting of plungers and bolts by means of which the door was secured. It was remarked that the door in question was like one leading from the court room. Next, the record shows:

"The Court: Mr. Bryant, will you open the door so I can see out in the passageway? It is a question of fact I am to pass on and not the jury, so I will take a view of it. Let the record show the court has examined or inspected the door to the bridge."

Later, the same question still being under examination, counsel for the defendants insisted upon questioning one of them in a certain manner. Then:

"The Court: You have a right to do that, * * * but be very cautious about it, because of the weight I have already told you I will attach to it.

"Mr. Cruzan: I would be perfectly willing to let your honor examine this witness.

"The Court: I don't desire to do that. * * * Proceed. In these matters I feel free to comment, because it is a matter I am passing on, myself.

"A Juror: May we have the defendant turn this way?

"The Court: This is a matter only for the court. They asked to have you excluded entirely, but I felt I could not, under the law. I am going to pass on the question of fact now being developed, myself."

Thus speaks this unusual record, upon the subject which now engrosses our attention, up to the time when the various proposed instructions to the jury were requested by the respective parties. The district attorney asked no instruction upon the question which had so long occupied the attention of the court. The counsel for the defendants, however, experienced an eleventh hour reformation from the sins which he had committed during the taking of the evidence. He requested the trial judge to give to the jury an instruction to the effect that, before that body could consider any confession of the defendants as evidence, its members "must believe that such confessions were voluntarily made," and explaining what was meant by the term "voluntarily." The instruction was refused. The refusal was error.

[4] Not only did the trial judge decline to give this proper instruction, but he charged the jury, of his own motion, after stating correctly the duty of the body in considering the confessions:

"The whole question as to the admissibility of the confessions is one addressed to the sound discretion of the court. I think I have stated that two or three times. Now let me state it again. The whole matter of whether or not the confessions were properly admissible, and that is to say whether or not they were voluntarily made under promise of immunity or reward, whether they were made under threats or violence, is one to be passed upon by the court, and if the court had not found that they were freely and voluntarily made, and were not made under promise of reward or immunity, and they were not made under violence, or fear of violence, or threats, they would not have been read to you in evidence. Therefore that question is disposed of, as to the question of whether or not the confessions were properly made; but, as to the truth of what is contained in those confessions, the jury is the sole judge."

The giving of this instruction was error.

The judge, again of his own motion, gave another instruction upon the same subject:

"If any expression of mine has seemed to indicate an opinion relating to any of these matters, such an expression must be entirely disregarded by you, with this exception, and that relates to the matters of the confessions. It is the duty of the court to determine whether or not the confessions have been freely and voluntarily made, without promise of reward or immunity, and whether or not they were made under threats or duress, and matters of that character, and the court has determined that they were made without promise of reward or immunity, and were not made under duress or threats, and were freely and voluntarily given, and I have so expressed myself, and do now so express myself."

The giving of this instruction was error.

[5, 6] Upon the state of the record leading up to the requested instruction presented by plaintiff, and to the two instructions given by the court of its own motion, the question naturally arises as to whether appellants may avail themselves of the errors which are above made manifest concerning those matters. There could be but little

doubt upon the point if appellants, with the conduct of their counsel as it stands forth upon the record, had not at last presented the requested instruction. It is settled by the adjudicated cases that a defendant in a criminal case may not object to an instruction which he has asked the judge to give to the jury. The cases on the point are many, and run, at least, from People v. Lopez, 59 Cal. 362, to People v. Rodley, 131 Cal. 240, 63 P. 351, and People v. Russell, 19 Cal. App. 750, 127 P. 829, without recourse to later adjudications touching what is evidently a just and proper rule. But, for the matter of the requested instruction, we should have little difficulty in applying this rule to appellants here, for their counsel was so persistent and cocksure in his attitude that we should feel bound, not alone upon what appears to us as sound reason, but upon authority as well, to determine that his conduct, laying aside his request for the instruction, was equivalent to a demand for a statement to the jury of an assumed rule of law such as was incorporated in the two instructions which the judge gave of his own motion. In a case in which an appellant sought to avail himself of alleged errors by the trial court and denying his challenges of members of the jury for cause, but in which he had not exercised all the peremptory challenges allowed him under the law, it was said:

That it is a "sound ethical principle that a defendant should not be heard to complain of an error, the injurious effects of which he has suffered, if at all, only by reason of his acquiescence in or failure to avoid it when he had the means and opportunity to do so." People v. Winthrop, 118 Cal. 85, 50 P. 390.

In a much later case the same rule was applied to a similar state of facts. There the appellant contended that the trial court had erred in limiting his examination of talesmen on their voir dire. He had not exercised all the peremptory challenges to which he was entitled. The Supreme Court said:

"The ensuing situation was, therefore, the result of his own acquiescence, and he cannot complain of it. This is the settled rule where a challenge for cause has been erroneously overruled. * * * And the reasons on which it is based apply equally to a case like the present. * * *" People v. Tyren, 179 Cal. 575, 178 P. 132.

In a prosecution under a charge of larceny by trick and device, in which the victim was plundered by means of the sale of stock in a corporation about to be organized, a part of whose property was said to be a certain invention, the appellate court said, after disposing of certain points:

"The defendant also complains of the ruling of the court in sustaining an objection to appellant's offer to prove that the stock of the company was of some value. Without determining whether or not such evidence was at all pertinent or material in view of the peculiar facts of the case, we do not think the court in its ruling committed any error of which appellant can be heard to complain. Before this offer of testimony occurred, appellant had offered in evidence certain letters from various persons, which, though not set forth in the record, seem to have been addressed to appellant, and to have contained statements bearing upon the value of the intention and the like. Upon objection these letters were ruled out, and appellant very properly makes no complaint as to such rulings. When he made his offer of the ruling out of which he does complain, he did not put his witnesses upon the stand, nor ask them any question. They were not shown to have had any knowledge of the company or of the value of the so-called invention. Appellant made a somewhat vague and general offer of testimony along certain general lines, and concluded his offer by the statement that 'Your honor has practically ruled on that.' By this statement counsel manifestly referred to the ruling of the court in rejecting the letters that had previously been offered, and we think in so doing really invited the ruling of the court that was thereupon made as to his present offer. The matter was certainly so presented to the court as to convey the idea that the same point was involved as had been ruled on. In this way the action of counsel was well calculated to mislead the court (unintentionally of course) as to the purpose of the offer. The previous ruling was clearly correct; and we think, under the circumstances above detailed as attending the last offer, appellant should not be heard to complain of the ruling which he in effect invited." People v. Miles, 19 Cal. App. 223, 125 P. 250.

These authorities, although proceeding upon facts utterly different from those which are now before us, seem to establish a rule which, but for the asking of the proposed instruction, would be applicable here. In addition to them, however, there is one case in which the facts are closely similar to those with which we now deal. It was there said:

"When the people offered in evidence the written confession which the defendant was alleged to have made, and the admissions and statements testified to by his fellow prisoner, the people and the defendant both consented that the preliminary evidence and the argument upon the defendant's objections to the offered evidence should be taken and heard in the absence and without the hearing of the jury. It is now claimed that the order and action of the court, taken in conformity with his consent, was error, and highly injurious to the defendant. It is not necessary to consider whether the action of the court in this matter would have been proper if objected to. It was not objected to at the time, there was no exception taken at the time, and there is nothing to review." People v. Evans, 5 Cal. Unrep. 125, 41 P. 444.

Of course, if the trial court here had granted the motion of the appellants for an ex-

clusion of the jury while the testimony preliminary to the confessions was being taken, the damage would have been done, as in the case last cited, despite the request for the proposed instruction. This would have settled the question, unless, which we do not decide, upon the request for the instruction being made the judge could have submitted the preliminary evidence already heard by him to the jury, together with cautionary instructions designed to remove the effects of his many erroneous remarks.

Here, however, the jury was not excluded. Its members heard the preliminary evidence. At least, we think we cannot assume that they did not hear it, although they were repeatedly told that they were not to consider it. They were interested in what was going on, much more than the ordinary spectators in the courtroom, and must have heard everything that transpired. All that was necessary, therefore, when appellants took their belated attitude and asked for the instruction, was for the judge to submit it, perhaps with a more specific charge directing the jury to consider what they had before been forbidden to consider, thus removing from their minds the impressions erroneously created by the former attitude of counsel and judge. Such a course would have required care and circumspection, but the result could have been accomplished. Under all the circumstances of the present situation, we think the authorities above cited do not apply. We think that in the last analysis appellants did not waive the point they now seek to press. Despite the persistent flounderings of their counsel, they finally reached firm ground in the presentation of the requested instruction. They thus gave the judge the opportunity to right himself and they had the right to expect that he would scramble ashore with them. We think they may now justly complain that he did not.

We shall consider, when we come to apply the provisions of section 4½ of article 6 of the Constitution to the cause, as we must, whether the error of the court in refusing the instruction asked by appellants, and in giving the two instructions which he read to the jury of his own motion, must result in a reversal of the judgment.

[7, 8] Departing from the judgment of conviction as a whole, attention is now drawn to the judgment of guilt of first degree burglary under the Fares count of the information. It is contended that the trial court erred in instructing the jury that burglary in the first degree is a lesser crime than burglary with explosives, and is included within it. It is also insisted that, aside from the confessions of appellants, the evidence failed to establish certain material elements of the corpus delicti as to the Fares count. These two points we shall amalgamate and treat as one: Was the evidence sufficient to support the verdict upon the Fares count? As the two points are stated, and as they are argued, they naturally lend themselves to such a treatment.

In considering the single point into which the two questions are thus coalesced, we shall pay no attention to the confessions. They are excluded by the very terms of the second specific point made by appellants, if we were considering that point alone, and justly so, for the corpus delicti in every criminal case must be proven by evidence aside from any confession or admission of the defendant. People v. Simonsen, 107 Cal. 346, 40 P. 440; People v. Besold, 154 Cal. 363, 97 P. 871; People v. Clark (Cal. App.) 233 P. 980. The confessions here are especially to be omitted from our view because of the instructions given by the trial judge to the jury touching the evidence preliminary to their admission. In depriving the jury of the right to find whether the confessions were free and voluntary, the instructions prevented a final determination of the question whether they were to be considered as evidence, even though they had been read to the jury. And the right of appellants to have the jury pass upon the manner in which the confessions were secured, and thereby to settle the question whether they were to be viewed as proper evidence, was a most substantial one, as we shall discover when we come to consider the effect upon the appeal of section 4½ of article 6 of the Constitution, for the evidence was such that the trial body might easily have determined that the confessions were not free and voluntary.

Laying aside the confessions, did the evidence uphold the verdict on the Fares count? Taking the definition to be found in section 460 of the Penal Code, it is necessary to a conviction of burglary in the first degree that at least one of the following elements be established by the evidence: (1) The building entered must be inhabited; (2) the burglary must have been committed (A) in the nighttime, or (B) at any time by a person (a) armed with a deadly weapon, or (b) who, while in the commission of the burglary, arms himself with such a weapon, or (c) who, while in the commission of the burglary, assaults any person. Considering these elements in the order stated, there was no evidence in the present case that the Fares property was inhabited. The record shows that it was a dry goods store and not a dwelling house, but the word "inhabited" in section 460 modifies or qualifies the word "building," as well as the words "dwelling house." People v. Clinton (Cal. App.) 233 P. 78. There was no evidence that the burglary was committed during the night. Fares closed his store between 7 and 8 on a Saturday evening and first went to the place thereafter on the next morning between 10 and 11. The crime was committed some time between these two events, as it was on the

Sunday morning visit that it was first discovered that it had been perpetrated.

The Saturday and Sunday mentioned were the 15th and 16th days of March, and on the latter day 10 o'clock a. m. was approximately four hours after sunrise. Further, the burglarious entry into the premises was effected either by means of a skylight or through the "back door," and not from the street, and there was no evidence to show that the burglars were ever in the front of the store. Only the safe on the premises was "robbed," and there was no showing as to where it was located. For all these reasons we think that People v. Ross, 61 Cal. App. 61, 214 P. 267, is not in point.

There was no evidence that the burglars were armed with a deadly weapon when they made their entry into the premises. There was testimony that those who burglarized the place took from the premises certain "guns" or revolvers which they found in the safe in the store. The weapons were not loaded, and, without deciding the single question whether an unloaded firearm is a deadly weapon, we are satisfied that the burglars who entered the Fares premises did not "arm" themselves with deadly weapons in the commission of the burglary, as the quoted word is intended by section 460. We think it would be no more correct to say that a burglar arms himself with a deadly weapon when in his burglarizing he steals an unloaded firearm and carries it away as a part of his loot, than to say that one commits an assault with a deadly weapon when he points an unloaded firearm at another. This latter the courts refused to say in People v. Sylva, 143 Cal. 62, 76 P. 814, and People v. Montgomery, 15 Cal. App. 315, 114 P. 792.

Considering the last element of section 460 of the Penal Code as its parts are listed above, there was no evidence that the burglars who entered the Fares property made any assault upon any person while in the commission of the burglary. It is manifest, therefore, that the conviction under the Fares count cannot stand.

It was the theory of the prosecution, and there was evidence which tended to show, that the burglarious entry into the Solomon place—a clothing store—was effected by means of a hole which was cut in the floor of a certain room in a hotel which was immediately above the store. The manager of the hotel testified that the room in question had been rented by one Jack Brown—not the Jack Black who is one of the appellants—a day or two before the burglary, and that he had retained it until the time of the commission of the crime, or thereafter. The manager also testified that she saw two or three other men about the hotel with Brown, none of whom she could identify as either of appellants. At the time of the trial Brown was under confinement in the county jail. He was brought into the courtroom in the custody of a deputy sheriff, and was placed upon the witness stand for the purpose of showing that appellants had effected an entrance into the store by means of the hole in the floor, and had committed the burglary. Brown was represented by counsel during the time he was on the stand. When he was first sworn, his counsel plainly stated to the court that Brown would exercise his constitutional right of refusing to answer questions on the ground that his answers might tend to incriminate him, and on that ground his counsel objected to any questions being asked him. Notwithstanding that fact, and despite the further fact that, upon being questioned, Brown began at once, upon objections by his counsel, to refuse to answer on the ground stated, the prosecuting attorney kept him on the stand for a lengthy quizzing. At least 63 questions were propounded to him, going over the entire assumed story of the commission of the burglary under the Solomon count by appellants. To each of these questions Brown's counsel objected on the ground that an answer might tend to incriminate him, the judge asked him if he refused to answer on that ground, he said that he did, and the objection was sustained. At the conclusion of the attempted examination the court directed the deputy sheriff to return Brown to the county jail.

[9] In the midst of the questioning of Brown, and after he had refused to answer 19 questions, it was objected upon behalf of appellants that it would be error to continue the examination further; that the continued line of questioning was misconduct upon the part of the district attorney, as that officer had been sufficiently informed that Brown would rely throughout upon his constitutional right to refuse to answer; and that the prosecution had not the right to conduct such a "continuous performance" before the jury. The objection was overruled, but we need not decide whether the ruling was correct, as no point is made concerning it here. We state the circumstance, as well as the other incidents of the attempted examination of Brown, for the purpose of leading up to the discussion of a question which appellants do present. After Brown had been returned to the jail this occurred; italics being ours:

"Mr. Cruzan: * * * I desire to ask your honor to instruct the jury that any questions asked, and the refusal of the witness Brown to answer, should not be considered by the jury as evidence, or to be considered by them as an admission or confession in any way prejudicing the rights of these defendants. We ask your honor to so instruct the jury they cannot regard the attempt to elicit information as evidence to be considered by them, either as going to prove the acts or commission of any of these counts, or that it can be considered as an admission or confession or in any way affecting the rights of these defendants.

"The Court: Well now, I doubt perhaps whether it is evidence, *but they are entitled*

to draw such inferences as to his refusal to testify, as the case may justify, it seems to me.

"Mr. Cruzan: We differ with your honor very decidedly on that point, and we request your honor to so instruct the jury.

"The Court: Ladies and gentlemen of the jury, in the matter of the testimony of Brown—rather, the lack of testimony—his refusal to testify on the ground that the various questions might tend to incriminate him, of course, it cannot be regarded there is any evidence in the case because he has refused to testify on that particular ground. I think that is about as far as the court can go, is to instruct you that there is no evidence before you, because he has refused to testify on the ground it might incriminate him, which he has a perfect right to do, under the statute of the state and under the Constitution of the state and of the United States. Proceed.

"Mr. Cruzan: Now, so there will be no question, we also ask your honor to instruct the jury that the reliance of the witness Brown upon his constitutional rights cannot be considered as an admission of guilt against these defendants, Black and France.

"The Court: I think that is true. They are not on the stand, therefore that instruction is very properly given. Neither Black nor France is on the stand. The effect of the refusal goes only to the defendant Brown himself; that is to say, he has refused to testify because he thought that the evidence that he might give in response to those questions would tend to incriminate him.

"Mr. Ryan: The ruling, if your honor please, does not exclude the privilege of the jury *as drawing any such proper inference from the refusal to testify*, either against the defendant Brown in the other case, or *against these two defendants here; that is a matter wholly and solely in their province.*

"The Court: *I think that is true. I think you may draw such inferences as you desire*, but it is not to be construed as the refusal of the defendants, because they are not making it, nor are they making the objection. The objection is being made by the witness Brown himself, and his counsel, Mr. Stutzman, who is his counsel independently in the proceeding which is now pending against Mr. Brown.

"Mr. Cruzan: To which we beg to differ, both with the court and the learned district attorney, and we will cite the statement of the district attorney in his argument as misconduct of the district attorney, and ask that the jury be so instructed.

"The Court: *The admonition will not be given.*"

We cannot but regard these remarks of the judge, coupled with his refusals to instruct as requested, as exhibiting most damaging error. In an opinion approving an utterance of the District Court of Appeal, the Supreme Court said:

"In addition to what the Court of Appeal says in its discussion touching the error of the trial court in refusing to give instructions proposed by defendant, to the effect that the jury had no right to indulge in any presumption or inference unfavorable to the defendant because of the refusal of any witness to testify, or the failure of any witness to testify for the prosecution, it is to be borne in mind that the argument of the prosecuting attorney against the defendant for the refusal of Zimmer to testify contained not only a severe arraignment of the defendant, but implication and insinuation that the testimony, if given, would have been unfavorable to the defendant. * * * It will be remembered that Zimmer refused to testify upon the ground that his testimony would incriminate, not Glass, but himself. Says the Supreme Court of the United States [really the United States Circuit Court]: 'No inference should have been permitted to be drawn against the defendant because of the assertion by the witness of this right to protect himself. He was called by the government. If he had testified, his testimony might have been in favor of the defendant, though criminating himself. It might have entirely exonerated the defendant. To infer that the very opposite would have been or might have been the effect of his testimony, had it been given, was unwarranted.'" People v. Glass, 158 Cal. 665, 112 P. 297.

The extent to which this rule was violated in the present instance, and the extent to which the error must have influenced the minds of the members of the jury, will be apparent from an additional review of the circumstances which have already been stated. It was made evident to the jury that Brown was in the toils of the law upon some charge the nature of which was not disclosed. While we are not called upon to decide whether the district attorney was guilty of misconduct in questioning him so persistently, or whether the trial court committed error in not halting the attempted examination when objection was made, and have made no examination whatever into either of those questions, it is apparent that the questioning was so conducted as to make a deep impression on the jury. This statement is justified, especially when the nature of the questions propounded to Brown is disclosed. Laying aside all interrogatories which were pressed upon him before objection was made to a further prolongation of the attempted examination, we quote a few of those which were propounded after that event:

"I will ask you whether or not you and the defendants Black and France ever made a diagram of the Solomon clothing store in this city? * * * Over how long a period of time, Mr. Brown, have you known the defendant Black?"

The same question was then asked as to France. Further questions:

"I will ask you whether or not on [the date of the burglary] if you were in the presence of these two defendants Black and France, and saw the defendants Black and France bore a hole from [the room in the hotel] into the clothing store of Mr. Solomon * * *? * * * I will ask you whether, on [the date of the burglary] * * * in front of the Solomon clothing store, if you acted as what is called, what is commonly known, as a lookout, while the defendants Black and France were inside of the store of Solomon?"

Other questions of a damaging character, and especially many questions asked for the purpose of showing an intimate friendship and association between Brown and Black and France, were put to the unwilling and recalcitrant witness.

Under all these striking circumstances the trial judge, after a presentation to him in the most direct manner of the questions involved in the situation, told the jury that—

"They are entitled to draw such inferences as to his refusal to testify, as the case may justify."

Then the district attorney made the erroneous statement to the effect that the jury might draw "proper inference" from Brown's refusal to testify "against these two defendants here; that is a matter wholly and solely in their province." To this the judge responded:

"I think that is true. I think you may draw such inferences as you desire."

When Mr. Cruzan asked that the jury be instructed that the remark of the district attorney was erroneous, the judge ruled: "The admonition will not be given." The remarks of the judge as to the drawing of inferences from Brown's refusal to testify, and those of the district attorney in which he concurred, were very general, it is true. We know, however, of no inference whatever which the jury might properly have drawn from that circumstance as against appellants. Moreover, a part of the vice in the judge's statements lay in their very general character. To tell the jury that they might draw such inferences "as the case may justify" and "as you desire" was to say to them that the members of that body might make an unbridled excursion into a field of riotous speculation concerning the guilt or innocence of appellants. So far as this particular question was concerned, they were left, absolutely untethered, to pasture themselves at will upon such succulent surmise as might suit their fancy. The result of the errors of the trial court in this regard will be considered when we come to contemplate the effect of section 4½ of article 6 of the Constitution.

[10, 11] The trial court was asked to instruct the jury:

"That in determining the question as to whether the evidence does point as strongly to the guilt of the witness Brown testified to by the witnesses as it does to the prisoners at the bar, it is competent for the jury, and, in fact they should take into consideration the fact, if proven in the case, that, about the time of the commission of the crime as charged, the said Brown was near the place where the crime was committed, and also consider whether one [he] did not then and there have the same opportunity to commit such crime as the defendants did"; and "that, before they can convict the defendants in this case, it must appear from the evidence, beyond a reasonable doubt, that the defendants, and not somebody else, committed the offense charged in the information. It is not sufficient that the evidence shows that the defendants, or somebody else, committed the crime, nor that the probabilities are that the defendants, and not somebody else, committed the crime, and unless those probabilities are so strong as to remove all reasonable doubt of the innocence of the defendants, and that there is no other hypothesis than that of guilt of the defendants, then you must acquit them."

This matter was all included in a single instruction, which the court refused to give. It is insisted that the refusal was error. Even, however, if there was some matter in the instruction which was proper, a point which we do not decide, there were parts of it which were not proper. It was incorrect to seek to embark the jury upon an inquiry as to whether "Brown was near the place where the crime was committed," or as to whether "[he] did not then and there have the same opportunity to commit such crime as the defendants did." The refusal of the instruction was not error. If an instruction is not correct in its entirety exactly as requested, the action of the trial court in rejecting the whole will be affirmed. People v. Lips, 59 Cal. App. 381, 211 P. 22. Other points are made by appellants, but they do not merit a special consideration.

[12] We are now to inquire what is to be the result of the errors of the trial court upon the disposition of the appeal under the provisions of section 4½ of article 6 of the Constitution, to the effect that a reversal of a judgment shall not follow where error is asserted, "unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." As is our duty, we have complied with the provision of the section requiring an examination of the entire cause now before us, including the evidence. Before we take up a consideration of the constitutional provision as applied to the evidence in the record as a whole, and attempt to admeasure the general effect of the errors committed, it seems necessary to pay regard to a special feature of the cause. The vast bulk of the evidence against appellants, upon the score of weight, was in the confessions. Can we say that there has not been a miscarriage of justice in the one particular disclosed by the error of the court in excluding from the jury the evidence upon the question whether the confessions were freely and voluntarily made? Can we say that the jury would have been bound under the evidence to reach the same conclusion upon that point as was arrived at by the judge? Can we say that they possibly would not have arrived at that conclusion, upon a just consideration of the evidence upon the subject which is unfolded to us from the cold record? We have stated at the outset of this opinion the general fea-

tures of the evidence touching the manner in which the confessions were procured, and it becomes necessary now to recur to that subject. The testimony of appellants concerning the alleged successful attempt of the police to coerce them into the making of a confession by means of a story of an assumed murder at Deming, N. M., was direct, clear, and positive. Judging from the only source of information open to us, the typewritten record of the evidence, it was not inherently incredible. Far from it. As parts of the story, it is to be especially noted that appellants both testified that they had been at Deming, and at the same time, although they had not arrived there together. France testified that he and some other men had "stolen" a ride on a train going toward Deming; that just before that place was reached an altercation was had between these men, including France, and a brakeman on the train, who insisted that each of the men pay him $5 or be put off; that during the row the brakeman struck France and blackened one of his eyes; and that one of the other men in the party felled the brakeman by a blow on the head with a coupling pin. Both appellants testified that the charge of murder alleged to have been mentioned by the police arose out of the killing of a brakeman. The writer of this opinion has at this moment concluded a third perusal of the testimony of both appellants upon this subject, and it must be remarked that the two stories taken together, so far as we are able to determine from the record alone and without a view of the witnesses, bear inherent marks of credibility. Some of the testimony of the police officers is opposed to the joint story, but a part of that testimony furnishes much that the jury might justly have regarded as corroborative of it. As already remarked, the officers, while admitting that the Deming affair was mentioned to appellants, denied that it was employed as a means of coercing a confession. In view of this state of the record, we shall recite some particular portions of the testimony of the officers. These were principally two, Officers P. and K., one or the other of whom appears to have been present at all times when appellants were questioned, although a sergeant of police, who was with them for a few moments on several occasions, also testified that no coercion was used in his presence. The interviews took place in a room in the city jail which is designated in the record as the "Crime Crushers' Office"; appellants being taken there from their cells from time to time for separate examination. The first circumstance we shall now note relates to the number of officers who attended upon appellants at these interviews. Speaking of a session with Black on the evening of the day of his arrest, he having been apprehended the day before France, Officer P. testified that—

"The officers who were working on the case at the time, and I am sure that each and every one of those, which I could name, were in and out of there during that time."

A few pages later in the record he named five of these officers, in addition to himself, and added:

"And there were several others that were picking up different angles of the case that were in and out of the office."

The sergeant testified that on one occasion when France was being questioned there were present six members of the police force, all of whom he named, in addition to himself. Speaking of France, again, the sergeant said:

"There was a dozen of us questioned him, to some extent."

Upon the head of the length of time that was expended in interviews with appellants, the record is equally remarkable. Officer P. testified that he talked with Black two or three times on the day intervening between the time of his arrest and the apprehension of France. Officer K. said that he and Officer P. talked with the two appellants the greater part of two days. Officer K. also said concerning one of appellants, apparently Black:

"I talked with him all the way from the time of the arrest until the time he was locked up."

And that, after his incarceration:

"I talked to him every day almost until the day he was arraigned and sent to the county jail."

We come now to a mention of the testimony of the officers concerning the Deming episode. Officer P. testified that knowledge of this affair came from a certain woman who was an associate of appellants. He said:

"She disclosed the fact to me that Homer France had told her that he had gotten into trouble coming out here from a southern state. I don't recall whether it was New Mexico or Arizona."

This was part of an answer to the question:

"Let us know what was said about this murder in New Mexico."

After 2 or 3 other questions Officer P. testified that—

"These talks [about the alleged murder] were after the arrest of Homer France. I asked them regarding the murder of the brakeman, if such did take place. They stated that it didn't take place. Homer France was the one of the two which was implicated, when stated to me that one of them had had a little trouble with a brakeman, so my questions pointed to him. He stated that he had a fight—no; I will withdraw that—there was two other boys riding in a gondola car with Homer France. That is the way it was in his answer to me,

and that one of those boys hit the brakeman in the head with a coupling pin, and the brakeman fell to the bottom of the gondola car, and he further stated that the two boys robbed the brakeman of the money that the brakeman had in his pockets, and that he left the gondola car and got off, if I recall correctly, at the next stop."

In testifying about a conversation with Black, the same officer said:

"To my knowledge, there was never anything said to Jack Black regarding a charge—I will withdraw that answer—will you read the question? (Question read.) The only time I can recall that charging him with the murder of a brakeman was mentioned was—I don't recall anything like that in those words.

"Q. Well, what was said about the murder of a brakeman? A. Nothing was said about the murder of a brakeman. I recall asking him if he had murdered a brakeman."

He testified further about a conversation with Black:

"Did you tell him a brakeman had been killed down there in a fight? A. No, sir.

"Q. Did you say anything about anybody getting a black eye? * * * A. I believe I asked him if it was not a fact that Homer France did receive a black eye during that altercation I referred to."

Officer K. said in answer to a question concerning the Deming affair:

"I heard it mentioned, yes. I said nothing about it."

It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say "whether appellant would or would not have been convicted but for the errors of the court." People v. Degnen (Cal. App.) 234 P. 129. The same rule is susceptible of an application to the special feature of the present cause which is now under consideration. Can we say whether or not the jury would have decided that the confessions were to be considered if its members had been permitted to pass upon the question whether they were freely and voluntarily made? We certainly cannot say that. We must assume that the members of the jury were in possession of the knowledge that the iniquity known as the "third degree" is stalking rampant throughout the land, in flagrant violation of human rights which are supposed to be secured by American constitutions, both state and national. This is a knowledge that is possessed by everybody, to the shame of the police organizations of the country. What evidence might the jury have seen in this cause, if its members had been permitted to exercise their functions, that appellants had been the victims of the nefarious practice? Why were appellants so thoroughly surrounded by the minions of the law? Why were they subjected to such lengthy "examinations"? Why was the Deming episode mentioned to them at all? In these circumstances would the jury have found, if it had been given the opportunity, that the police officers were merely attuning their ears to voluntary statements which they hoped might fall from the lips of appellants, or would it have found that the evidence disclosed one of those illicit inquisitions which are not only too frequent, but which should never occur, one of those assaults upon liberties which are guaranteed by the organic laws of state and nation? We cannot say what the jury might have decided in these respects. Therefore we must hold that the error of the trial court, in depriving the trial body of its duty to pass upon the manner in which the confessions were procured, cut deeply into the rights of appellants and worked a material injury to their defense, in the single feature of the cause which is now under examination. Therefore, also, as we have remarked in disposing of another point, the confessions can be considered by us in no phase of the appeal.

We are now to inquire into the effect of the errors of the trial court upon the disposition of the appeal, in the light of the provisions of section 4½ of article 6. This inquiry involves a statement of the evidence against appellants under but two of the counts, as we have already made disposition of the Fares count. And we must first marshal certain aspects of the evidence which apply generally to the two counts which are yet under consideration. There was ample evidence that both the Solomon and the Tarter premises were burglarized by means of explosives. The corpus delicti was undoubtedly proven. The question in the cause is as to whether appellants were the perpetrators of the offenses. The police officers first came in actual contact with appellants at an apartment house outside the business district of Los Angeles, in which city the crimes were committed. The two, in a conversation held at the apartment house, admitted that they lived at a hotel in the business district. To this hotel the officers soon proceeded and entered the room of appellants. Black came to the room while they were ransacking it. The officers found, as a result of their search, three bottles of nitroglycerine and some burglars' tools. While France was in jail, and after the confessions had been signed, he penned a letter to his sweetheart and handed it to a police officer for deposit in the mails. The officer apparently did not scruple to open the missive, for he at once did so, and he kept it for use at the trial, where it was introduced in evidence. The letter, which was of some length, contained the following:

"* * * It's all my own fault why I'm in here. * * * I should have quit when you

asked me to, honey, * * * I am glad they got me before I had murder or something worse against me. I have too much against me already. * * * I told them every job I ever pulled, so they can't get me for another one when I get out. * * * I found it doesn't pay to try and beat the law. They get you in the long run. * * * I feel sorry for Jack. But any one that ever went with me, went on his own free will. * * * I don't feel that I was to blame for him being in this predicament. * * *"

Before we proceed to state the evidence which relates more specifically to each of the two counts, let us view for a moment this evidence which applies generally to both. Let us consider what arguments might have arisen in the minds of the jurors as to its various items. The possession of the nitroglycerine and the burglars' tools, while proper to be viewed as a circumstance in determining the guilt or innocence of appellants in the present cause, might have been considered by the jury as reflecting only upon the general bad character of appellants, the view that the jury took of this evidence depending largely upon the manner in which its members applied the entire evidence. The letter to France's sweetheart was, of course, not evidence against Black, but, in considering it as against the former, some question as to its applicability may have arisen in the minds of the jurors. The expressions in the letter were all of a very general character. It cannot be said that they referred to any of the three charges involved here, much less to all three, except in connection with the confessions, and to them we may not look. The expressions admitted a guilt upon no particular charge, and are therefore without weight here. If, however, we go so far as to ascribe some weight to them, or grant grudgingly that the jury might have given them weight, to what extent were they inspired by the fact that France's confession had already been signed? Did the writer foresee that his letter might possibly be purloined by a zealous police officer, and for that reason continue to "make good" under the confession by inserting the above-quoted expressions as he wrote the long letter to his sweetheart? What figure did the admissions cut in a possible attempt to avoid extradition to New Mexico on a murder charge? We do not say how these various questions, arising from the general evidence, should have been answered. It is not within our province to do so. The question is: How would the jury have resolved them, if we grant, which we really need not grant, that they had weight at all?

[13] We turn now to the evidence bearing more specifically upon the Solomon count. There was really none which pointed toward appellants. The testimony concerning the room in the hotel which was above Solomon's store, and concerning the orifice which was cut in the floor, did not affect appellants. There was nothing shown which connected either of them with the crime through that evidence. Jack Brown was the only person toward whom it pointed, and it pointed toward him most directly. Under the Solomon count it is practically certain that the conviction resulted through the errors of the trial court. In addition to the weight which the jury was bound to ascribe to the confessions in considering that count, under the erroneous instructions of the judge, there is yet the incorrect attitude which he adopted toward the refusal of Brown to testify. Under the rulings made in that behalf, what inferences did the jury draw against appellants? It is practically certain that they drew some inferences under the court's direction, considering all the circumstances surrounding the attempt to examine Brown, the length of the examination and the nature of the questions propounded to him being especially noteworthy. We do not regard the general evidence above stated, as applying to both the Solomon and the Tarter counts, as sufficient to put into operation the saving grace of section 4½ of article 6, when considering the former count.

[14] We now come to a more specific consideration of the Tarter count, under which was presented evidence against appellants of a more damaging character than that produced under either the Solomon count or the Fares count. The room in which appellants lived and in which the officers found the nitroglycerine and burglars' tools was occupied by appellants at the time when the Tarter burglary was committed. The entry into the Tarter premises was effected by means of a skylight in the roof over the place, and this roof was accessible through a window of a toilet in the hotel in which appellants had their room. The Tarter place was a jewelry store, and the owner, when on the witness stand, described certain watches and many articles of adornment which were taken from his stock by the burglars. Similar articles of jewelry were found by the officers in the room occupied by appellants at the time when the nitroglycerine and burglars' tools were located, and several watches were at that time taken from the person of Black, for it was then that he was arrested and searched. Tarter was put on the witness stand for the purpose of identifying the various articles of jewelry and watches. He said, as to one of the watches, that it was identical with one which had been taken. In the same manner he referred to a watch chain with a penknife attached. He said of a certain belt buckle that—

"It looks just exactly as those we have in stock, or did have in stock."

He testified concerning another belt buckle that—

"This is just like the one, as near as I can remember, as the one we missed from the store."

He said of some cuff buttons that they were "just the same exactly" as some he had in stock before the burglary and missed afterward. He also said that certain studs were identical with some he had lost. Tarter visited the jail after France's arrest and had a conversation with that individual. This event was also after the confessions had been signed, and we have for that reason excluded the conversation from our consideration. During its progress, however, France took from his person a belt buckle and handed it to Tarter, by whom it was retained. This buckle was introduced in evidence, and was positively identified by Tarter, by means of certain marks upon it, as one which had been taken by the burglars.

Without reviewing this array of undisputed evidence in detail, it appears to us that its character was such that the jury could not have done otherwise than convict appellants upon the Tarter count. We think that result would have been attained if the errors of the court had not been committed. We think appellants would have been convicted on the Tarter count if the jury had not considered the confessions, and if they had drawn no inferences against appellants because of Jack Brown's refusal to testify. It is true that Tarter did not identify completely the stolen property, except in the instance of the belt buckle surrendered by France, but his very general identification, relating as it did, to so many articles, must necessarily have convinced the jury that the property was that which was taken from his store. It is improbable that appellants could have been in possession of so many articles exactly similar to those taken from Tarter's place of business unless they were a part of those actually so taken. It is true, also, that the possession of stolen property is not alone evidence of guilt, but we do not pause to cite authority to the effect that such possession, when attended by corroborating circumstances, is weighty evidence of guilt. Those corroborating circumstances are here present, as the above recital will witness, and they are themselves of considerable weight. We are of the opinion that the Tarter conviction must stand, despite the errors of the trial court.

[15] In closing, we feel impelled to direct the attention of district attorneys and trial judges to the frequent occasion which is thrust upon us to save judgments of conviction by means of the provisions of section 4½ of article 6 of the Constitution. It seems evident that the prosecutors of the state, and possibly that the trial judges, are conducting criminal cases with an eye to the saving grace of the section. It should be manifest that such a course is improper. In the performance of their respective duties incident to trials, the existence of the section is of no concern to those officers. That part of the organic law of the state is of interest, so far as its application is concerned, if we except proceedings on motion for a new trial (see People v. Tomsky, 20 Cal. App. 672, 130 P. 184) only to the courts of review. District attorneys and trial judges should conduct the trial of criminal cases exactly as if the section did not exist. Such a course, if faithfully and diligently pursued, will lessen the number of appeals, will shorten the time necessary for the consideration of appeals which are taken, will lessen the number of retrials by superior courts, and will conduce to the general dispatch of business in both trial and appellate courts.

The judgment and order under the first and third counts of the information are reversed. The judgment and order under the second count are affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

196 Cal. 593

GREAT WESTERN POWER CO. OF CALIFORNIA v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al. (S. F. 11431.)

(Supreme Court of California. July 31, 1925. Rehearing Denied Aug. 27, 1925.)

1. Master and servant ⟸386(1)—Award of Industrial Accident Commission held properly arrived at by using gross daily wages as basis.

In proceedings for annulment of award of Industrial Accident Commission, rate of contribution *held* properly arrived at by using gross daily wages as basis of award, when it appeared deceased had turned all of his wages into common family fund, and amount of fund used for purposes other than support of dependents was deducted.

2. Master and servant ⟸386(1)—Amount drawn from bank account of father and employee, and used in purchase of equipment for ranch, held immaterial considerations in arriving at award.

The amounts drawn from common bank account of father and son to purchase equipment for ranch *held* immaterial and insufficient, in fixing compensation for son's death, to show that son's earnings were devoted to purposes other than support of himself and family, where subsequent to such expenditure son had left ranch and obtained employment at wages in which he was injured.

3. Master and servant ⟸386(1)—Award of Industrial Accident Commission must be based on loss of support.

Award of Industrial Accident Commission under Workmen's Compensation Act must be based upon loss of support defendants were receiving from employee at time of injury, regardless of how long support has been continuing, and not upon what he has contributed in any given time of employment.

4. Master and servant ⟸417(4)—Objection to award of Industrial Accident Commission not considered for first time on writ of review.

Objection to award of Industrial Accident Commission, based on employee's wages, that certain allowances were not made for personal expenses cannot, in view of Workmen's Compensation Act, § 64(c), be considered on writ of review, when not made to commission in petition for rehearing.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

5. Master and servant ⟹388—Award of Industrial Accident Commission not disturbed because including allowance for grandfather.

Award of Industrial Accident Commission to father of deceased employee for use of family under Workmen's Compensation Act, § 14(c), will not be disturbed because including allowances for grandfather, though no special finding as to his dependency was made, where commissioner found that grandfather was a member of decedent's family, and actually supported out of family's common fund.

6. Master and servant ⟹398—Provision of Compensation Act removing limitation of time held to apply in case of death of employee.

Workmen's Compensation Act, § 11 (a), removing limitation of time for instituting proceeding for compensation, where application has been filed with Industrial Accident Commission for any portion of benefits, *held* to apply in case of death of employee, as well as in case of his injury, in view of Const. art. 20 § 21, and section 1 of the act, vesting the commission with broad powers, and section 17 (c), providing for but one cause of action for each transaction within the act.

7. Master and servant ⟹398—Industrial Accident Commission may exercise jurisdiction of whole subject-matter in controversy, though claims not filed in time.

Under Workmen's Compensation Act, § 11 (a), when claim for any portion of benefits under act has reached point where it is necessary to submit matter to Industrial Accident Commission, such commission may exercise jurisdiction of whole subject-matter of the controversy, including further claims of all other persons presented within life of continuing jurisdiction, though not filed within time required for presenting original claim.

8. Master and servant ⟹417(5)—Court without power to disturb award, unless unreasonable.

In view of Workmen's Compensation Act, § 67b, court is without power to disturb award of Industrial Accident Commission, unless it is unreasonable.

9. Master and servant ⟹386(1)—Award for death held not unreasonable.

Award by Industrial Accident Commission of $4,946.80 for death of employee earning $5.81 per day, whose annual contributions to dependents at time of injury was $1,615.60, *held* not unreasonable; dependents, being father, mother, and grandfather, also nine brothers and sisters, each under 18 years of age.

In Bank.

Proceeding under the Workmen's Compensation Act by James Savercool, on behalf of himself and wife and minor children, for compensation for the death of Lorin L. Savercool, opposed by the Great Western Power Company of California, employer. Compensation was awarded by the Industrial Accident Commission, and the employer brings certiorari. Award affirmed.

Cooley & Gallagher and W. H. Spaulding, all of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Acc. Commission.

WASTE, J. Petitioner is here seeking an annulment of an award of the Industrial Accident Commission. Lorin Savercool, a minor 20 years of age, while in the petitioner's employ, received injuries which resulted in his death. A claim was filed by his father, James Savercool, with the Industrial Accident Commission, on behalf of himself, his wife, and minor children, for a death benefit under the Workmen's Compensation Act (St. 1917, p. 831), in which the applicant alleged himself and his family to have been partially dependent on the deceased employee for support. After a lengthy hearing, the commission found the annual contribution of the minor to the support of the family during the year previous to his death amounted to $1,366.66. Assuming that sum to be the employee's "average annual earnings," it allowed three times the amount as a death benefit, and made an award in the sum of $4,099.98, which it directed to be paid to James Savercool, "in his own right to be used for the support of all the dependents." On certiorari to this court the award was annulled for the reasons stated in the opinion, and the cause was remanded to the Industrial Accident Commission for further proceedings in accordance with our decision. Great Western Power Co. v. Ind. Acc. Comm., 191 Cal. 724, 218 P. 1009. On the going down of the remittitur no new testimony was taken, but, after proceedings had for the purpose, in which the petitioner was at all times represented, a new award was made on the same evidence that was presented in the former proceeding here.

It is unnecessary to make a full restatement of the facts involved, for they will be found in the former opinion (supra). The petitioner contends that, in making the second award, which is larger in amount than the first, the commission has exceeded its jurisdiction in a number of specified particulars, and that it has placed an erroneous construction upon our former decision in the case and upon the opinion of the court in Spreckels Sugar Co. v. Ind. Acc. Comm., 186 Cal. 256, 199 P. 8. In the former proceeding the respondent commission fixed the death benefit for partial dependency upon the amount it found the deceased employee actually contributed to the support of his father's family during the year preceding his death. On the theory that the decedent's employment was seasonal, it being customary for him to work at wages during the summer months, and to perform services about his father's farm and in other ventures during the winter months, the commission went fully into the employee's activities over a period of

one year and more in order to determine his annual contribution to the dependents. We were of the opinion, therefore, that it adopted an erroneous method in arriving at the amount of the annual contribution devoted by the decedent to the support of his partial dependents, which the law requires as the basis of an allowance of a death benefit. It did not determine as the basis of the award the "rate of contribution existing as of the date of the injury." It is that rate which the commission must determine from all the facts in such a case, and, when it has determined it, it is three times the amount of the annual contribution, according to that rate, which the law says shall be the amount of the death benefit. Spreckels Sugar Co. v. Ind. Acc. Comm., supra; Great Western Power Co. v. Ind. Acc. Comm., supra; Market St. R. Co. v. Ind. Acc. Comm., 193 Cal. 178, 182, 224 P. 95; Workmen's Compensation Act, § 9. After a somewhat critical discussion of the reasoning of the commission, and of the evidence on which it based its finding, we indicated the facts which, in our opinion, afforded a plain, simple, and, in the light of the Spreckels Case, the only logical and legal basis on which to compute the annual amount devoted by the decedent to the support of the dependents. For some time before his (the employee's) injury, the rate of compensation for his services in the mill of petitioner was 74 cents per hour. All of his wages, other than a small deduction for hospital dues and for supplies obtained from petitioner's commissary by the Savercool family, were paid by checks. These he gave to his mother for deposit in the joint bank account of his father and himself. The whole amount, according to the evidence, was in fact turned into the common family fund, which, as has been related, was used for the support of the family and the upkeep of the different ranches, and in whatever small business affairs the father and son were from time to time engaged in. We made no immediate application to the facts of the case of the rule to be followed, leaving that to be done by the commission, in the light of the provisions of the Workmen's Compensation Act and the established rules of procedure and interpretation.

In response to the present writ of review the respondent commission asserts that it has endeavored to closely follow the rule in the Spreckels Case, reaffirmed in our former opinion. It found that the employee earned $459.41 during the period between July 1 and September 17, 1920, the date of his injury, a period of 79 days, or an average of $5.81 per day (we disregard fractions of a cent), for employment 7 days a week. It multiplied the daily wage by 365, the number of days in a year; the result, $2,122.47, being the anticipated earnings of the minor at that rate for the year following had he not received the injuries resulting in his death. From the result thus obtained the commission deducted $360 for the estimated cost of the employee's own support, and the sum of $146.87, the cost of support of a sister of the employee, who was not dependent upon him for any part of her support. The net result, or the sum of $1,615.60, the commission found to be the annual amount devoted by the employee to the support of his dependents. Applying the rule of the Compensation Act (supra), it fixed the award at three times the annual rate of contribution thus determined; the full amount of the death benefit, with $100 added for burial expenses, being $4,946.80.

[1] Petitioner complains that the commission used a gross daily wage as of the date of the injury as the basis of its award, and not the rate of devotion to the support of the family on that date. That is not exactly so. The evidence showed that the employee turned all his wages into the common family fund. Consequently, the rate of contribution was the same as the rate of the daily wage, and it was only necessary to make the proper deductions from the anticipated gross earnings in order to arrive at the amount of the annual contribution according to the rate. The commission did that by deducting an amount charged to the personal support of the employee, and to the nondependent sister.

[2] Petitioner charges that the commission was in error in not taking notice of the amounts withdrawn from the common bank account of the father and the employee and used in the purchase of stock or equipment and on ranch upkeep and improvement. For the reasons so plainly stated by Mr. Justice Olney in Spreckels v. Ind. Acc. Comm., supra, and in view of the evidence in the case, those matters had no connection with the rate of contribution by the employee at the time of his injury, and were an immaterial consideration in arriving at that rate. The commission found that the decedent left the family ranch during 1920, and started working for wages, thereby making a change in conditions, which existed at the time of his injury, and that the evidence was insufficient to establish the fact that any of his earnings, at the time of his injury, were used for any purpose other than the support of himself and his family.

[3] It is next urged that the commission assumed a year-round employment of the decedent at the same rate, while the evidence shows that his employment for wages had been, up to the time of his death, only seasonal. In a sense, in a very large number of cases, employment in industry is irregular, and in many it is seasonal. But, the "theory of the compensation act as to death cases is that the dependents of the employee killed through some hazard of his employment shall be compensated for the loss of the support they were receiving from him at the time of his injury. This necessarily means that the

death benefit must be computed on the rate of contribution at that time. It is the rate which is the measure of the loss, not the gross amount which the decedent has happened to pay through any past year, or through any other period of time." Spreckels Sugar Co. v. Ind. Acc. Comm., supra. Under this theory, and we are satisfied that it is the correct one, and according to the evidence, the loss of the support the family of the decedent was receiving from him at the time of the injury was measured by his daily wage of $5.81½, or $2,122.47½ per year, less the cost of his own support, and other proper deductions, regardless of how long that support had been continuing; and compensation for the loss must be upon that basis, and not upon the basis of what the employee has actually contributed in a seasonal, or any given time of employment.

[4] Complaint is made by petitioner that no allowance was made by the commission in fixing the amount of the contribution to the dependents, for hospital dues, and certain small personal expenditures by the employee at the petitioner's commissary, which were deducted from the employee's wages in issuing his pay checks. The findings are silent on the subject, but the claim of the petitioner cannot be considered in this proceeding on the writ of review, for the reason that it was not made to the commission in the petition for rehearing filed by petitioner in the proceeding below. Workmen's Compensation Act, § 64 (c).

[5] Finally, petitioner contends that the respondent commission exceeded its jurisdiction in including in its award an allowance for William W. Savercool, the decedent's grandfather. Two contentions are made: First, that the grandfather was not a dependent; and, second, that his claim was barred because not presented in time. The evidence shows that the grandfather was, at the time of the employee's death, 76 years old, and was incapacitated for labor. He lived alone on a small ranch, and was furnished with his groceries and supplies by his son, the applicant, James Savercool, and his grandson, the deceased employee. In return for this support he appears to have done a little work around the ranch, increasingly less as he grew older, until it amounted to but very little. The commission found that he was a member of the family of the decedent, and actually supported out of the common fund, upon substantially the same basis as the other partial dependents. There is evidence in the record which supports the finding. We therefore deem it unnecessary to discuss the family relations and the situation of the parties, from which petitioner would have us form an opinion different from that held by the respondent. It made no special finding as to the extent of the grandfather's dependency, it is true, but set apart the entire death benefit to James Savercool, the father, for the use of the family, under the discretion granted to it by the Workmen's Compensation Act, § 14 (c).

The more serious problem is that presented by the contention of the petitioner that any claim for compensation by the grandfather is barred by the limitation of time prescribed by the Workmen's Compensation Act (section 11 [a]), which provides that, unless compensation is paid, or an agreement for its payment made within the time limited in the section for the institution of proceedings for its collection, the right to institute such proceedings shall be barred. Proceedings for the collection of a death benefit, in cases like the one at bar, must be commenced within one year from the date of death. William W. Savercool the grandfather, was not originally a party claimant in the proceeding before the commission. The original application for compensation for the death of the employee was filed December 28, 1920, by James and Lillian Savercool, father and mother of the decedent. Among the other allegations it was therein stated that "Wm. W. Savercool, grandfather, age 73," was one of the dependents; the others being the father and mother, and nine brothers and sisters under 18 years of age. After proceedings had, an award made and set aside, the matter came on for rehearing on June 29, 1922. At that time applicant, James Savercool, requested that William W. Savercool, the grandfather, be joined as a party applicant in the proceeding. Over the objections of petitioner, first, that the request "came late," and second, that the grandfather "was not a member of the household," the order was made. William W. Savercool was not present at the hearing; no appearance was made for him, other than a waiver of notice and a consent that the hearing proceed, which was entered by the applicant, James Savercool. Thereafter the commission made its first award, in which it held that the application of the grandfather was barred because not presented in time. When that award was annulled, and the proceedings remanded, the petitioner objected to the inclusion of the grandfather in the action on the ground that he had never requested any relief in the premises. Thereupon, apparently at the behest of the commission, William W. Savercool filed written appearance, and requested that an award be entered in his favor for such amount as he should be entitled to "by reason of the circumstances involved in this matter." Formal objection to the grandfather being included in the proceedings was made by petitioner, and, we may assume, overruled, for subsequently the respondent made new findings, in which it decided that the claim of the grandfather was filed within time.

[6, 7] In support of its finding that the claim of William W. Savercool was filed within time, which is in effect a finding that the applicant instituted a proceeding for the collec-

tion of a death benefit within the time limited by the Workmen's Compensation Act, the respondent invokes the application of the proviso, found in section 11(a), supra, which declares that the filing of an application with the commission for any portion of the benefits prescribed by the Workmen's Compensation Act shall render section 11 inoperative as to all further claims of any person or persons for compensation arising from the same transaction, and that the right to present such further claims shall be governed by the provisions of section 20 (d) and section 65 (b) of the act. The two latter sections provide that the commission shall have continuing jurisdiction over all its orders, decisions, and awards made and entered under the provisions of sections 6 to 31, inclusive, of the Workmen's Compensation Act. No order was made in the matter of bringing William W. Savercool into the proceeding as an applicant until more than 1½ years after the death of the employee. If he was not properly before the commission before that time, either actually or so constructively as to be subject to its jurisdiction, he was not brought in by either of his belated appearances. The respondent's position, then, is that, under the saving terms of the proviso in section 11(a), supra, the grandfather was so constructively before the commission that it had jurisdiction to determine his right to claim compensation. While there is some force in the contention of the petitioner that the proviso removing the limitation of time for instituting proceedings for compensation should be held to relate only to claims for injury, we are of the view that it should be given a more generous interpretation. By both constitutional enactment (article 20, § 21), and legislative decree (Workmen's Compensation Act, § 1), the Industrial Accident Commission is vested with wide powers, to the end that the administration of legislation, enacted to create and enforce a complete system of workmen's compensation, "shall accomplish substantial justice in all cases expeditiously, inexpensively, and without incumbrance of any character." The Workmen's Compensation Act provides (section 17c) that there shall be but one cause of action for each transaction coming within the provisions of the act. All claims brought for medical expense, disability payments, death benefits, burial expense, liens, or any other matter arising out of such transaction, may, in the discretion of the commission, be joined in the same proceeding at any time. Going one step further, we see no reason why the Legislature may not have intended to provide, in the proviso to section 11(a), that, when a claim for any portion of the benefits prescribed by the act has reached the point where it is necessary or expedient to submit the matter to the decision of the Industrial Accident Commission, the whole subject-matter of the controversy, including the further claims of the applicant, or of any and all other persons, should be thereby submitted to the jurisdiction of the commission for a complete determination, provided, of course, that all claims relating to the transaction be presented within the life of the continuing jurisdiction of the commission. That, we conclude, was the legislative intent, and the effect of the proviso added to section 11 (a). From this conclusion it results that the respondent did not exceed its jurisdiction in adding William W. Savercool as a party claimant in the proceeding.

[8, 9] Considerable discussion has been evoked in this case as to the fairness of an award of a death benefit predicated upon a rigid adherence to the rule laid down in Spreckels Sugar Co. v. Ind. Acc. Comm., supra. Rigid adherence to any rule, in such cases, may, in some instances, and doubtless will, work a hardship. In some cases the hardship will fall on the employer; in others it will be visited on the dependents of the employee. Such a consideration is not one that may be addressed to this court unless we can say the award is unreasonable. Workmen's Compensation Act, § 67 (b). While in this case the present award is considerably greater than the first one, which was determined by an erroneous method, we are unable to say that it is so large in amount as to be unreasonable.

The award is affirmed.

We concur: LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.

---

196 Cal. 576

In re BASSETT'S ESTATE.

MANION et al. v. BRYSON. (L. A. 8275.)

(Supreme Court of California. July 31, 1925.)

1. Wills ⇐215—Trial court had jurisdiction to determine whether decedent died intestate, and without leaving any last will or testament.

In proceedings to revoke probate of a will and to probate a destroyed holographic will later executed, trial court had jurisdiction to determine whether decedent died intestate, without leaving any last will or testament.

2. Wills ⇐183—Later will revokes earlier will so far as inconsistent.

A later will containing provisions inconsistent with an earlier will revokes such earlier will so far as inconsistent therewith, in view of Civ. Code, § 1296.

3. Wills ⇐183—Later will held to revoke earlier will, where inconsistent therewith.

Where wills made disposition of all of testatrix's property, but to different beneficiaries, they were inconsistent to that extent, and later revoked the earlier.

---

4. Wills ⊂306—Due execution of later will, containing express revocatory clause, destroyed animo revocandi, may be sufficiently proved by one witness.

Where a later will containing an express revocatory clause is destroyed by testator animo revocandi, its due execution may be sufficiently proved by one witness so as to render effective such revocatory clause.

5. Wills ⊂306—Inconsistency of later will might be proven by testimony of one witness to work revocation of earlier will.

Under Civ. Code, §§ 1296, 1297, relating to revocation of wills, inconsistency of later holographic will, subsequently destroyed animo revocandi with earlier will, might be sufficiently proven by testimony of one witness to work a revocation of the earlier will.

6. Wills ⊂306—Dispositive provisions of later will inconsistent with those of former will might be proven by testimony of one witness.

Under Civ. Code, §§ 1296, 1297, relating to revocation of wills, dispositive provisions of later holographic will, destroyed animo revocandi, and inconsistent with those of a former will, might be proven by testimony of one witness for purpose of working revocation of such earlier will.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Proceedings by Hattie B. Manion and another to contest the will of Kate W. Bassett, deceased, opposed by Frank Bryson, administrator c. t. a. From a judgment revoking probate of the will, defendant appeals. Affirmed.

J. L. Minnis, Jr., of Long Beach, for appellant.

Meserve & Meserve, of Los Angeles, for respondents.

LAWLOR, J. The decedent, Kate W. Bassett, died on the 11th day of November, 1923, in the county of Los Angeles, being a resident of said county and leaving estate therein. Shortly thereafter a will bearing date December 11, 1912, presumably an attested will, was duly admitted to probate, and letters of administration with the will annexed issued to Frank Bryson, public administrator of Los Angeles county. By said will the testatrix left her estate and property to one Nancy Willis. Within a year after the admission to probate of said will, Hattie B. Manion and Emma A. Jones, sisters of the decedent, instituted this proceeding to contest said will, to revoke the probate thereof, and to probate a destroyed holographic will bearing date July 20, 1922, executed by the decedent as required by law, under the terms of which she devised all of her estate to her sister, Hattie B. Manion. The contestants alleged in their petition and their opposition to probate that said holographic will was the last will and testament of said decedent; prayed that said holographic will be admitted to probate; that the former order admitting the prior will to probate be annulled and vacated; and that the letters of administration granted thereon be set aside. Probate of the holographic will was denied on the ground that it had been destroyed before the death of said decedent animo revocandi, and that there was but one witness to prove its contents. The earlier will, upon which letters of administration with the will annexed had been issued, however, was adjudged not to be the last will and testament of said decedent, and the order admitting it to probate was thereupon vacated and set aside, and said letters vacated and annulled, the decedent being adjudged to have died intestate; that is to say, the court, in effect, held that, though two witnesses were necessary to establish the contents of the holographic will before it might be admitted to probate, nevertheless its contents could be established by the testimony of a single witness in order to work a revocation of an earlier will by virtue of its provisions being inconsistent therewith.

Frank Bryson, the public administrator and the administrator with the earlier will annexed, prosecutes this appeal from said order and judgment, and urges two points in support of a reversal thereof. We quote:

[1] "Point I. The judgment amounts to a denial of due process of law to appellant as guaranteed by the Constitution of the United States and of the state of California, because it is beside the issues in the case as presented by the pleadings."

Under this point appellant contends, in substance, that the petition of contestants merely alleged that the holographic will was duly executed by said decedent and had never been destroyed or revoked by her, and that it was her last will and testament; that this was the only ground of contest in the case. "The only issue, therefore, in the case was whether said writing was the last will and testament of the deceased, and this issue only could have properly passed into judgment. This was the only controversy between the adversary parties before the court, and was therefore the only controversy of which the court had jurisdiction. * * * Manifestly, the only issue tried by the court and concerning which the parties offered evidence or about which they had an opportunity to be heard was whether said document of July 20, 1922 [the holographic will], was the last will and testament of Kate W. Bassett." It is then contended that the court exceeded its jurisdiction when it further found that the decedent "died intestate and without leaving any last will or testament." And, further, it is contended that, as a conse-

quence, appellant has not had an opportunity to be heard on the issue whether or not the execution of the holographic will, containing provisions inconsistent with the prior will, served to revoke said prior will.

In reply to this point the respondents urge that "much of the argument of counsel for appellant is, apparently, due to a failure to consider respondents' opposition to probate and contest of will. On page 4 of appellant's opening brief he has confused the petition for probate of will and the opposition to probate and contest of will. In their petition for probate of will respondents are affirmatively seeking to have the document dated July 20, 1922, admitted to probate as an holographic will and letters of administration with the will annexed issued to petitioner Hattie B. Manion. In their opposition to probate and contest of will contestants pray that the probate of the will previously admitted to probate and under which appellant was appointed administrator with the will annexed be vacated and set aside, and that it be adjudged and decreed that said will was not the last will and testament of said Kate W. Bassett, deceased. They then pray affirmatively as they pray in their petition that the holographic will set out in their opposition to probate and contest of will be adjudged to be the last will of said deceased, and that said Hattie B. Manion be appointed administratrix with the will annexed of the estate of said deceased. * * * "His [appellant's] conclusion that the only issue in the case was whether said writing was the last will and testament of the deceased and that this issue only could have properly passed into judgment, if valid at all, would be valid only on the theory that the only pleading before the court was respondents' petition. Obviously, the issue before the court on the hearing of respondents' petition for probate of will was whether the writing referred to was the last will and testament of said deceased. When, however, the court was considering the opposition to probate and contest of will, the issue was not merely whether the instrument set out in the second paragraph of contestants' opposition to probate and contest of will was in fact a will, but whether such an instrument had been executed, and whether it was so inconsistent with the prior will, previously admitted to probate, as to, as a matter of law, revoke said will."

We are of the opinion that the trial court had jurisdiction to determine whether or not "Kate W. Bassett died intestate and without leaving any last will or testament," and we will consider under "Point II" the correctness of said finding. The claim of a want of due process is therefore without merit.

[2, 3] "Point II. The document of July 20, 1922, if written and signed by Kate W. Bassett, would not revoke the will of Kate W. Bassett, previously probated."

The appellant discusses In re Johnston's Estate, 188 Cal. 336, 206 P. 628, wherein the court held, in effect, that the contents of a will destroyed animo revocandi, and which contained an express revoking clause, might be proved by less evidence for the purpose of showing a revocation of an earlier will than that required for its admission to probate. It is contended, however, that said case "is not in point, because it dealt with an instrument expressly revoking a previous will." It is urged that "manifestly, a distinction exists between a will or instrument which contains a revoking clause and one which does not. In the former, the intent of the testator to revoke the former will is definitely expressed and instantly executed, whereas, in the latter, the intention at most is a matter of inference and remains executory, because the intentions expressed in the inconsistent will may or may not become effective or executed. Thus, if you execute an express revocation, your intention to revoke the previous will becomes effective instantly, but, if you execute an inconsistent will, your intentions as therein expressed may or may not become effective. Their effectiveness depends entirely on the proof or probate of the inconsistent will."

Respondents in reply cite Estate of Thompson, 185 Cal. 763, 198 P. 795, and Estate of Johnston, supra, and contend that "in the two cases cited, the later will contained an express revoking clause. It does not seem, however, that the rule would be different if the revoking clause was implied rather than expressed." It is well settled that a later will containing provisions inconsistent with an earlier will has the effect of revoking said earlier will so far as inconsistent therewith. Civ. Code, § 1296; Estate of Iburg (Cal. Sup.) 238 P. 74. The wills in the instant case made disposition of all of testatrix's property but to different beneficiaries—they are therefore inconsistent to that extent, and the later revokes the earlier. In other words, the later will contains "provisions wholly inconsistent with the terms of the former will," and therefore revokes it.

The inquiry then reduces itself to this: Does the principle enunciated in Estate of Thompson, supra, and Estate of Johnston, supra, extend to a case where the later will does not include an express revocation of all other wills, but revokes them merely because inconsistent therewith? An examination of Estate of Johnston, supra, will suffice for our present purpose. In that case the testator during his lifetime had executed two wills. The later will contained an express revocation of all former wills. Said later will was destroyed by the testator animo revocandi. On a contest of the probate of the earlier will the question arose whether or not it was

necessary to prove the due execution of the later will by two witnesses for the purpose of working a revocation of the earlier will, or whether or not the testimony of one witness would suffice for this purpose. In determining this question the court declared:

"This question has, however, been recently set at rest by the decision of this court in the case of the Estate of Thompson, supra [185 Cal. 763, 198 P. 795], for, while in that case the court was divided upon the question as to whether evidence less than that required under section 1339 of the Code of Civil Procedure for the proof of a lost or destroyed, but unrevoked, will, namely, that 'of two credible witnesses,' could be permitted to establish and give effect to a revoking clause in such will, the court was in agreement in holding that the due execution of a will which was either proved or presumed to have been destroyed animo revocandi might be proved so as to give effect to its revoking clause by one witness, or, in other words, by the same amount and quality of evidence generally required and held sufficient for the proof of any fact under section 1844 of the Code of Civil Procedure. In the prevailing opinion of the court in Estate of Thompson, supra, Mr. Justice Wilbur thus stated the rule: 'If the will of 1916 had been revoked by cancellation or otherwise, the evidence of one witness to the contents of the will of 1916 would be sufficient to establish that it contained a revoking clause, for section 1297 of the Civil Code declares that the revocation of a revoking will does not revive the first will "unless it appears by the terms of such revocation that it was the intention to revive or give effect to the first will." No doubt can be entertained that where the second testamentary act is revoked, evidence of the contents of the revoked will may be considered to determine the effect of such revocation upon an earlier will still in existence.' In the dissenting opinion in the same case, Mr. Justice Olney states: 'The leading opinion admits that if the will containing the revocation clause is in turn revoked, the revocation is still effective, the instrument cannot be probated, and, if destroyed, two witnesses as to its contents are not required for the purpose of proving the revocation.' * * *

"From the foregoing discussion we conclude that the evidence of the witness Blakely was sufficient, if believed by the trial court, to establish the fact as found by it that the will of the decedent dated April 25, 1918, had been duly executed by him so as to render effective its revoking clause to the extent of revoking all former wills by him made, and that said revoking clause remained in full force and effect as to former wills of the decedent although said later will had been presumptively destroyed by the testator with the intention of revoking same."

[4] In other words, where a later will containing an express revocatory clause is destroyed by the testator animo revocandi, its due execution may be sufficiently proved by one witness so as to render effective said revocatory clause. No reason suggests itself why a different principle should be applied to the instant case where the later will, destroyed by the testatrix animo revocandi, revoked the former will because of its provisions being "wholly inconsistent with the terms of the former will." Merely because it may become necessary in a particular case to prove the entire contents of the later will in order to reveal the inconsistency of the two wills does not, in our opinion, call for the application of a different principle.

Section 1296, Civil Code, reads:

"A prior will is not revoked by a subsequent will, unless the latter contains an express revocation, or provisions wholly inconsistent with the terms of the former will; but in other cases the prior will remains effectual so far as consistent with the provisions of the subsequent will."

Section 1297, Civil Code, declares:

"If, after making a will, the testator duly makes and executes a second will, the destruction, cancellation, or revocation of such second will does not revive the first will, unless it appears by the terms of such revocation that it was the intention to revive and give effect to the first will, or unless, after such destruction, cancellation, or revocation, the first will is duly republished."

[5] It becomes apparent that section 1296, Civil Code, provides two methods by which a prior will may be revoked by a subsequent will, one by an express revocation, and the other where the subsequent will contains provisions wholly inconsistent with the earlier will. Section 1297 then goes on to state that the destruction, cancellation, or revocation of a later will does not revive an earlier will, unless such intention appears by the terms of the revocation, or unless the first will is duly republished. This section announces a rule applicable as well to a case where the later will, destroyed animo revocandi, revoked the earlier will by virtue of its inconsistent provisions as to a case where the later will contained an express revocation of all former wills; that is to say, section 1297 provides, in effect, that, if the later will revokes the earlier will by either method prescribed in the preceding section, then the destruction of said later will does not thereby revive the earlier one. Either method of revocation specified in section 1296 may be said, therefore, to take effect eo instanti without regard to the time of the testator's death. Either method of revocation provided for in section 1296 having the same effect, and the destruction of the later will not reviving the former will, we are of the view that the principle enunciated in the Estate of Johnston, supra, is applicable to the instant case, and the inconsistency of the later holographic will, destroyed animo revocandi, with the earlier will may be properly and sufficiently proven by the testimony of one witness for the purpose of working a revocation of the earlier will.

Though perhaps not necessary to that de-

cision, we adopt, as controlling here, what was said by the court in Estate of Thompson, supra. We quote:

"* * * It is true that the authorities draw a distinction between a will which operated to revoke a former will because inconsistent therewith and a will that contains a revoking clause. This is pointed out in Blackett v. Ziegler, 153 Iowa, 344, 133 N. W. 901, 37 L. R. A. (N. S.) 291, Ann. Cas. 1913E, 115. That case holds that the latter operates eo instanti and that the former only operates in case the will is in effect at the time of death. The court quotes with approval the following from Page on Wills, section 273:

"'In the United States, in the absence of a statute on this subject, the decisions are by no means uniform. The better line of authority made a distinction between the cases where the later will contained an express revocation clause, and where it was merely inconsistent with the earlier will. There seems to have been material distinction, and on good ground, between the state of a former will after a second one merely inconsistent with it, and its state after a second one with a declaration expressly revoking it. In the first case, the only chance for the second to operate in revocation of the first, according to the prevalent theories of the courts, was by its coming to a head as an active will, which it could do only by surviving its author. Being the last expression of the decedent, and at the same time practically inconsistent with the prior one, the intent to repeal the first by it was to be implied. In case, however, of its being recalled by the testator in his lifetime, it could not, on the theory referred to, be taken to have had the effect to do away with its predecessor. Being cut off before having its disposition of property awakened into life, it could have no affirmative operation through its dispositions upon the estate. Where such distinction is recognized, the destruction of a later will inconsistent with an earlier will, but containing no clause of express revocation, revives the first will. Where the second will contains a clause of revocation, it is held in many jurisdictions in the United States, in accordance with the distinctions already given, that the destruction of the second will does not revive the first will.'

"In California, however, this distinction between a revocation by implication and an express revocation cannot well be drawn, for section 1296 of our Civil Code expressly provides that the will is revoked by a subsequent will containing provisions inconsistent with the previous will as well as by a will containing an express clause of revocation, and section 1297 declares the effect of the destruction of the revoking will. If the execution of an inconsistent will operates as a revocation as well as and with equal force as a will containing an express revoking clause, as seems to be declared by section 1296, it would seem to follow, if we are to adopt the view that a lost revoking will may be proved as such by one witness, that the whole of an inconsistent lost will, containing no revoking clause, could be proven by one witness to establish a revocation of an earlier will."

[6] It follows that the dispositive provisions of a later will inconsistent with those of a former will may be proven by the testimony of one witness for the purpose of working a revocation of said earlier will.

The judgment appealed from is hereby affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; SHENK, J.; LENNON, J.

---

196 Cal. 445

CITY OF LOS ANGELES et al. v. SUPERIOR COURT OF LOS ANGELES COUNTY et al. (L. A. 8496.)

(Supreme Court of California. July 18, 1925.)

1. Corporations ⊜517—Complaint held sufficiently verified.

That president of corporation plaintiff stated by deposition that "he had read the foregoing complaint, and knew the contents thereof, and that the facts stated therein are true," while not in precise form of language of Code Civ. Proc. § 446, conformed substantially thereto, and was sufficient to verify complaint, in compliance with section 527, requiring the complaint to be verified in order to form a basis for issue of preliminary injunction.

2. Prohibition ⊜28 — Whether complaint was verified held immaterial, where restraining order supplanted by preliminary injunction.

On application to enjoin enforcement of an injunction pendente lite, allegation that the court was without authority to issue restraining order, as complaint was insufficiently verified, *held* no longer available, where the restraining order was supplanted by a preliminary injunction, based on a verified complaint.

3. Injunction ⊜145—Statutory time for filing affidavits on hearing of order for injunction pendente lite held not to apply on continuance of hearing.

Provision of Code Civ. Proc. § 527, requiring plaintiff receiving a temporary ex parte restraining order, and applying for a preliminary injunction upon notice, to serve his affidavits two days prior to the date first set for hearing, *held* not to apply to an affidavit filed at date of continuance of hearing.

4. Prohibition ⊜28 — Objection to affidavit, filed at continuance of hearing for injunction pendente lite, not considered on application for writ of prohibition.

That trial court considered affidavits filed at date set for continuance of hearing of motion for injunction pendente lite, containing matter part of the original showing, which plaintiffs should have served two days prior to the date first fixed for hearing, was simply error in the exercise of acquired jurisdiction of trial court, which might be corrected upon appeal, but would not be considered upon application to restrain enforcement of injunction.

In Bank.

Prohibition by the City of Los Angeles and another against the Superior Court of Los

Angeles County and another to enjoin enforcement of an order. Writ denied.

Jess E. Stephens, City Atty., and Chas. B. MacCoy, Deputy City Atty., both of Los Angeles, for petitioner City of Los Angeles.

Charles J. Kelly, of Los Angeles, for petitioner Eddie.

Charles H. Mattingley, of Los Angeles, for respondent.

RICHARDS, J. The petitioners herein apply for a writ of prohibition whereby they seek to prevent the respondent superior court of the county of Los Angeles and Hon. F. C. Valentine, one of the judges thereof, from taking any further proceedings in connection with or in the matter of the enforcement of a certain injunction pendente lite issued by said court through the said judge thereof in a certain action entitled Los Angeles Rock & Gravel Corporation, Plaintiff, v. The City of Los Angeles and E. C. Eddie, Defendants, commenced on August 14, 1924, and since pending in said court. The petition sets forth in substance that in the complaint in said action the plaintiff prayed for and was accorded a temporary restraining order, and also prayed for an injunction pendente lite and for a permanent injunction restraining the defendants from doing the acts and things set forth and complained of in said complaint. At the time of issuing said temporary restraining order the said court also issued an order to show cause on the 22d day of August, 1924, in said court, why said temporary restraining order should not be made permanent. The said temporary restraining order and order to show cause were each issued upon the complaint in said action alone, and no affidavits in support of said application for said orders or either of them or of their issuance were presented at the time of the making and issuance thereof, but that on the 19th day of August, 1924, there were served and filed certain affidavits on behalf of said plaintiff and in support of its application for an injunction. On the 22d day of August, 1924, at the hour set for the hearing upon said order to show cause, the defendants in said action served upon the plaintiff and filed in said court their respective demurrers, answers, and counter affidavits in opposition to the plaintiff's said application for an injunction. The plaintiff thereupon requested that its application for an injunction pendente lite be continued to a later date, because of the fact that the counter affidavits of the defendants, which were voluminous, had just been served. The court granted said request, and the hearing upon the plaintiff's application for an injunction was accordingly continued until the 27th day of August, 1924. When said matter came up for hearing in said court on August 27, 1924, the plaintiff served upon the defendants certain further and additional affidavits in support of its said application and in reply, in part, at least, to the counter affidavits which had theretofore been filed by said defendants. When said matter was called for hearing on said last-named day, the defendants objected to the consideration by the court of the plaintiff's said last-mentioned affidavits upon the ground that said affidavits had not been served at least two days prior to such hearing, and also moved to strike said last mentioned affidavits from the files. The defendants also objected to the consideration of said application upon the ground that the plaintiff's complaint had not been verified, as required by statute. The defendants further moved to dismiss and vacate the temporary restraining order and order to show cause upon the ground last stated. The court overruled these several objections of the defendants, and denied their said motions based thereon, and proceeded to hear said matter and to consider all of the affidavits presented therein, and to thereupon order an injunction pendente lite to issue in said cause; and such injunction pendente lite was thereupon issued and is being enforced, and is threatened to be continued in force against the petitioners herein, wherefore they seek this writ. Upon the return to an alternative writ issued herein the plaintiff in said action and the respondent herein has presented an answer and return embracing the entire record and all of the pleadings, motions, and affidavits of the respective parties thereto and the rulings of the court made therein. We are thus placed in a position to fully consider the merits of the application for this writ and the response and opposition thereto.

[1, 2] The first contention of the petitioner herein is that the said court in which said action was pending acquired no jurisdiction to issue or enforce a temporary or other restraining order therein, for the reason that the plaintiff's complaint therein was not verified, as required by the statute. The verification of said complaint was attempted to be made by one H. W. Hawley, who, after deposing therein that he was the president of said corporation plaintiff, proceeded to state that "he has read the foregoing complaint, and knows the contents thereof and that the facts stated therein are true." While this verification does not in precise form or verbiage conform to the language of section 446 of the Code of Civil Procedure, it does substantially conform to the interpretation placed upon that section in the cases of Newman v. Bird, 60 Cal. 372, 375, and Lassen v. Board of Dental Examiners, 24 Cal. App. 767, 770, 142 P. 505. It will therefore be held sufficient to constitute said complaint a verified complaint in compliance with section 527 of the Code of Civil Procedure requiring the complaint to be verified in order to form a basis for the issuance of a

preliminary injunction. This point, however, is no longer available to the petitioner herein, for the reason that, even though the temporary restraining order issued by the court was void, because based upon an inadequately verified complaint without affidavits, said temporary restraining order has fulfilled its function and been supplanted by the preliminary injunction issued herein on August 29, 1924, and which was based in part, at least, upon the plaintiff's verified complaint and upon the affidavits served and filed on behalf of the plaintiff on August 19, 1924.

[3] The sole question herein is, therefore, as to the power and jurisdiction of said court to order and issue this latter injunction. A further statement of the facts as disclosed by the record herein will be required in order to a proper determination of this question. Following the order of the court made on August 14, 1924, fixing the date of August 22, 1924, for the hearing upon the plaintiff's application for a preliminary injunction, the plaintiff, on August 19, 1924, filed a supporting affidavit of one H. W. Hawley, president of the plaintiff corporation, purporting to supplement the averments of its complaint as to why the defendants should be enjoined, pending the action, from doing the acts complained of. The plaintiff, having also filed its points and authorities in support of its application at the time of filing its complaint, had thus fully complied with the requirements of the provisions of section 527 of the Code of Civil Procedure, relating to the issuance of temporary restraining orders ex parte; and the court, in fixing the date of August 22, 1924, for the hearing upon the plaintiff's application for an injunction pendente lite, had also acted within the authority granted it by said section. The matter was therefore regularly before the court for hearing upon said last-named day, and the court had jurisdiction to then hear and determine the plaintiff's said application for an injunction pendente lite, or, under certain conditions, also provided for in said section 527 of the Code of Civil Procedure, to continue the hearing thereon to a later date. These conditions are embodied in the further terms of said section, which provide that "the defendant, however, shall be entitled as of course to one continuance for a reasonable period if he desires it to enable him to meet the application for the preliminary injunction." In this case the defendants did not request or desire such continuance, but in response to the order to show cause, and at the time fixed for the hearing thereon, presented, served, and filed affidavits in opposition to the plaintiff's application for a preliminary injunction. Not having, however, served or filed such affidavits two days prior to said hearing, the further provision of said section of the Code came into play, which entitled the applicant for the preliminary injunction to a continuance of said hearing in order to enable plaintiff to respond to the defendants' said counter affidavits. The trial court had, therefore, jurisdiction to grant the plaintiff's request for such continuance, and hence to make its order fixing August 27, 1924, as the date for hearing the plaintiff's motion for a preliminary injunction; and, having such power, it would also seem clear that under the intendments of said section of the Code it had also power to continue in force the temporary restraining order theretofore issued by it ex parte, to the end that whatever preliminary injunction it might conclude to issue might not be ineffectual. When the matter of the issuance of such preliminary injunction came on for hearing upon August 27, 1924, the plaintiff presented and served and offered for filing its further affidavits in opposition to the counter showing which the defendants had proffered upon the date set for the previous hearing, whereupon the defendants made the several objections to the receipt or consideration thereof and to the hearing itself which are above set forth and which form the basis of its present application for a writ of prohibition. The trial court overruled these objections, and proceeded to hear and consider the matter upon the plaintiff's said verified complaint and upon all of the affidavits then before it. That it did so properly upon the basis of the plaintiff's verified complaint we have already above determined. That it also did so properly upon the basis of its order continuing the matter of said hearing from the date first fixed for such hearing we have also above determined. As to the defendants' objection to such hearing upon the date last set therefor, based upon the fact that the plaintiff had not presented, served, and filed its counter affidavits to the defendants' showing two days before said last-named date of hearing, we find nothing in the statute which so requires. The provision in section 527 of the Code of Civil Procedure, which requires the plaintiff receiving a temporary ex parte restraining order and applying for a preliminary injunction upon notice to serve his affidavits two days prior to the date first set for hearing upon said application, has reference only to such hearing, and the only penalty imposed by said section upon his failure to so serve his said affidavits is the dissolution of the temporary restraining order. When the provisions of the statute have been satisfied, and the trial court has acquired jurisdiction to hear and determine the plaintiff's application for a preliminary injunction upon the day first appointed for such hearing or to continue such hearing to a later date, there is no provision in the statute nor is there any authority to which we have been cited which declares that the court shall lose its jurisdiction over the subject-matter of such hearing for the reasons which are urged by

the petitioners herein. The case of Green v. City of Los Angeles, 65 Cal. App. 237, 223 P. 582, has no application to the facts of this case or to the order or orders of the trial court which form the subject of assault in this proceeding.

[4] It is, however, contended by the petitioners herein that the affidavits which the plaintiff finally filed upon August 27, 1924, were not in fact counter affidavits to the showing in opposition to the granting of said preliminary injunction presented, served, and filed by the defendant upon the previous date, but were part of the original showing which the plaintiff should have served and filed two days prior to the date first fixed for such hearing, and hence that such affidavits should not have been considered by the trial court in determining to issue such preliminary injunction. An examination of such affidavits does not bear out this latter construction, since some considerable portions thereof at least consist in statements in rebuttal of the defendants' said counter showing; and, even if it were true that some portions of the plaintiff's said affidavits consisted of matter which should have been earlier presented, and if it also be true that the trial court considered such portions thereof in concluding to grant the preliminary injunction, its action in so doing would be simply error in the exercise of its acquired jurisdiction which might be corrected upon appeal, but which cannot be considered upon this application.

The application for a writ of prohibition is denied.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; WASTE, J.; LAWLOR, J.; HOUSER, Judge pro tem.

---

196 Cal. 557, 575

ROBERTS v. SECURITY TRUST & SAVINGS BANK et al. (L. A. 7909.)

(Supreme Court of California. July 31, 1925.)

1. Principal and surety ⟸59—Building contract and bond to be read together to determine scope of surety's undertaking.

Where building contract by reference was made a part of contractor's bond, two instruments must be read together in order to determine scope of surety's undertaking.

2. Principal and surety ⟸59—Surety's liability not extended by implication beyond express terms of his contract.

Surety's liability is not to be extended by implication beyond express terms of his contract, in view of Civ. Code, §§ 2819, 2836, 2840.

3. Principal and surety ⟸99 — Any change made in requirements of undertaking in matters of substance, without consent of surety, extinguishes his liability.

When surety's undertaking is to assure performance of an existing contract, if any change is made in its requirements in matters of substance without consent of surety, his liability is extinguished.

4. Principal and surety ⟸100(1)—Rule that any change in matters of substance without consent of surety extinguishes his liability applies to building contracts.

Rule that any change made in existing contract in matters of substance, without consent of surety, extinguishes his liability, applies to building contracts as well as to ordinary transactions.

5. Principal and surety ⟸59—Bond may incorporate by reference other contracts; bond and contract read together when construed.

A bond may incorporate by reference, expressly made thereto, other contracts, in which case bond and contract should be read together and construed fairly and reasonably as a whole according to intention of parties, in view of Civ. Code, § 2837.

6. Principal and surety ⟸100(4)—Alterations made in building contract binding on surety, unless so extensive as to amount to a departure from original contract.

Under building contract authorizing owner to make changes from the contract plans or specifications without voiding the contract, alterations and changes made pursuant to such agreement are binding on contractor's surety, unless so extensive and material as to amount to a departure from the original contract rather than a permissible modification of its details.

7. Principal and surety ⟸100(4) — Surety equally bound with contractor to turn over building free from liens, if changes made are within scope of contract.

Where building contract is referred to in bond, and it provides that contractor shall faithfully keep its covenants and agreements and turn over building free and clear of liens accruing by reason of work described in contract or any modification thereof, surety must be *held* to have agreed that it will be equally bound in case changes authorized by building contract are made.

8. Principal and surety ⟸100(4)—Surety held to have subscribed to provision authorizing owner to make alterations in plans and specifications of building.

Where building contract provides that owner may make alterations in plans, materials, or workmanship without invalidating contract, and that, if such alterations involve increased or diminished expense or require additional time to complete the building, a proper addition to or reduction of the contract price shall be made, and a reasonable amount of time added, such provision is one of the covenants to which surety will be held to have subscribed and bound itself.

9. Principal and surety ⟸100(4)—Surety not discharged from liability on contractor's bond by failure of owner and contractor to agree on value of extra work, materials, and delays.

Where building contract authorized alterations and changes during construction, and bond was conditioned on performance of con-

tract or any modification thereof, failure of owner and contractor to agree in advance on value of extra work and materials, and to provide in writing for delays as required by the contract, did not of itself work an absolute release of surety from its liability on bond.

10. Principal and surety ⟸100(1)—Surety on contractor's bond not released from liability by failure of owner and contractor to comply with contract.

Failure of owner and contractor to comply with building contract, providing that no work should be considered as extra unless a separate estimate in writing therefor should be submitted by contractor to supervising architect, and his signature obtained before its commencement, *held* not to release surety on contractor's bond from liability, where it did not appear that it was prejudiced by failure to obtain agreement in advance.

11. Contracts ⟸210—Contractor held to have waived any right to claim an extension on account of being required to do extra work.

Under building contract providing that, should contractor be delayed in completion of the work by default of owner or architect, time fixed for completion should be extended, but that no allowance should be made unless a claim therefor was presented in writing to architect within 24 hours, failure of contractor to invoke benefit of such clause for delays occasioned by owner's request for extra work waived any right to subsequently claim an extension.

12. Contracts ⟸287(2) — Architect's certificate on matter in dispute conclusive on parties, where he acted in good faith.

Where building contract provided that any dispute arising thereunder should be settled by architect, and his determination should be final and conclusive, his certificate, duly made on a dispute respecting extent and value of extras furnished at request of owner and contractor's claim of an additional allowance of time to complete work, was conclusive on the parties, where he acted in good faith, and in exercise of a reasonable judgment, and as an impartial arbitrator.

13. Contracts ⟸287(2)—Certificate of architect conclusive on parties to building contract, in absence of fraud or gross mistake amounting to fraud.

Where parties to building contract by its terms authorize architect as arbitrator to determine and certify facts material to a proceeding under the contract, certificate of architect duly made, that fact exists, is conclusive on the parties with respect to thing to be done to which such fact relates, or as to which, under the proceeding, it is to affect the rights of the parties, and can be impeached only for fraud or for gross mistake amounting to fraud.

14. Mechanics' liens ⟸315—Surety held obligated to pay lienholders in full, provided their claims did not exceed penal sum of the bond.

Under bond given by surety to secure payment for labor and materials, and conditioned that contractor should pay all claims against him for such labor or materials, and expressly inuring to benefit of persons who performed labor or furnished material, and Code Civ. Proc. § 1183, giving such persons a right of action on the bond, *held* that judgment in their favor against surety was proper where their claims did not exceed penal sum of the bond, notwithstanding that there remained in hands of owner more than enough of contract price due contractor to fully pay and discharge the liens.

In Bank.

Appeal from Superior Court, Los Angeles County; L. H. Valentine, Judge.

Action by John Roberts, doing business as the John Roberts Company, against the Security Trust & Savings Bank and another, as executors of the last will and testament of Mary H. Spires, deceased, and others, with a cross-complaint by named defendants against plaintiff and codefendants. Judgment for plaintiff, and the United States Fidelity & Guaranty Company, a corporation, and cross-defendant, appeals. Affirmed.

Lawler & Degnan, of Los Angeles, for appellant.

Newlin & Ashburn, of Los Angeles, for Mary H. Spires.

Sheldon Borden, of Los Angeles, for plaintiff, cross-defendant, and respondent John Roberts, doing business as John Roberts Co.

Lawler & Degnan, of Los Angeles, for cross-defendant, appellant, and respondent United States Fidelity & Guaranty Co.

J. P. Chandler, of Los Angeles, for defendant, cross-defendant, and respondent Security Trust & Savings Bank.

G. C. De Garmo and H. B. Cornell, both of Los Angeles, for defendant, cross-defendant, and respondent Spreckels Bros. Commercial Co.

James, Pace & Smith, of Los Angeles, for respondents F. A. Dixon et al.

James, Pace & Smith, of Los Angeles, for defendant, cross-defendant, and respondent K. O. Wetzel Co.

Jones & Weller, of Los Angeles, for defendant, cross-defendant, and respondent Patten & Davies Lumber Co.

G. F. McCulloch, of Los Angeles, for cross-defendant and respondent Hill.

Rufus L. Horton, of Los Angeles, for defendant, cross-defendant, and respondent Hammond Lumber Co.

Clement L. Shinn, of Los Angeles, for defendant, cross-defendant, and respondent W. S. Kline Co.

Richard J. O. Culver, of Los Angeles, for defendant, cross-defendant, and respondent Los Angeles Pressed Brick Co.

Black, Hammack & Black, of Los Angeles, for defendants, cross-defendants, and respondents Blue Diamond Materials Co. and Howard Booher.

WASTE, J. This is a companion appeal to that already considered by the court in Roberts v. Spires et al. (Cal. Sup.) 232 P.

708. It is therefore unnecessary to restate the facts set forth in that opinion. The lien claimants in the case were awarded personal judgments against Roberts, the contractor, and the United States Fidelity & Guaranty Company, his surety upon the materialmen's bond, for the full amounts of their respective claims, aggregating $40,791.41, which were adjudged to be liens upon the property of the owner. The judgment directed that the owner pay this sum of $40,791.41 to the lienholders out of the unpaid balance of the contract price due Roberts, amounting to $52,295.56, and apply the balance of $11,504.15 toward the payment of her judgment in the sum of $36,211.35 for damages against Roberts, caused by his delay in completing the building, and that she have and recover of and from the contractor and his surety the unpaid balance of her damages, amounting to $24,707.20, plus certain costs.

Mrs. Spires appealed from that portion of the judgment which required her to pay the lien claimants in full before deducting the whole amount of her judgment for damages from the amount due the contractor. That judgment was affirmed. Roberts v. Spires, supra.

The United States Fidelity & Guaranty Company, as surety on the contractor's bonds, appealed from the judgment upon the ground that the court erred (1) in awarding to the owner, and against it, any damages caused by the delay of the contractor in completing the building, and (2) in decreeing that the laborers and materialmen have direct judgments against the surety for the respective amounts of their claims, notwithstanding such claims were found to be a lien upon the owner's property, when there remained in the hands of the owner more than enough of the contract price due to the contractor to pay and discharge all of such liens. The surety company, by an amendment to its answer to the cross-complaint of the owner, Mrs. Spires, who sought to recover damages caused by the delay of the contractor in completing the building, took the position that it had been released from all liability to the owner, for the reason that during the progress of the work material provisions of the contract were disregarded and set at naught, in that extra labor and materials were ordered and furnished by the contractor without the knowledge or consent of the surety company, and that no extension of time to be granted to the contractor for completing the work in consequence of such extra work and materials was ever established, as required by the contract. It also alleged that a substantial part of such extra work and materials was ordered and performed without any agreement having been reached between the owner and the contractor as to the amount to be paid therefor, and that the actual value of such extra labor and material was in excess of the sum of $11,000. It was also claimed that delays in the construction of the building, due to and caused by such extra and additional work, exceeded one hundred and twenty days. Roberts, the contractor, in his answer to the cross-complaint of the owner, also alleged that he was delayed in the completion of his contract by extra and additional work required and ordered by the owner, but that the provisions of the contract invoked by appellant were waived by the owner and himself.

At the trial Roberts and appellant each sought to introduce evidence of the delay in the completion of the building, resulting from and necessitated by the performance of extra and additional work, beyond the time originally required by the contract. The owner objected, and the court sustained the objection. The contractor is not here on appeal, and we need consider the ruling of the court only in its effect on the cause of the surety. As to it, the objection to the introduction of the evidence was twofold: First, that the contractor and the owner had waived certain of the contract requirements; and, second, that the condition of the undertaking given by the surety company constituted an assent in advance to a departure from the terms of the building agreement, for the reason that the bond, by its terms, guaranteed the provisions of the contract, "or any modification thereof." Both views were adopted by the trial court. It construed the contract together with the bond, and held that the surety for the contractor must be deemed to have assented to a provision in the contract that, should the owner at any time during the progress of the work request any alterations, deviations, additions, or omissions from the contract, she should be at liberty to make such change or changes without in any way affecting or making void its terms. As a result of the court's view, the judgment against the appellant surety company followed.

[1] The faithful performance bond executed by the appellant refers to the contract between Mrs. Spires, as owner, and Roberts, as contractor, and briefly describes the work to be done to complete the building in accordance with the plans and specifications "referred to in said contract, to which contract reference is" had. The contract by reference having been made a part of the bond, the two instruments must be read together in order to determine the scope of appellant's undertaking. Smith v. Molleson, 148 N. Y. 241, 246, 42 N. E. 669, 671. In consideration of the letting of the contract by Mrs. Spires to Roberts, appellant is, by the terms of the bond, held and firmly bound unto the owner in the sum of $47,500, or 25 per cent. of the contract price. The condition of the obligation is that, if the contractor shall well and faithfully keep and perform all of the cove-

nants and agreements of the contract by him to be kept and performed, and shall turn over and deliver the structure according to the contract, free from all liens that may be filed or asserted by any and all persons who perform labor upon, or furnish materials to be used in, the work described in the contract, or in any modification thereof, and shall save and hold harmless the owner from any and all loss or damage arising out of the failure of the contractor to fulfill his contract, then the obligation to be void; otherwise to remain in full force and effect. There is a provision in the contract that, should the owner at any time during the progress of the work require any alteration, deviation, addition to, or omission from, the contract, plans or specifications, she should have the right and power to make such change or changes, and the same should "in no way injuriously affect or make void the contract," but the difference for work omitted should be deducted from the amount of the contract by a fair and reasonable valuation, and for additional work required, the amount, based upon the market value of labor and material, should be agreed upon before commencing such additions, which agreement should state also the extension of time, if any, which was to be granted the contractor by reason thereof.

The trial court found that, during the progress of the work, labor and material, in addition to that required by the contract, plans and specifications, were ordered by the owner and furnished by the contractor, a large portion of which was ordered and furnished without any agreement being entered into establishing the amount thereof before the additional work was commenced, and without any agreement fixing the extension of time which should be granted the contractor by reason of such extra construction. These findings furnish the basis for the first contention made by the appellant, which is that no judgment should have been awarded against it for the default of the contractor in not completing the building on time, for the reason, it contends, that without its consent the original obligation of its principal, the contractor, was altered in a material respect, whereby it was exonerated from all liability. It relies upon the rule of strictissimi juris, relating to the obligation of sureties, found in sections 2819 and 2840 of the Civil Code.

[2-4] No principle of law is perhaps better settled than that the liability of a surety is not to be extended by implication beyond the express terms of his contract. Civ. Code, § 2836. It is also the law that, when the undertaking is to assure the performance of an existing contract, if any change is made in its requirements in matters of substance without the consent of the surety, his liability is extinguished. United States v. Freel, 186 U. S. 309, 316, 22 S. Ct. 875, 46 L. Ed. 1177. The rule applies to building contracts, as to ordinary transactions, and in Wolf v. Ætna Indemnity Co., 163 Cal. 597, 605, 126 P. 470, 473, this court said:

"It may be conceded that material changes in the plans and specifications not expressly authorized by the contract, or material changes authorized by the contract, made by the parties without following a particular method prescribed therefor by the contract, made without the knowledge or consent of the surety, would operate to discharge the surety on the bond of the contractor."

See, also, Tally v. Parsons, 131 Cal. 516, 63 P. 833. The authority most strongly relied on by the appellant is the decision of this court in First Congregational Church of Christ v. Lowrey, 175 Cal. 124, 165 P. 440. The contract between the owner and the contractor in that case made provision for alterations, deviations, additions, or omissions in the work to be done, and provided that the reasonable value should be added to or deducted from the contract price, "provided, however, that the character and valuation of any or all of said changes, omissions, or extra work should be agreed upon and fixed in writing, signed by the owner and the said contractor prior to the commencement of the work of making such alterations, deviations additions or omissions." The contractor abandoned his contract, and the owner brought an action against him and his sureties to recover the amount of damages which it alleged it sustained by reason of the failure to complete the contract. The trial court found that certain alterations and omissions were made and agreed to between the owner and the contractor, amounting to $577.25. The character and value of these changes and extra work were agreed upon by the owner and contractor, but were not agreed upon and fixed in writing prior to the commencement of the work, or at any time; but the court found that none of the alterations, deviations, or omissions was detrimental to the interest of the surety, and did not materially alter the terms or conditions of the contract or bond. Judgment was entered for the owner, and the surety appealed. This court held that the alterations, changes, and omissions were material, and that the case was controlled by section 2819 of the Civil Code, which provides that a guarantor "is exonerated * * * if by any act of the creditor, without the consent of the guarantor, the original obligation of the principal is altered in any respect," and by section 2840 of the same Code, which applies the rule to sureties. The court said (page 126 [165 P. 441]):

"Our decisions construing these sections uniformly hold that if there has been such a change in the contract in any (material) respect, the inquiry there ends, and the guarantor is exonerated, and that it is not a subject of inquiry

whether the alteration has or has not been to his injury."

Our present view is that the decision in First Congregational Church of Christ v. Lowrey, supra, is correct as a general statement of an abstract proposition of law, but that it cannot be properly held to be decisive of the present controversy. The decision fails to take into consideration other well-established principles of law that have a material bearing on the liability of sureties undertaking to guarantee the performance of contracts for the erection of buildings, wherein provision is made for modifications or for changes as the work progresses, and entirely fails to note the distinction between material changes in the contract or in the work to be performed, and mere departures from the terms of the contract relating to the method of procedure or performance in the manner of carrying out the contract. For these reasons we do not consider the opinion a final authority on the question now here. It was for that reason also that we were impelled to grant a rehearing in this case following our first decision, in which we rested our conclusion primarily on the Lowrey Case. The contentions now advanced by the respondents were not considered or referred to in the earlier decision.

[5] Our Civil Code, § 2837, provides that, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. In Sather Banking Co. v. Briggs Co., 138 Cal. 724, 730, 72 P. 352, 354, this court said:

"While it is true that a surety cannot be held beyond the express terms of his contract, yet in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts. Such construction does not mean that words are to be distorted out of their natural meaning, or that, by implication, something can be read into the contract that it will not reasonably bear; but it means that the contract shall be fairly construed with a view to effect the object for which it was given, and to accomplish the purpose for which it was designed. The old rule of strictissimi juris applies only to the extent, that no implication shall be indulged in to impose a burden not clearly inferable from the language of the contract, but does not apply so as to hold that the contract shall not be reasonably interpreted as other contracts are."

A bond may incorporate, by reference expressly made thereto, other contracts, in which case the bond and the contract should be read together and construed fairly and reasonably as a whole according to the intention of the parties. Callan v. Empire State Surety Co., 20 Cal. App. 483, 486, 129 P. 978, 981; Smith v. Molleson, supra. Therefore, in interpreting the language of the undertaking for the purpose of gathering its scope, or the measure of the liability of the sureties, we must do so by treating or viewing the contract and the undertaking as completing an indivisible contract. In other words, we must, in order to ascertain the nature and extent of the liability to which the sureties have bound themselves, examine the language of the undertaking by the light of the agreement; faithful performance of the terms of which it guarantees (W. P. Fuller & Co. v. Alturas School District, 28 Cal. App. 609, 612, 153 P. 743), or, as was said by this court, the extent of the surety's liability must be gathered from the language used when read in the light of the circumstances attending the transaction (Hollenbeck-Bush, etc., Co. v. Amweg, 177 Cal. 159, 162, 170 P. 148).

[6-8] The trial court here found that it was not true the additional work was ordered or performed without the knowledge or consent of the appellant, but that it had notice and knowledge of the changes and alterations by reason of the provisions in the contract and undertaking, which amounted "to advance consent of said surety to the said changes and alterations." This finding is based on the provision of the contract, supra, that, should the owner at any time during the progress of the work require any alteration, deviation, addition to, or omission from the contract, plans, or specifications, she should have the right and power to make such change or changes and the same should in no way injuriously affect or make void the contract. The court also found that the provision in the contract requiring the value of extra labor and material and the extension of time, if any, to be granted, to be reduced to writing before the work was done or materials furnished, was waived by the owner, the contractor and the architect. Provisions in building contracts similar in language and in effect have been frequently construed by the courts. The rule seems to be thoroughly well established that where alterations and changes are made pursuant to such agreement they are binding upon the surety unless they are so extensive and material as to amount to a departure from the original contract rather than a permissible modification of its details. Equitable Surety Co. v. McMillan, 234 U. S. 448, 457, 34 S. Ct. 803, 58 L. Ed. 1394. It appears to be equally well established that, where a building contract is referred to in the bond, and one of its provisions is that the contractor shall well and faithfully keep its covenants and agreements and turn over the building free and clear of liens accruing by reason of the work described in the contract or any modification thereof, the surety must be held to have agreed that it will be equally bound in case changes are made within the scope of the provisions of the contract referred to. People's Lumber Co. v. Gillard, 136 Cal. 55, 61, 68 P. 576. Where the contract provides that the owner may make or require to be made any alterations,

additions, omissions, or substitutions in the plans, materials, or workmanship he may desire without invalidating the contract, and further provides that, if such alterations and deviations from the plans and specifications involve increased or diminished expense and require additional time to complete the building, a proper addition to or reduction of the contract price shall be made, and a reasonable amount of time be added for the completion of the building, such provision is one of the covenants to which a surety company will be held to have subscribed and bound itself. Dunne Investment Co. v. Empire State Surety Co., 27 Cal. App. 208, 219, 150 P. 405, 411; City of Kennett v. Katz Const. Co., 273 Mo. 279, 202 S. W. 558, 563; Hiller v. Daman, 183 Mo. App. 315, 166 S. W. 869.

[9] There is no express requirement in the contract here under consideration that the surety for the contractor should be consulted, or its express consent obtained, for the making of any alterations or modifications or changes in the plans or specifications or in the contract for the building. It agreed in advance to the making of such changes, with the proviso inserted that the cost thereof, and any delay occasioned the contractor thereby, should be fixed and determined before any extra work was done. The first question that presents itself, then, in this case is, Did the failure of the owner and the contractor to agree upon these matters, as required by the contract, of itself work a release of the surety on the contractor's bond? We are of opinion that it did not. Callan v. Empire State Surety Co., supra. The appellant stood as guarantor for the faithful performance of the building contract, or any modification thereof. It consented in advance to the making of alterations, deviations, additions, or omissions during the construction, with the understanding that the same should in no way injuriously affect or make void the contract. We are not now dealing with an alteration of the contract for the performance of which the appellant became surety. About the most that can be said is that we are considering a departure from or a violation by the parties of certain provisions relating to the method of procedure during the performance of the contract. Smith v. Molleson, supra; Hustace v. Davis, 23 Haw. 606. In this last case it was said (page 612):

"Courts have properly drawn a distinction between changes in the contract or in the work to be performed, and a departure from the terms of the contract relating to the method of procedure or performance in the manner of carrying out the contract. As to the latter, deviations will not result in the release of the surety unless they tend to prejudice his rights."

The rule seems to be quite concisely stated in Martin v. Whites, 128 Mo. App. 117, 106 S. W. 608, where, in discussing the rule that the liability of a surety is strictissimi juris, and that an alteration or change in the terms of the contract by the principal parties without the consent of the surety will operate to release him, the court said (page 123 [106 S. W. 609]):

"There is a marked distinction, however, between a case where the identity of the surety's contract has been destroyed without his consent and a case where there has been merely an immaterial deviation in performance from its terms without any implied or express agreement between the parties adding to or deducting from the original terms. The principle above referred to is entirely without influence under the circumstances mentioned, when there has been a mere permissive deviation in acts and omissions with respect to the performance of the contract. Now, in such cases, the matter of the surety's liability or nonliability turns upon the question as to whether or not the deviations by the owner or obligee are material to the surety's risk. The sum and substance of the entire adjudicated law upon this subject is, we believe, that whenever a creditor does an act, whereby injury or loss or liability to loss or increase of risk accrues to the surety without his assent, the surety is entitled, by reason thereof, to be discharged. In accord with this doctrine, it has frequently been adjudged in building cases that in the matter of acts and omissions with respect to the performance of the contract assured, mere immaterial variations and insubstantial deviations which do not, in any manner, prejudice the right or encroach upon the liability of the surety, will be insufficient to operate a discharge."

See, also, School District v. United States F. & G. Co., 96 Kan. 499, 152 P. 668, 670.

An interesting note on the subject we are now considering is to be found in 16 Ann. Cas. 348, wherein the writer declares that the reason for the above rule is based upon the doctrine of prior consent by the surety. It is held that the stipulations permitting alterations constitute consent in advance on the part of the surety to such alterations as are within the terms of the stipulations. It has become a common practice, the writer continues, for the parties to a working contract, when stipulating for alterations, to provide that such changes shall be made only on written agreement of the parties, or that the parties shall agree upon the cost thereof before they shall be made. When a material alteration is made without the observance of such formalities, the question arises whether the sureties are discharged. The authorities are not agreed on the subject. In some jurisdictions it is held that a failure to observe such formalities will discharge the surety. A contrary doctrine is adhered to in other jurisdictions, where it is held that such formalities are solely for the benefit of the owners and contractors, and may be waived by them without releasing the surety. The authorities holding the divergent views on the subject are collated in the note mentioned. We therefore deem it unnecessary to cite them here. We are of the view, notwithstanding

anything in the former decision of the court, that we are in accord with the better rule, and the weight of authority, in holding that the failure of the owner and the contractor in this case to agree in advance on the value of extra work and materials, and to provide in writing for delays, as required by the contract, did not, in and of itself, work an absolute release of the appellant from its liability on the contractor's bond. See Siegel v. Hechler, 181 Cal. 187, 190, 183 P. 664.

[10] The conclusion we have reached brings us to a consideration of the question whether or not the failure of the owner and the contractor to observe the formalities relating to extra work and materials resulted in such extensive and material alterations as to amount to a departure from the original building contract, rather than a permissible modification of its details. The building contract provides that no work should be considered as extra unless a separate estimate in writing therefor should be submitted by the contractor to the supervising architect, and his signature obtained thereto before its commencement. According to the evidence, Roberts, the contractor, was content in almost every case to accept the oral direction of the owner's architect, or her building superintendent, in the matter of changes, alterations, or omissions, and in regard to extra work and materials. Such waiver of the written agreement concerning those matters did not in any way change the liability of the surety. As a practical matter, it appears from the evidence and the findings that appellant was not prejudiced by the failure, in some instances, to obtain the agreement in advance. The contractor was allowed and received a fair and reasonable compensation for all items of extra work. It is not contended, as we understand the record, that the cost to the owner, or the burden placed on the contractor, was any greater or any less by reason of the failure to observe the formalities concerning cost and delays, if any, than it would have been had those matters been reduced to writing. Consequently the liability of the surety was just the same as though all the formalities had been strictly observed. Grafton v. Hinkley, 111 Wis. 46, 86 N. W. 859, 863.

[11] There is a further clause in the contract that—

"Should the contractor be obstructed or delayed in the prosecution or completion of work by the act, neglect, delay, or default of the owner, or the architect, * * * then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within 24 hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect, and his decision shall be final."

In the absence of such a clause in the contract, the contractor could no doubt have claimed an extension for delays, if there were any, occasioned by the act of the owner in ordering extra work. Ward v. Haren, 139 Mo. App. 8, 119 S. W. 446, 447. The requirements for extra work were acts of the owner. The failure of the contractor to invoke the benefit of the clause of the contract, in case any delay was occasioned by such act of the owner, operated to waive any right to subsequently claim an extension on account of his being required to do such extra work. Hiller v. Daman, 183 Mo. App. 315, 166 S. W. 869; Wagner Co. v. Cawker, 112 Wis. 532, 88 N. W. 599; Curry v. Olmstead, 26 R. I. 462, 59 A. 392; Ward v. Haren, supra. In Wagner v. Cawker, supra, the contractor sued on his contract. The owners, just as in this case, counterclaimed for damages for delay. In reply, the contractor alleged the delay was occasioned by the owners and their architects, by other contractors, and by changes and alterations made in the building. No claim for such delays was presented, as required by a clause in the contract like the one here. The court held that compliance with the delay clause was a condition precedent to the right of the contractor to claim an extension of time for the completion of the building. It being admitted that the work was not completed within the time limited by the contract, the owners were held entitled to damages for the delay.

[12, 13] Another clause of the contract has a material bearing on the rights of the parties to this controversy. It is provided therein that, should any dispute or controversy arise respecting the true construction or meaning of any of the provisions of the contract, plans, or specifications, or as to what is extra work outside of the contract, or as to any payment to be made thereunder, or any matter or thing to be done or performed thereunder, by either the owner or the contractor, or as to any omission, failure, or neglect on the part of either the owner or contractor, such controversy or dispute shall be determined and decided by the architect, and his determination or decision thereupon shall be final and conclusive. On completion of the building, a controversy arose between the owner and the contractor respecting the extent and value of extras furnished at the request of the owner, and the claim of the contractor that, by reason of his having been compelled to do the extra work, he was entitled to an allowance of additional time, or an extension of the period within which he had contracted to complete the contract. All the matters were referred to the architect for the purpose of procuring a ruling and certificate from him as to the actual facts. The architect filed such a certificate, in which he certified the facts and his conclusions in detail and at length concerning the matters re-

ferred to him. The question of the effect of such a certificate, under the provisions of a contract like the one here, has been considered by this court in a number of cases. It is now well settled that, where the parties to a building contract, by its terms, authorize the architect, as arbiter, to determine and certify facts material to a proceeding under the contract, the certificate of the architect, duly made, that the fact exists, is conclusive upon the parties with respect to the thing to be done, to which such fact relates, or as to which, under the proceeding, it is to affect the rights of the parties. Such certificate can be impeached only for fraud or for gross mistake amounting to fraud. American-Hawaiian Eng. Co. v. Butler, 165 Cal. 497, 513, 133 P. 280, Ann. Cas. 1916C, 44; Connell v. Higgins, 170 Cal. 541, 552, 150 P. 769. In this case the trial court found that the architect acted in good faith, and in the exercise of a fair and reasonable judgment, and as an impartial arbitrator between the owner and the contractor.

In his certificate the architect certified all items of extra work and their reasonable value. Many items claimed by the contractor were found to be included in the original contract. No serious complaint is made here concerning the determination of the architect on those matters. He further found, however, and certified that, beyond one extension of 30 days, which appears to have been given, the contractor was not delayed in the completion of the building by performance of any extras, or by any act, neglect, delay, or default of the owner or the architect, or any other contractor employed by the owner on the work, and also that he was not entitled to have his claim for an extension of time allowed by reason of any alterations, deviations from, additions to, or omissions in, the contract. In view of the binding force of the architect's unimpeached certificate, we conclude that it was not error for the trial court to exclude the evidence by which the appellant sought to show that the delay in the completion of the building resulted from, and was necessitated by, the performance of extra and additional work.

[14] The second point made by appellant on this appeal is that the court should not have entered a decree giving the materialmen and laborers direct judgments against it for the full amounts of their claims, when there remained in the hands of the owner more than enough of the contract price due the contractor to fully pay and discharge the liens. So far as the relation of the lien claimants to the owner was concerned, there being a valid contract, they could only enforce their claims against the land on which the building was situated, and a personal judgment against the owner would have been erroneous. Builders' Supply Depot v. O'Connor, 150 Cal. 265, 267, 88 P. 982, 17 L. R. A. (N. S.) 909, 119 Am. St. Rep. 193, 11 Ann. Cas. 712; Pacific Portland Cement Co. v. Hopkins, 174 Cal. 251, 256, 162 P. 1016. Roberts, the contractor, was personally responsible to the lien claimants, and appellant stood for him. Hammond Lumber Co. v. Willis, 171 Cal. 565, 568, 153 P. 947. The bond given by appellant to secure the payment for labor and materials is conditioned that the contractor shall pay, or cause to be paid, all claims against him for such labor or materials, and is expressly made to inure to the benefit of any and all persons who perform labor upon or furnish materials to be used in the work described in the contract between Roberts and Mrs. Spires, or any modification thereof. By section 1183 of the Code of Civil Procedure, and by the express stipulation in the bond, such persons are given a right of action to recover upon the bond against the contractor and his surety, or either of them, in any suit brought to foreclose liens which may be filed by such persons upon the property of the owner, or in a separate suit brought upon the bond. The claimants may recover in such action, or actions, the value of such labor done or materials furnished, not exceeding, however, in the aggregate the amount of the bond, which in this case was one-half of the contract price for the erection of the building. The obligation of the appellant is therefore to pay the lienholders in full, provided their claims do not exceed the penal sum of the bond, $95,000. Roystone Co. v. Darling, 171 Cal. 526, 543, 154 P. 15. The direct judgment aginst appellant and in favor of the lien cliamants in the aggregate sum of $40,791.41 was therefore proper.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LENNON, J.

On Application for Writ of Supersedeas.

PER CURIAM. In its application for a writ of supersedeas, pending the final determination of this action on appeal, the petitioner admits that, if the judgment as rendered by the trial court is affirmed in toto, no prejudice will be suffered by it. The court has this day handed down its judgment affirming the judgment of the trial court as rendered.

For that reason the writ is denied.

196 Cal. 508

In re BARTON'S ESTATE.

BLAKE et al. v. CLARK et al.

(L. A. 8245.)

(Supreme Court of California. July 29, 1925.)

1. Wills ⊂=423—Findings of jurisdictional facts, supporting order and admitting will to probate, are final adjudications upon those facts for all subsequent stages of administration.

In proceeding for probate of will, heirs of deceased legatee *held* properly precluded from proving, at time of filing administrator's petition for distribution, that at time of testator's death he was a resident of Rhode Island, since fact of residence was determined when will was admitted to probate, and findings of jurisdictional facts supporting order of court admitting will to probate are final adjudications upon those facts for all subsequent stages of administration.

2. Wills ⊂=423—Failure to appear and introduce evidence for purpose of opposing order admitting will to probate held to preclude objection, after adjudication as to residence, that testator was resident of another state.

Though heirs of deceased legatee could not, in proceeding for probate of will, have prevented admission of will to probate, if requisite jurisdictional facts existed, their failure to appear and introduce evidence for purpose of opposing an order admitting will to probate, based upon ground that testator was resident of state, *held* to preclude them from asserting after adjudication as to residence that testator was resident of another state.

3. Descent and distribution ⊂=5—Distribution of personal property is governed by law of testator's domicile, unless a general or special law where property is situated provides that law of domicile shall not govern.

Civ. Code, § 946, construed to mean that distribution of personal property is governed by law of testator's domicile, unless a general or special law where the property is situated provides that the law of the domicile shall not govern.

4. Evidence ⊂=80(1)—Law of foreign state is presumed to be same as law of California.

In proceeding for probate of will, *held*, in absence of evidence to contrary, law of Rhode Island upon question of whether legacies lapse upon death of legatee will be presumed to be similar to law of California. Civ. Code, § 1343.

5. Wills ⊂=436—Operation and effect of wills with respect to bequests of personal property are controlled by the law of testator's domicile.

Operation and effect of wills with respect to bequests of personal property are controlled by the law of the testator's domicile.

6. Wills ⊂=487(1)—Evidence of circumstances surrounding execution of will for purpose of showing that testator intended law of Rhode Island to apply held properly excluded.

In proceeding for probate of will, evidence of circumstances surrounding execution of will for purpose of showing that testator intended the law of Rhode Island to apply *held* properly excluded; Civ. Code, § 1343, preventing lapsing of legacy of deceased legatee only when will provides for disposition of property in the event legatee predeceases testator.

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

Proceeding by Albert Clark and another, administrators with will annexed, for probate of will of Percy R. Barton, deceased. From a decree of the superior court, directing distribution, Raymond H. Blake and another, heirs of a deceased legatee, appeal. Affirmed.

Jos. G. Pfanstiel and Laurence H. Smith, both of San Diego, for appellants.

Hamilton & Lindley and Eugene Daney, all of San Diego, for respondents.

LENNON, J. Petition for the probate of the will of Percy R. Barton, deceased, was presented to the superior court of San Diego county. In admitting the will to probate, the court found, among other things, that Percy R. Barton died September 2, 1922, in San Diego county; that he was a resident of San Diego county at the time of his death; that he left property in said county; and that the document presented was executed as required by law. Administration proceeded without interruption until the filing of the administrator's petition for distribution, when appellants appeared and interposed written objections to the distribution of certain personal property to the residuary legatee. The residuary legatee filed a demurrer to, and moved to dismiss, appellants' objections, and the court sustained the demurrer, and granted the motion to dismiss, "without leave to amend or refile said pleading." A final decree was then entered distributing the property in accordance with the administrator's petition. From this decree the present appeal is taken, and particularly from that part thereof which decrees that appellants are not entitled to receive any portion of decedent's personal property.

The point of contention has its origin in the second paragraph of the will, which reads:

"I give and bequeath two hundred and fifty-five shares of the capital stock of the National City Bank, of the city of New York, state of New York, also ten thousand dollars in cash, to Charles E. Blake, of Barrington, Rhode Island, his heirs and assigns forever."

The legatee named in the above quoted paragraph of the will died prior to the death of the testator, Percy R. Barton, and appellants are the heirs of said legatee, Charles E. Blake. For the purposes of this appeal

it is conceded that the testator was domiciled in the state of Rhode Island at the time he executed the will; that a considerable part of the personal property, bequeathed as mentioned in the above paragraph, was situtated in the state of Rhode Island at the time of the testator's death, and that, according to the law of Rhode Island, the heirs of Charles E. Blake, that is to say, the appellants herein, would be entitled to receive the bequests, whereas, under the California law (Civ. Code, § 1343) the bequests would lapse by reason of the fact that Charles E. Blake predeceased the testator, and the property would become part of the residue.

[1] In the written objections to the petition for distribution, it was alleged, and appellants contend, that they should have been accorded the opportunity of proving that, at the time of his death, the testator was a resident of the state of Rhode Island and not of California. This contention cannot be sustained, because the fact of residence was determined by the court when it admitted the will to probate. It has been repeatedly held that—

"The procedure of this state contemplates in the administration of the estates of deceased persons a series of different proceedings, each of which is, as to the matters embraced within its purview, separate. And an adjudication as to each step in this series is intended to be final in its nature, and not subject to review in a subsequent stage of the administration of the estate. * * * Each can be attacked directly by appeal, or by some motion authorized by law for the purpose, or, perhaps, by bill in equity, but an attack made in a different proceeding in the same estate would clearly be collateral." Estate of Davis, 151 Cal. 318, 86 P. 183, 90 P. 711, 121 Am. St. Rep. 105; Irwin v. Scriber, 18 Cal. 499; Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of Parsons (Cal. Sup.) 237 P. 744.

Appellants seek to distinguish these cases upon the ground that attempt is not being made to attack the probate of the will, but merely to raise the question of the residence of the testator at the time of his death for the purpose of ascertaining the construction to be given the will. However, the fact of residence was a jurisdictional fact upon which the order of the court admitting the will to probate was made and based. Unless set aside upon direct appeal, findings of jurisdictional facts supporting such an order are final adjudications upon those facts for all subsequent stages of the administration proceedings, and are as conclusive as the order admitting the will to probate. Estate of Relph, 185 Cal. 605, 198 P. 639.

Appellants also point to the fact that they could not have successfully objected to the admission of the will to probate for the reason that, even though decedent was not a resident of this state, the court was warranted in admitting the will to probate in San Diego county upon the ground that decedent died in that county, leaving estate therein. Code Civ. Proc. § 1294, subd. 2. It is therefore urged that this is appellants' first opportunity to present evidence concerning the testator's residence. While it is true that appellants could not have prevented the admission of the will to probate in San Diego county if the requisite jurisdictional facts existed, nevertheless, appellants were privileged to appear and introduce evidence for the purpose of opposing an order admitting the will to probate based upon the ground that the testator was a resident of the county of San Diego and state of California. Having failed to do so, the adjudication as to residence, made after due notice and hearing of evidence, is conclusive upon them in the present proceeding.

Then, so appellants contend, notwithstanding that it must be regarded as an established fact that the testator was a resident of California at the time of his death, the law of Rhode Island governs and controls the disposition of that portion of the personal property, described in the paragraph above quoted, which is physically within the state of Rhode Island.

[2] In answer to this contention it may be stated that, where a testator leaves personal property situated in a state other than that of his domicile at the time of his death, it is a clearly established general rule that the disposition of such property is governed by the law of the state of domicile. This is so, not because the law of the state of domicile operates of its own force in the state where the personal property is situtated, but because, as a matter of comity, the latter state adopts, as part of its own law, the law of the state of the domicile of the testator, and permits it to govern the property in certain particulars. The operation of this general rule of law is explained in Whitney v. Dodge, 105 Cal. 192, 38 P. 636, as follows:

"Of course, the law of any one state or nation does not ex proprio vigore extend beyond its own territory; and any state would have the rightful power to provide that the rule above stated should not prevail within its jurisdiction. But the rule is part of the general law of every state in which it has not been abrogated either by express legislative language or the enactment of statutes which work such abrogation by necessary implication. In the absence of such abrogation the rule is not to be considered as imposed by foreign power upon the state in which it is invoked, but as part of the law of such state."

This rule is embodied in section 946 of the Civil Code which provides:

"If there is no law to the contrary, in the place where personal property is situated, it is deemed to follow the person of its owner, and is governed by the law of his domicile."

[3] Appellants seek to construe this section to mean that, since the law of Rhode

Island concerning the lapsing of legacies is contrary to the California law, the California law does not govern. However, such is clearly not the import of the language above quoted, and is not the construction which has heretofore been accorded it in this state. To construe this section as appellants suggest, namely, that no law of the domicile of the owner is applicable to personal property if there is a contrary law in the place where the property is situated, would be an unwarranted interpretation of its language. The obvious meaning of the statute is that personal property is governed by the law of the domicile of its owner, unless a general or specific law where the property is situated provides that the law of the domicile shall not govern. Thus, in Estate of Lathrop, 165 Cal. 243, 131 P. 752, the court had under consideration an attempted disposition of personal property situated in California which was valid in the state of the testator's domicile but void in California, because in violation of section 1313 of the Civil Code. The court declined to apply the law of the domicile, because there is a positive law in California (Civ. Code, § 1285) to the effect that the law of the domicile of the owner shall not operate when the facts come within the provisions of section 1313 of the Civil Code.

[4] Applying section 946, Civil Code, to the present situation, the important point is, not whether the law of Rhode Island concerning the lapsing of legacies is contrary to the California law, but whether there is any law of Rhode Island to the effect that the law of the domicile of the testator concerning lapsed legacies shall not apply to personal property situated within the state of Rhode Island. In the absence of evidence, it must be presumed that the law of Rhode Island upon this point is similar to the law of California, and, according to the California law, the law of the domicile of the testator controls. Estate of Apple, 66 Cal. 432, 6 P. 7; Collins v. Maude, 144 Cal. 294, 77 P. 945; Whitney v. Dodge, supra; Estate of Lathrop, supra. See, also, Estate of Randall, 230 P. 445.

[5] It is urged by appellants that, even if the law of the domicile does control, it is the domicile at the time of the execution of the will, and not that at the time of death. This suggestion is based upon the argument that the intent of the testator should be considered, and that it is reasonable to assume that the expression of testamentary intent was influenced by the law in existence at the place where the will was made.

It is unnecessary to discuss what law would be applied if the question of the construction or interpretation of the will were before the court, for no such point is here presented. Suffice it to say that it has been expressly held in this state, in Estate of Sutro, 139 Cal. 87, 72 P. 827, that section 1343 of the Civil Code, concerning the lapsing of legacies, "contains nothing which aids, or was intended to aid, in the construction of a will; it provides that a legacy given in apt words, and leaving no room for the play of interpretation, shall lapse if the legatee dies before the testator." In other words, section 1343, Civil Code, does not attempt to provide a method of arriving at the testator's intent, but establishes a positive law for the disposition of property. Likewise, the Rhode Island law pleaded by appellants does not purport to interpret the language of the will. Both statutes are rules of substantive law concerning the transfer of property of a decedent upon the happening of an event beyond the decedent's control. As in the case of other laws concerning the operation and effect of wills and as in the case of laws governing the validity and revocation of wills, it is the law of the domicile at the time of death that applies, at least, in the case of bequests of personal property. In Alexander on Wills, vol. 1, p. 345, the law is stated as follows:

"If a testator, subsequent to making a testamentary disposition of personal property, removes to a different state, or country, and becomes domiciled there, in the event of his death his will is controlled, as to personalty, by the laws of his last domicile. Should different laws prevail and the will fail to comply with the requirements of the law of the last domicile of the testator, such change of domicile would, in effect, be a revocation of the bequests, since the personal property could not pass under the instrument," citing In re Coburn's Will, 9 Misc. Rep. 437, 30 N. Y. S. 383; Irwin's Appeal, 33 Conn. 128; Matter of Braithwaite, 19 Abb. N. C. (N. Y.) 113.

See, also, Estate of Patterson, 64 Cal. App. 643, 222 P. 374.

[6] Finally, appellants point to the fact that section 1343, Civil Code, provides that a legacy shall not lapse, if "an intention appears to substitute some other in his place," and contend that they should have been permitted to introduce evidence of the circumstances surrounding the execution of the will for the purpose of showing that the testator intended the law of Rhode Island to apply. However, the "intention" mentioned is not the intention of the testator as to whether or not section 1343 shall apply to his will, for section 1343 applies, regardless of the testator's wishes. The application of the section results in the lapse of the legacy, unless the testator prevents the lapse by inserting a provision for the disposition of the property in the event that the legatee predeceases him. As stated in Estate of Sutro, supra, "Under the Code, the only way in which he could have made such intention appear—'clearly', or at all—would have been by an express substitution of some other person" to take the place of Charles

E. Blake in the event of his death. The intention of the testator expressed in the will was to make a testamentary disposition to Charles E. Blake—nothing more or less. It follows that the decree must be, and it is hereby affirmed.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; LAWLOR, J.

---

196 Cal. 585

SILVERMAN v. THOMPSON, Superior Judge. (L. A. 8538.)

(Supreme Court of California. July 31, 1925.)

Exceptions, bill of ⊂=42—Plaintiff held to have waived objection to settlement of bill of exceptions, because of belated service.

Plaintiff waived any objection to settlement of bill of exceptions, because of its service subsequent to time allowed by law, where he not only acknowledged service and receipt of copy of proposed bill, but subsequently and without any reservation of his right of objection, procured from trial court an order extending time within which he might prepare and serve proposed amendment to bill.

In Bank.

Application by Herman Silverman for writ of mandate to be directed to Ira F. Thompson, Judge of the Superior Court of Los Angeles County, to compel settlement of a bill of exceptions. Writ granted.

James, Pace & Smith, Paul E. Younkin, and Troy Pace, all of Los Angeles, for petitioner.

Henry O. Wackerbarth, of Los Angeles, for respondent.

LAWLOR, J. The petition shows that on January 18, 1922, an action entitled M. Levinson v. Herman Silverman was filed in the superior court of Los Angeles county, wherein the plaintiff sought to recover $5,150, with interest, as a balance alleged to be due the plaintiff under a contract assigned to him; that judgment was entered for the plaintiff on May 5, 1924, for $6,768.92; that notice of entry of judgment was served on the attorney for the defendant May 7, 1924; that on May 15, 1924, the defendant served on the plaintiff and filed a notice of intention to move for a new trial; that on June 25, 1924, the plaintiff was served with notice by the defendant that said motion for new trial would be heard on July 3, 1924; that said motion was heard on the date noticed therefor and that the court, on July 5, 1924, in the absence of the parties and their counsel, made its order denying said motion for new trial and that the clerk entered the order on July 9, 1924, nunc pro tunc as of July 5, 1924; that no notice of the trial court's disposition of the motion was ever served on defendant or his counsel; that on August 6, 1924, the defendant made a substitution of attorneys; that on said latter date defendant served on the plaintiff a notice of appeal to the Supreme Court; that on October 20, 1924, the defendant served on plaintiff a draft of a proposed bill of exceptions; that plaintiff's counsel acknowledged service and receipt of a copy on the original thereof without any objection or reservation of a right to object to the settlement of said proposed bill of exceptions by reason of delay in the service thereof; that on October 24, 1924, the plaintiff served and filed in the Supreme Court a notice of motion to dismiss the appeal of defendant; that said notice contained several grounds upon which the motion was to be made, none, however, being on the ground that said bill of exceptions had not been seasonably presented or proposed; that on October 29, 1924, during pendency of the motion to dismiss the appeal, the plaintiff applied to the trial court for an order extending time within which the plaintiff might prepare, serve, and file amendments to said bill of exceptions—here, likewise, no reservation being made by the plaintiff of a right to object to any tardiness in the service of said bill of exceptions; that on November 6, 1924, plaintiff's motion to dismiss the appeal was denied by the Supreme Court; that on November 14, 1924, the plaintiff served and filed his objections to the settlement, allowance, and certification of the proposed bill of exceptions, specifying that said bill of exceptions had not been presented within the time or in the manner provided by law, and that it had not been served or presented within 10 days after notice of the trial court's decision denying the defendant's motion for a new trial, nor within 10 days after the determination by the trial court of defendant's motion for a new trial; that simultaneous with the serving and filing of said objections the plaintiff served and filed his proposed amendments to said bill of exceptions "without waiving such objections to the settlement"; that on November 20, 1924, a response was filed by defendant to said objections; that upon this latter occasion the defendant left with the clerk for the judge of the superior court the proposed bill of exceptions with the proposed amendments thereto, requesting that the judge fix a day for the hearing and settlement thereof; that on December 2, 1924, the matter of the settlement was heard and submitted; that on January 20, 1925, the trial court sustained plaintiff's objections to said proposed bill of exceptions and dismissed the proceedings. The defendant and appellant thereupon made application to this court for the issuance of a writ of mandate to compel said trial judge to settle and certify said bill of exceptions.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Petitioner admits that his proposed bill of exceptions was served on the plaintiff after the expiration of the time allowed therefor, but contends that the latter, by virtue of his conduct in the matter, has waived any objection thereto on that ground. We quote:

"The proposed draft of the bill of exceptions was served upon the plaintiff in the action after the expiration of the time allowed therefor, that is on the 20th day of October, 1924. But service of the proposed bill of exceptions was accepted by plaintiff and a written acknowledgment of receipt of copy of the proposed bill was indorsed and signed upon the original of such draft of the bill, without any objection and without any reservation of right to object to the settlement thereof. Thereafter on the 29th day of October, 1924, and within the 10-day period allowed the adverse party within which to prepare and serve amendments to the proposed bill, the plaintiff without making any objections to the time of serving the proposed bill of exceptions and without reserving any right to make such objections, made application to the court for an order extending plaintiff's time within which to prepare, serve, and file amendments to the proposed bill, filed affidavit in support of such application, and upon such affidavit an order was entered by the presiding judge extending such time by 20 days. * * *

"The motion in this court to dismiss the appeal, so referred to in the affidavit, was based upon the grounds that notice of appeal had not been taken in time, and did not involve at all the question as to whether bill of exceptions had been proposed within time. Apparently affiant had at that time no thought of objecting to the settlement of bill of exceptions as for delay else some statement to that effect would have been contained in the affidavit.

"The rule is well established that delay in the presentation of bill of exceptions may be waived by the adverse party. 2d Cal. Jur. 'Appeal and Error,' § 292; Title Ins. & Tr. Co. v. Cal. Dev. Co., 171 Cal. 173, 152 P. 542; Kramm v. Railway Co., 22 Cal. App. 737, 136 P. 523; Howell v. Pedersen, 41 Cal. App. 45, 181 P. 674; Mulcahy v. Young, 58 Cal. App. 382, 208 P. 321.

"This court has held that the objection to the settlement of a bill of exceptions on account of its being served too late should be made when the party objecting is first required to speak in relation to it; that the objection should be made at the earliest opportunity. And in that connection makes use of this language: 'The party or attorney who seeks to avail himself of a technicality not affecting a substantial right must himself be held to a prompt, consistent, and, exact assertion of such technical right.' Hicks v. Masten, 101 Cal. 651, 654, 36 P. 130, 131.

"It appears from the authorities cited and from an equitable application of the rule, that the plaintiff in the instant case 'was first required to speak' if he desired to object to settlement of the proposed bill as for delay, when the bill was presented to him for acceptance of service, and again, when the application was filed for an extension of time in which to propose amendments to the bill. Upon neither of these occasions was the objection made, and petitioner earnestly contends that a waiver of the right to object was completely made."

In reply respondent contends that—

"Section 650, C. C. P., grants to the respondent 10 days after service of the proposed bill of exceptions within which to propose and serve amendments thereto. Neither this section nor any other section of the code under this subdivision mentions the matter of filing or presenting objections to a proposed bill of exceptions; however, the courts have, in no uncertain terms, laid down the rule regarding the filing or presenting the objections to a proposed bill of excetions.

"As heretofore mentioned, section 650, C. C. P., does not grant time to present objections to a proposed bill of exceptions, but merely grants time for presenting amendments thereto; therefore, we submit that M. Levinson, the respondent in said appeal, should have filed his objections to said proposed bill of exceptions at the time of the filing of the amendments.

"In the case of Hicks v. Masten, 101 Cal. 651-654, 36 P. 130, 131, this court held that objections to the settlement of a proposed bill of exceptions 'should be made [by the person objecting] at the earliest opportunity, or, at least, when the party is first required to speak in relation to it.'

"The holding in the case of Hicks v. Masten, supra, is sustained in the case of Bollinger v. Bollinger, 153 Cal. 190, 94 P. 770.

"Applying the rule laid down by this court in the two cases just mentioned, it was incumbent upon the plaintiff, M. Levinson, to file his objection to the proposed bill of exceptions at the 'earliest opportunity, or, at least, when' he was 'first required to speak in relation to' the proposed bill of exceptions; and the first time that the plaintiff, M. Levinson, was required to speak regarding the defendant's proposed bill of exceptions was when he proposed amendments thereto. The objections to the proposed bill of exceptions accompanied the amendments.

"We submit that the granting of 20 days additional time to file proposed amendments clearly carries with it the right to said additional time to file the objections, for, as heretofore mentioned, the objections should accompany the proposed amendments, as the filing of amendments is the only step which section 650, C. C. P., prescribes for a respondent."

We have reached the conclusion that the plaintiff, M. Levinson, by his conduct waived any objection he might have had to the settlement of the bill because of its service subsequent to the time allowed therefor by law. Not only did he acknowledge service and receipt of a copy of the proposed bill but, subsequently, and without any reservation of his right of objection, he procured from the trial court an order extending the time within which he might prepare and serve proposed amendments to said bill. Under these circumstances which we hold constitute a waiver of said objection, the trial court should have settled and certified the petitioner's bill of exceptions.

The general rule is thus stated in 2 Cal. Juris. p. 562, § 292:

"The rule is well established that delay in the presentation of a bill of exceptions may be waived by the adverse party. As the reason for this rule, it has been said that jurisdiction of the subject-matter does not depend on prompt service of a bill of exceptions, as it does in the case of a notice of intention to move for a new trial. In fact, where the adverse party desires to avail himself of the objection that a bill of exceptions was not presented in time, he must interpose it in the trial court, or he cannot do so on appeal.

"Waiver of delay may be found in participation in proceedings for settlement without raising an objection as to the time of presentation, or in a stipulation for an extension of time (citing in support of the latter part of this statement the case of Kramm v. Stockton Electric R. R. Co., 22 Cal. App. 737 [136 P. 523], hereinafter quoted from). * * * No waiver can be found, however, in the acceptance of service or in a stipulation for a hearing if the party expressly reserves the right to object to the delay."

The text cites Howell v. Pedersen, 41 Cal. App. 45, 181 P. 674, from which we later quote.

Hayne on New Trial and Appeal, § 146, p. 728, states, after examining many California cases, that—

"The results of the foregoing examination of the practice where it is claimed that the statement was not proposed in time may be recapitulated as follows: The party must reserve his objection on account of the delay before proposing amendments to the statement. If he does not, he waives the objection, and cannot afterward raise it in any form. The objection when so reserved is to be urged when the statement is presented for settlement as a reason why it should not be settled. * * *"

In Kramm v. Stockton Electric R. R. Co., supra, at page 744 (136 P. 523), the court, in excess of its jurisdiction, granted several extensions of time, aggregating more than 30 days, within which defendant might prepare and serve its proposed bill of exceptions. The day preceding that on which the time granted by the last order of the court would expire, the plaintiff's attorney stipulated that the defendant might have an additional period within which to prepare and serve its proposed bill. The court subsequently gave an additional four-day extension and defendant within this latter period served its proposed bill of exceptions. Counsel for plaintiff thereafter acknowledged by letter the receipt of a copy of the proposed bill and inclosed a draft of a stipulation extending her time for proposing amendments thereto. This stipulation was signed by defendant's counsel. Subsequently the plaintiff procured an additional 30-day extension from the court within which to prepare and serve her proposed amendments. Later, on the appeal, the plaintiff contended that the bill was not prepared and served within the time required by law. The court declared:

"It is necessarily to be conceded that the court was without power to extend the time for more than 30 days beyond that allowed by law without the consent of the plaintiff. * * * It follows that the several orders made by the court extending the time after the first order was made were void because in excess of the authority of the court. But we think that the stipulation entered into by the attorneys for the plaintiff on the 10th day of November, and after the orders referred to were made by the court, should be held to operate as an acquiescence in and virtually a consent by said attorneys to all the orders theretofore made by the court. * * *

'The allowance by the court of the four days' more time after the bill had been completed within which to serve it upon the attorneys for the plaintiff in Los Angeles without the consent of the latter was clearly in excess of the power of the court; but, as has been shown, the attorneys for the plaintiff not only accepted the bill but requested of and secured from the defendant a stipulation granting to them 30 days within which to prepare and serve their proposed amendments. Thus, we think, the plaintiff waived any right she might otherwise have had to object to the bill on the ground that it was not served within time, and should be held to be estopped from objecting to the allowance and settlement of the bill on that ground. The acceptance of the proposed bill by the plaintiff was, in our judgment, tantamount to the giving of her consent to the order of the court allowing the four days' additional time referred to."

Howell v. Pedersen, 41 Cal. App. 45, 48, 181 P. 674, 675, declares, in part:

"Appellants next contend that the defendants waived their objections to the delay of the plaintiffs in serving their proposed bill of exceptions by requesting and receiving from plaintiffs additional time within which to propose amendments to such bill. It is asserted by appellants that the stipulation requested by defendants extending such time reserved no objection to the time within which the proposed bill of exceptions was served, and that therefore that objection was waived. An examination of the stipulation relied upon discloses that the stipulation provided that the defendants and respondents should have until the 30th day of April 1918, within which to propose any amendments or make any objections to the proposed bill of exceptions. If this language is not sufficiently broad to reserve the right now asserted by defendants and respondents, it is nevertheless true that an intention to waive is an essential element to effect a waiver. * * * The defendants, clearly, never intended to waive their objections and plaintiffs had no reason to believe that they did, for upon the admission of service of the bill, the defendants added the words: 'But objections on account of not being prepared and served on time are preserved for presentation when the bill of exceptions is presented for settlement.' And the stipulation setting the matter down for hearing, which is signed by the attorneys for both parties, concludes with the words: 'This

stipulation is made with the understanding that said defendant does not waive, and does hereby expressly reserve, any and all objections that he may have on account of plaintiffs' proposed bill of exceptions in the above-entitled action not having been prepared and served within the time allowed by law.' Under these facts, it is manifest that there was never any intention to waive this objection, and such objection was not waived either in terms or by implication."

As to the waiver of an objection, see, also, Mulcahy v. Young, 58 Cal. App. 382, 208 P. 321, and cases cited therein.

In the early case of Cottle v. Leitch, 43 Cal. 320, 322, the court, in effect, held that proposing amendments to a statement on motion for a new trial is not a waiver of the objection that the statement was not filed in time, if such objection is reserved, and no particular form of reservation is required. Though in the instant case the objection was expressly reserved at the time the proposed amendments were served, no such reservation was made when an order extending time for the service of said proposed amendments was procured from the court. In our view the absence of such a reservation when the extension of time was procured constituted a waiver of the objection.

As already indicated, the plaintiff did not pursue the course suggested by Hicks v. Masten, supra, where it is declared:

"Objections of this character should be made at the earliest opportunity, or, at least, when the party is first required to speak in relation to it. * * * The party or attorney who seeks to avail himself of a technicality not affecting a substantial right must himself be held to a prompt, consistent, and exact assertion of such technical right."

Let a writ of mandate issue.

We concur: MYERS, C. J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; SHENK, J.; HOUSER, Judge pro tem.

---

196 Cal. 414

SACRAMENTO & SAN JOAQUIN DRAINAGE DIST. v. SUPERIOR COURT IN AND FOR COLUSA COUNTY et al. (S. F. 11491.)

(Supreme Court of California. July 16, 1925. Rehearing Denied Aug. 13, 1925.)

1. Prohibition ⊂=26—Denials that drainage district was public agency held to raise no issue.

When petition by drainage district for writ of prohibition specifically set forth the facts as to its organization as a public agency, with appropriate references to statutes providing for its formation, denials that it was a public agency, or ever was created or existed as such, amounted simply to demurrers to sufficiency of petition, and presented no issue of fact.

2. Pleading ⊂=125—Allegation that judgment of court of general jurisdiction was duly made and entered mere surplusage.

Code of Civ. Proc. § 456, has no application to pleading judgments of a court of general jurisdiction, and therefore the averment that such judgment was duly given and made was mere surplusage, and denial of such averment presented no issue of fact.

3. Pleading ⊂=8(9)—Plea of denial of due process of law held mere conclusion.

On application for prohibition against a suit to enjoin drainage district assessment which had been declared valid by judgment of superior court, plea that such judgment denied due process of law and equal protection of the laws in violation of Const. U. S. Amend. 14, § 1, *held* to present no issue of fact; being mere legal conclusion.

4. Judgment ⊂=486(1)—Apparently valid judgment of superior court not subject to collateral attack.

A judgment of the superior court validating drainage district assessment under St. 1919, p. 1092, when appearing on its face to be valid, is not subject to collateral attack.

5. Drains ⊂=81—Legislative intent to limit jurisdiction of proceedings affecting drainage district assessments to superior court of county in which validation proceeding instituted.

St. 1919, p. 1092, §§ 4, 12, 32, gives the superior court for county, in which proceedings to validate assessment by drainage district existing under St. 1911, Extra Sess. p. 117, are required to be had, exclusive jurisdiction, and deprives superior court of that or any other county of jurisdiction to thereafter entertain any proceedings purporting to involve validity of assessment or bond issue.

6. Constitutional law ⊂=56—Legislature has power to regulate jurisdiction and procedure of superior courts.

Although superior courts constitute system of state courts exercising judicial power of the state under Const. art. 6, § 1, and their jurisdiction, as defined by section 5, cannot be trenched upon, lessened, or limited by Legislature, the Legislature possesses some regulative power with relation to their jurisdiction and procedure.

7. Constitutional law ⊂=56—Venue ⊂=3—Superior court of county within drainage district may be given exclusive jurisdiction over validity of assessments.

St. 1919, p. 1092, § 32, giving exclusive jurisdiction to superior court of county containing largest area of land included within drainage district to determine validity of assessment or bond issue, *held* not violative of Const. art. 6, § 5, requiring all actions affecting real estate to be brought in county in which land is situated and not invalid as trenching on constitutional jurisdiction of superior courts.

In Bank.

Prohibition by the Sacramento & San Joaquin Drainage District against the Superior Court in and for the County of Co-

lusa, Ernest Weyand, Judge thereof, Percy King, Judge presiding therein, and another. Writ granted.

Stephen W. Downey, of Sacramento, for petitioner.

Devlin & Devlin, of Sacramento, amici curiæ.

J. W. Dorsey, Chas. S. Wheeler, Jr., and R. M. F. Soto, all of San Francisco, for respondents.

RICHARDS, J. The petitioner herein applied for a writ of prohibition whereby it seeks to have the respondent superior court in and for the county of Colusa, the judges thereof, and one Byron de la Beckwith restrained from taking any further proceedings in a certain action pending in said court entitled Byron de la Beckwith, also known as B. D. Beckwith, Plaintiff, v. The Reclamation Board of the State of California et al., Defendant, and decreeing that all proceedings theretofore taken by said court are null and void. The facts set forth in the application may be briefly stated to be these: The petitioner herein is a drainage district created and for several years past existing under and by virtue of an act of the Legislature adopted in the year 1911 (Stats. 1911, Extra Sess., p. 117) and known as the Reclamation Board Act and the acts amendatory thereto, and by which original and amended acts the management and control of which drainage district was vested in the reclamation board of the state of California. That said drainage district embraces lands within several central and contiguous counties of the state of California, among which are the counties of Colusa, Sutter, and Butte. That thereafter, and on November 6, 1917, the said reclamation board adopted a certain drainage and reclamation project known and designated as "Sutter-Butte By Pass Project No. 6," and which embraced in its proposed expenditures for reclamation and drainage purposes the several counties above named and others, and embraced the lands of the respondent Beckwith herein. That thereafter, and pursuant to the carrying forward of said project, and on September 17, 1920, the said reclamation board passed a certain resolution and order for the levy of an assessment upon the lands within said district amounting to the total sum of $8,155,988.70, said assessment to be known as "Sutter-Butte By Pass Assessment No. 6," and that thereafter, and in the course of making said assessment, said board appointed certain assessors for the purpose of making and placing the same upon all of the lands within said district, and which assessors did make said assessment, and in so doing prepared separate lists of the lands so assessed in each of the counties wherein such lands were situated, which said assessment lists were by the secretary of said reclamation board forwarded to and filed with the treasurers respectively of each county in which the lands affected thereby were situated, and which said lists remained open for public inspection for the period of 30 days. That thereafter said board duly appointed a time and place for the purpose of hearing objections to said assessment, of which due notice was given in each of the said counties affected thereby, and at which time and place such objections were heard and acted upon, and that thereafter, and on March 25, 1921, said board duly passed and adopted its order and resolution approving and equalizing said assessment, and whereby the same was finally approved, fixed, apportioned, and equalized so as to amount to the sum of $8,144,327.33. That thereupon the said board determined that in its judgment it would be for the best interests of the owners of land within said district affected by said assessment to issue bonds in said amount for the purpose of obtaining money for the payment of the cost of the work and other expenditures for which said assessment had been levied. That pursuant thereto, and acting under and in accordance with the terms and provisions of an act entitled "An act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district based upon assessments levied by the reclamation board upon land in said district," approved May 27, 1919 (Stats. 1919, p. 1092), and known as the Bonding Act, the said reclamation board commenced a judicial proceeding in the superior court of the state of California in and for the county of Sutter, which is the county within which the largest acreage of land affected by said assessment is situate, for the validation of said assessment as provided in said act. That thereafter said judicial proceeding was prosecuted as provided in said bonding Act, with the result that on the 5th day of April, 1922, a judgment was duly given, made, and entered in said proceeding approving and validating said assessment. That thereafter an appeal from said judgment was taken by certain parties to said proceeding to the Supreme Court of the state of California, and was heard therein, and that said court upon such hearing and on August 22, 1923, by its decision duly given and made, affirmed said judgment, validating said assessment and the whole thereof. That thereafter certain parties to said judicial proceeding procured a writ of error to issue for a review of such judgment by the United States Supreme Court, and that thereafter the said United States Supreme Court by its order and judgment duly given and made dismissed said writ of error. That subsequent to the date of said judgment, and on or about the 25th day of April, 1922, the said reclamation board directed and procured the filing of the assessment lists aforesaid in the offices of

the county treasurers of said respective counties, the lands within which were affected thereby, whereupon collections upon said assessment amounting to more than $127,641.95 were paid over to said county treasurers by landholders within their respective counties. Thereafter, and on September 22, 1922, and pursuant to the provisions of said Bonding Act, the reclamation board, by its orders duly given and made, called and held a bond election within that portion of said drainage district affected by said assessment to determine whether the money required to pay the cost of the works and expenditures for which said assessment had been provided should be raised by calls to be made upon such assessment, or whether bonds of said drainage district should be issued in an amount equal to the amount thereof then remaining unpaid. That at said election the majority of the votes cast were in favor of the issuance of said bonds. That thereafter the interest which said bonds were to bear was fixed by said board at 5½ per cent. per annum, payable semiannually, and said bonds bearing such rate of interest were prepared and executed in accordance with said Bonding Act and the order of said board, and were, on the 9th day of January, 1923, deposited with the treasurer of the state of California as in said act provided, and in the aggregate amount of $8,028,147.75. That within 10 days after said bonds had been so delivered the said reclamation board, in pursuance of its order duly given and made, commenced an action in the superior court of the state of California in and for the county of Sutter against the lands and all persons owning the same or interested therein within that portion of said drainage district affected by said assessment or the issuance of said bonds to have it determined that said bonds were and are a legal obligation upon said drainage district. That thereafter such proceedings were had in said action that on the 27th day of November, 1923, a judgment was duly given and made therein, decreeing that said bonds were in all respects valid. That thereafter certain of said bonds were canceled pursuant to the terms of a certain act of the Legislature amending section 34 of the aforesaid Reclamation Board Act, adopted in 1923 (St. 1923, p. 640), leaving duly executed and uncanceled bonds of such issue in the state treasury in the total sum of $7,133,000. That thereafter, and on the 23d day of December, 1924, the said reclamation board, in accordance with law, directed the state treasurer to offer said bonds and the whole remaining amount thereof for sale. That thereafter, and pursuant to said direction and order of said board, the state treasurer duly published notice that at the time designated therein he would offer said bonds for sale, and would sell the same. That on the 24th day of January, 1925, Byron De La Beckwith, also known as B. D. Beckwith, one of the respondents herein, commenced an action in the superior court of the state of California in and for the county of Colusa against the said reclamation board and the members thereof, and also against the said state treasurer, entitled in the caption of the complaint therein a "Complaint to quiet title and for injunction." That said plaintiff in said complaint in substance alleged himself to be the owner of certain real property in the said county of Colusa and within the territorial limits of said drainage district, and that said reclamation board claims to have some legal title or interest therein arising out of the facts above set forth herein relating to the creation, levy, and imposition of the assessment or assessments hereinabove referred to upon and affecting the lands within said district, and specifically the said lands of the plaintiff therein, and that said board had further caused to be executed and issued and were about to sell said bonds in an amount to cover the unpaid portion of said assessment or assessments, and that said assessment or assessments and the said bonds had been purported to be validated by the judgment of the superior court in and for the county of Sutter as hereinabove set forth, and that said bonds were offered for sale, and that thereby a cloud would be cast upon the title of the said plaintiff to his aforesaid lands. That the said claim of the said reclamation board to have or impose the lien of said assessment upon the plaintiff's said lands is without foundation in either law or equity, and that all of the acts and things done by said board looking to the imposition of such lien upon the plaintiff's said lands are illegal and void, and in contravention of the Fourteenth Amendment to the Constitution of the United States, and without due process of law. Wherefore the said plaintiff prayed that his title be quieted against the aforesaid claims of said reclamation board, and that an injunction issue against the said state treasurer preventing his or any sale of said bonds, and that all proceedings leading up to the validation of said assessment or of said bonds and to the sale thereof be declared null and void, and for general relief. Thereupon and after the said institution of said action the present proceeding for the procurement of a writ of prohibition against said plaintiff and said superior court of Colusa county and the judges thereof, preventing any further proceedings in said action and nullifying such proceedings as had theretofore been taken or had therein, was commenced in this court, and has been brought on to hearing and to the point of a determination herein.

[1-3] The respondents herein filed separate answers to said petition, which are, however, identical in form. Their first denials were

that the petitioner is or ever was a public agency or mandatory, or was ever created or ever existed as such under or by virtue of the laws of California or of the so-called Reclamation Board Act. These denials amount simply to demurrers to the sufficiency of paragraph 1 of said petition wherein the facts of the organization of the petitioner as such public agency are specifically set forth with appropriate reference to the several statutes providing for its formation, and thus present no issue of fact. The respondents' second denials consist in admissions that there is of record the judgment of the superior court in and for the county of Sutter referred to in paragraph 1 of said petition and also attached thereto as an exhibit, but denies that said judgment was ever duly given, made, or entered, and alleges that said judgment denies to the respondent Beckwith due process of law and also the equal protection of the laws in violation of section 1 of the Fourteenth Amendment to the Constitution of the United States. These denials also present no issues of fact. The judgment referred to, the existence of which the respondents admit, is in form a judgment of a court of general jurisdiction. This being so, section 456 of the Code of Civil Procedure has no application to the pleading of said judgment. Weller v. Dickinson, 93 Cal. 108, 28 P. 854; Clark v. Nordholt, 121 Cal. 26, 53 P. 400; Ashton v. Heydenfeldt, 124 Cal. 14, 56 P. 624; S. F. & F. L. Co. v. Hartung, 138 Cal. 223, 71 P. 337. It was therefore sufficient in said petition to aver the making and entry of such judgment. The averment therein that such judgment was duly given and made was mere surplusage, and hence the denial of such averment, the making and entry of such judgment being admitted, would present no issue of fact. The same principles of pleading apply as to the judgment of this court affirming the aforesaid judgment of the superior court of the county of Sutter, and hence the respondents' denials that our said judgment was duly given and made present no issue of fact. Neither is any issue of fact presented by the respondents' remaining averment that by either or both of said judgments the respondent Beckwith has been denied due process of law and also the equal protection of the laws. Such averments or denials present but the pleaders' legal conclusions.

It is the contention of the petitioner herein that pursuant to the acts of the Legislature hereinabove referred to and to the proceedings taken and had thereunder, which are in their substance and sequence above set forth, and particularly of the judgment of the superior court in and for the county of Sutter, and of the affirmance thereof by this court and by the Supreme Court of the United States, and of the language of the act of the Legislature providing for the procurement of such judgment and declaring the effect and finality thereof, the said superior court of the county of Colusa has no jurisdiction to entertain or proceed with said action pending therein, nor had the plaintiff therein any further right to commence, prosecute, or maintain such action, and hence that the writ sought herein should issue. In order to ascertain and properly determine the basis of this contention a more extended reference to the legislative acts in question and to the administrative and judicial proceedings taken thereunder and to the past conclusions and determinations of this court thereon must be made. With respect to the validity of the several and successive acts of the Legislature beginning with the act of 1911, known as the Reclamation Board Act, and the acts amendatory and supplementary thereto, continuing down to and including the so-called Bonding Act, this court has consistently upheld the validity of such legislation in so far as it has relation to the inception and carrying forward of the work of reclamation and flood control within the several counties and portions of the state of California affected by the provisions of said acts. It will not be necessary to refer more particularly to said legislation in its relation to the preliminary stages of reclamation and flood control within said drainage district rendering necessary and leading up to the creation and levy of the assessment in question, nor to refer to or restate the effect of the earlier decisions with relation to the validity of said legislation. We may, for the sake of brevity, come immediately to the act of the Legislature adopted in the year 1919, and known as the Bonding Act. Said act is entitled:

"An act to authorize the issuance and sale of bonds of the Sacramento and San Joaquin drainage district based upon assessments levied by the reclamation board upon lands in said district."

By section 1 of said act reference is made to the preceding acts of the Legislature providing for the creation of the reclamation board and defining its powers with relation to the work of reclamation and flood control and the expense thereof within said drainage district and to the creation and levy of an assessment or assessments upon the lands included within said district for the purpose of paying for such work and expenditures. Section 2 of said act provides:

"Whenever any assessment levied by the reclamation board upon lands within the Sacramento and San Joaquin drainage district has been completed and all of the hearings before the reclamation board in regard thereto have been heard and the reclamation board is ready to make its order approving such assessment as finally fixed, as directed by section 13 of said reclamation board act, the reclamation board may at the time of making said order finally approving the assessment, and in and by such or-

der and as a part thereof, also determine that in its judgment it would be for the best interests of the owners of land in the Sacramento and San Joaquin drainage district affected by said assessment to issue bonds for the purpose of obtaining money to pay the cost of the works or other expenses for which such assessment was levied; and if the reclamation board shall so determine in and by its said order, then the subsequent proceedings in and about the matter of such assessment and the collection thereof and all other proceedings for the raising of money to be used for the purposes for which said assessment was levied, shall be as in this act provided, notwithstanding any provision or provisions in regard thereto in said reclamation board act contained."

Section 4 of said act provides:

"If the reclamation board shall in its order approving such assessment as finally fixed determine that in its judgment bonds should be issued as aforesaid, said board shall thereupon and within ten days after the passage of its said order commence a judicial proceeding for the validation of said assessment, which judicial proceeding shall be commenced, prosecuted and determined as hereinafter in sections five to thirteen, inclusive, of this act provided. During said period of ten days no action or proceeding shall in such case be commenced by any party other than said reclamation board to contest or in any manner question or interfere with the validity of said assessment, nor shall any action be commenced to have the assessment upon any land modified or annulled as provided in section thirteen of the said reclamation board act; nor shall any such action or proceeding of any kind be commenced by any party other than the reclamation board at any time thereafter; provided, the reclamation board shall itself within said period of ten days have commenced said judicial proceeding to validate said assessment as herein provided."

Section 5 of said act provides:

"Within said period of ten days after the passage by the reclamation board of its order approving said assessment as finally fixed by said board, the reclamation board shall commence in the superior court of the state of California in and for the county within which the largest acreage of land affected by said assessment is situate, a proceeding to validate said assessment, which proceeding shall be commenced by filing a copy of the assessment lists for said assessment, together with a copy of said order of the reclamation board approving said assessment as finally fixed by said board, both duly attested by the certificate of the secretary or assistant secretary of the reclamation board, in the office of the county clerk and ex officio clerk of the superior court in and for the county in which said proceeding is commenced. Thereupon the reclamation board shall notify the governor of the commencement of such proceeding and thereupon it shall be the duty of the governor to designate three judges of the superior court in the state of California, from counties or cities and counties wholly outside the said Sacramento and San Joaquin drainage district, and it shall be the duty of said three judges to sit in bank in said proceeding so commenced. Upon the filing of said assessment lists it shall be the duty of said county clerk to fix a time not less than thirty nor more than forty days from the date of such filing when objections will be heard to the said assessment lists, and thereupon it shall be the duty of said clerk to give notice of the time and place of such hearing by publishing a notice for once a week for four weeks in a newspaper of general circulation published in each county in said drainage district wherein any lands affected by said assessment are situated, and if in the case of any such county no newspaper be published in the county, or if for any reason such notice cannot be published therein, then such notice shall be published in a newspaper of general circulation published in an adjoining county. Affidavits showing such publications shall, prior to such hearing, be filed with said county clerk."

Section 7 of said act provides:

"At any time before the day for such hearing fixed in the notice published by said county clerk, any person interested in any land upon which any charge has been assessed in and by said assessment, may file in said proceeding written objections to said assessment, stating in detail the grounds therefor, which said statement shall be verified by the affidavit of such person or of some other person who is familiar with the facts."

Section 8 of said act provides:

"At said hearing or any adjournment thereof, the said court shall hear such evidence as may be offered touching the correctness or validity of such assessment or the manner of its apportionment and as expeditiously as possible shall determine and pass upon all such written objections filed in said proceeding, and shall make and enter its judgment approving said assessment or annulling, modifying or amending the same or any part thereof. Such judgment shall refer to the assessment apportioned to each county separately and it shall be sufficient to refer to the portions of said assessment which are affected thereby. The decision of a majority of said court shall be final and conclusive, and no motion for a new trial of said proceeding shall be allowed, and no appeal from the judgment given and made by said court shall be had."

Section 10 of said act provides:

"Thereupon and thereafter said assessment lists, unless annulled by the judgment in said judicial proceeding, embracing any modifications made by said judgment shall be conclusive evidence that said assessment has been apportioned according to the benefits that will accrue to each tract of land in such drainage district by reason of the expenditure of the sums of money to be raised thereby."

It is conceded herein that the procedure provided for in the foregoing sections of the said Bonding Act were regularly followed, and that pursuant thereto a judgment and decree of the superior court in and for the county of Sutter was made and entered purporting to validate said assessment as levied and apportioned under said preceding acts of the Legislature, and upon which and the validity there-

of the bonds provided for in said Bonding Act were to be issued and sold. The question as to the nature and validity of the proceeding which resulted in said judgment of the superior court of the county of Sutter was first presented to this court in the case of Athearn v. Nicol, 187 Cal. 86, 200 P. 942, wherein this court was asked to prohibit the court and the judges who were proposing to sit therein from entertaining or taking action in said proceeding upon various grounds. In denying said writ this court decided that the said proceeding was a judicial proceeding over which the said superior court had been properly given jurisdiction, and that the provisions of the act of 1919, above quoted, relating to the sitting of several superior court judges therein for the purpose of determining the issues presented in such proceeding, were valid, and that such judges, when so sitting in said court under the provisions of said act, were sitting and acting as judges of the superior court of the state of California, and not as a special board for the purpose of determining such issue. The writ was therefore denied. The next case wherein the question arose as to the nature, validity, or effect of the aforesaid proceeding was that entitled, "In the Matter of a Proceeding to Validate Sutter-Butte By-Pass Assessment No. 6 of the Sacramento & San Joaquin Drainage District," 190 Cal. 532, 213 P. 974. The questions discussed therein arose upon a motion to dismiss an appeal taken to this court from the judgment of the superior court of the county of Sutter in the said proceeding pending before it. In denying said motion this court held that the proceeding so pending in said court and from the judgment in which said appeal had been taken was a judicial proceeding which had all of the characteristics of a suit in equity to quiet title to land; and that as such the parties thereto could not by legislative enactment be denied their constitutional right of appeal. The next case wherein the similar questions more broadly arose for discussion and determination was that arising upon the hearing on its merits of said appeal, and is found reported under the same title in 191 Cal. 650, 218 P. 27, wherein this court had before it the whole subject of the interpretation to be given to the foregoing sections of the Bonding Act, and of the nature, validity, and effect of the judgment which had been rendered and entered by the superior court in and for the county of Sutter in conformity therewith. In affirming said judgment this court approved what it had tentatively determined in its decision upon the motion to dismiss said appeal, to the effect that this proceeding was in the nature of an action to quiet title to each and every parcel of the lands affected by said assessment, whether located within the county in which said proceeding was pending or not, if within said drainage district; and that being such it was in the nature of a proceeding in rem, wherein the constitutional requirement of due process of law was subserved and satisfied by the giving of the notices of the pendency of such proceeding required by the statute authorizing the same, citing the long line of cases in this and other jurisdictions sustaining such procedure. The sufficiency of the notices given in the course of such proceeding was also considered and upheld by this court, as were also a number of other objections to the sufficiency of said proceeding which are sought to be re-presented to this court in the instant case. As the result of a very thorough and exhaustive consideration of the merits of said appeal and the issues presented thereon, the judgment therein was affirmed. Not content to rest upon the affirmance of said judgment, certain of the parties affected thereby sought a writ of error to the Supreme Court of the United States for the purpose of having reviewed therein the decision of this court; but that supreme tribunal, on December 15, 1924, dismissed said writ of error, and this gave finality to the aforesaid decision of this court affirming said judgment upon appeal. Thus, in our opinion, it has been finally determined, first, that the assessment created by the successive acts and orders of the reclamation board affecting the lands, not only of the respondent Beckwith herein, but of all other landowners within said drainage district covered by said assessment and by the lien or liens imposed thereby, is and that each and all of said liens are valid and subsisting liens upon said properties respectively; second, that the bonds provided to be voted for, issued, and sold under the terms and provisions of said Bonding Act, and depending for their validity upon the validation of said assessment, are valid and subsisting bonds, for the redemption of which all of the lands within said district which remain subject to the lien and payment of such assessment stand pledged are valid and enforceable bonds; third, that the proceeding instituted in the superior court in and for the county of Sutter, and in which was rendered and entered the judgment which was affirmed by this court upon appeal, was essentially in the nature of an action to quiet title affecting each and all of the lands and landowners within said drainage district; that, being such, the procedure for obtaining jurisdiction over each and all of such landowners and their aforesaid properties and over all persons interested therein or claiming title thereto was sufficient to confer such jurisdiction upon said court so as to satisfy the constitutional requirement as to "due process of law."

[4] As to the several objections which the respondents make to the sufficiency and validity of the proceeding in the superior court of the state of California which resulted in

the judgment above referred to, such as the objection that the judicial tribunal in which said proceeding was conducted was a special tribunal and was not the superior court, and also that the said tribunal, whether or not the superior court, had no jurisdiction over the lands of the respondent Beckwith for the reason that no portion of said lands lies within the territorial limits of the county of Sutter, and also the several objections made to the validity of the Reclamation Board Act and the various acts amendatory thereto based upon the sufficiency of the titles of said acts or the nature of said amendments, these questions have, we think, been concluded by the decisions of this court against the respondents' several contentions heretofore handed down, and to which reference has hereinbefore been made. The judgment of the superior court of the state of California in and for the county of Sutter, which is in precise form attached to the petition herein as an exhibit, and which in such form the respondents herein admit to have been given and made, appears on the face thereof to be a valid judgment of said court. Being such, it cannot successfully be made the subject of collateral attack. Mulford v. Estudillo, 23 Cal. 94; Hill v. City Cab & T. Co., 79 Cal. 188, 21 P. 728; Dunn v. Dunn, 114 Cal. 210, 46 P. 5; Crew v. Pratt, 119 Cal. 139, 51 P. 38; Brush v. Smith, 141 Cal. 466, 75 P. 55; Emery v. Kipp, 154 Cal. 83, 97 P. 17, 19 L. R. A. (N. S.) 983, 129 Am. St. Rep. 141, 16 Ann. Cas. 792; Estate of McNeil, 155 Cal. 333, 100 P. 1086; Williams v. Lane, 158 Cal. 39, 109 P. 873; Crouch v. Miller & Co., 169 Cal. 341, 146 P. 880; Crouch v. Shafer, 177 Cal. 154, 169 P. 1019; Seaboard Nat. Bank v. Ackerman, 16 Cal. App. 55, 116 P. 91; Eccleston v. Roseberg, 53 Cal. App. 14, 199 P. 859. The several objections which the respondents have undertaken to set forth in their answers herein and which they urge upon the argument and in their briefs herein constitute a collateral attack upon said judgment, which under the foregoing authorities they, or either or any of them, are not permitted to make herein.

The foregoing conclusions as to the nature and finality of the judgment of the superior court in and for the county of Sutter with relation to the parties and the issues involved in that proceeding bring us to the final and only question involved in the instant proceeding, which is as to the effect of such determination upon the action now pending in the superior court in and for the county of Colusa, the past proceedings wherein we are asked to annul and the future proceedings wherein and the maintenance whereof we are asked to prohibit. This question involves a determination of the validity, effect, and application of the provisions of the Bonding Act relative to the institution and maintenance of actions involving the validity of said assessment or of such bonds. Section 4 of the Bonding Act, after providing for the institution by the reclamation board of an action for the validation of said assessment and of the issuance of such bonds within the period of ten days after the determination of such board to issue such bonds, proceeds to provide that—

"During said period of ten days no action or proceeding shall in such case be commenced by any party other than said reclamation board to contest or in any manner question or interfere with the validity of said assessment, nor shall any action be commenced to have the assessment upon any land modified or annulled as provided in section thirteen of the said reclamation board act; nor shall any such action or proceeding of any kind be commenced by any party other than the reclamation board at any time thereafter; provided, the reclamation board shall itself within said period of ten days have commenced said judicial proceedings to validate said assessment as herein provided."

Section 12 of the Bonding Act contains the provision that, "excepting in the said judicial proceeding herein provided for, no action or defense shall ever be maintained attacking the said assessment in any respect," while section 32 of said Bonding Act provides, in part, that—

"Any action or proceeding commenced by any party other than the reclamation board to contest or in any manner interfere with the validity or disposition of said bonds must be tried in the superior court of the state of California, in and for the county within which the largest acreage of land affected by said assessment or the issuance of said bonds is situated, and no such action or proceeding shall be commenced by any party other than the reclamation board until the expiration of ten days after such bonds have been so executed and delivered to the state treasurer, nor unless the action in this section provided for shall not have been commenced by the reclamation board within said period of ten days."

[5] It is the contention of the petitioner herein that the effect to be given by this court to the foregoing provisions of the Bonding Act is that it was the intent of the Legislature to render the jurisdiction of the superior court in and for the county wherein the proceedings provided for in said Bonding Act for the validation of said assessment and of such bond issue were to be and were in fact instituted and determined, exclusive as to such determination, and to deprive the superior court of said or any other county within said drainage district or elsewhere of jurisdiction to thereafter entertain or determine any other action or proceeding involving the issue as to the validity of said assessment or of such bond issue. Such was doubtless the legislative intent, as evinced by the clear and unmistakable terms of the provisions of the Bonding Act, above quoted, and it remains for us to determine whether such legislative

intent can be given effect through the issuance of the writ prayed for herein.

[6] The superior courts of the state of California, while located and functioning in the several counties of the state, are not local or county courts, but constitute a system of state courts, being vested with and exercising the judicial power of the state under the express terms of section 1 of article 6 of the state Constitution. The jurisdiction of the system of state courts thus established is defined by section 5 of article 6 of the Constitution, and it is conceded by the petitioner herein that the constitutional jurisdiction and powers of the superior court as thus defined can in no wise be trenched upon, lessened, or limited by the Legislature. While this is undoubtedly true, it does not follow that the legislative department of the state government possesses no regulative power with relation to the jurisdiction of the superior courts of the state or to the method and procedure in and means of which the constitutional powers of these courts are to be exercised. On the contrary, it has been decided by this court in a long and consistent line of cases that "the mere procedure by which jurisdiction [of said courts] is to be exercised may be prescribed by the Legislature," and that the statutory regulation thereof will be upheld, unless "such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." Ex parte Harker, 49 Cal. 465. The principle announced in the foregoing decision has been frequently approved and applied to cases involving the constitutional power of superior courts "in all cases in equity." In the case of Glide v. Superior Court, 147 Cal. 21, 81 P. 225, a writ of prohibition was issued by this court restraining the superior court of the county of Yolo from assuming jurisdiction to enjoin the board of supervisors of that county from proceeding to determine certain matters of fact relating to reclaimed lands within a reclamation district which had been confided by the Legislature to the exclusive jurisdiction of said board. In the case of United Railroads v. Superior Court, 170 Cal. 755, 151 P. 129, Ann. Cas. 1916E, 199, a writ of prohibition was issued by this court prohibiting the superior court of the city and county of San Francisco from proceeding in attempted violation of the provisions of sections 525 to 533, inclusive, of the Code of Civil Procedure, defining and limiting the powers of superior courts in the matter of provisional remedies by way of injunction. In that case the objection to the issuance of the writ of prohibition was based upon the contention "that inasmuch as the state Constitution of 1879 confers on the superior court 'original jurisdiction in all cases in equity,' and that as independent of statute, by virtue of such grant, such court would have the power, incident to the exercise of that jurisdiction, to make such an order as that proposed, the Legislature had no authority to thus limit the power of the superior court." In disposing of this contention this court said:

"We are not strongly impressed by the argument made in support of this claim. We are aware of the fact that by our Constitution very many limitations have been imposed upon the legislative department, but we are satisfied that there is nothing therein that expressly or impliedly prevents the Legislature from enacting such regulations as to the exercise by the superior court of its 'original jurisdiction in all cases in equity' as those pertinent to the matter before us,"

—and the court proceeded to show that from the earliest period in our state history similar regulations and limitations of the powers of courts in the exercise of their equity jurisdiction had been enacted and had been consistently upheld. In the Matter of Reclamation District 1500 v. Superior Court, 171 Cal. 672, 154 P. 845, the question was brought more immediately home in its application to the situation presented in the instant proceeding. In that case this court issued a writ of prohibition preventing the superior court in and for the county of Sutter from entertaining an application for an injunction restraining said reclamation district from proceeding with the construction of certain levees in accordance with an act of 1913 (Stats. 1913, p. 130), the basis for the issuance of such prohibitory writ being the declared validity of section 3423 of the Civil Code denying to courts of equity the power to enjoin the execution of a public statute. It may be said incidentally at this point in the course of our decision that the petitioner herein urges that the foregoing case has direct application to the instant case, for the reason that the pending action in the superior court of the county of Colusa is in effect one to impede and prevent the execution of the public statutes above referred to relating to the imposition and collection of the assessment levied thereunder upon the lands within said drainage district. We do not, however, see fit to place our decision herein upon that ground. Before proceeding to a discussion of the immediate issue herein upon which our conclusion will be predicated, it will be instructive to refer to certain other classes of cases wherein writs of prohibition have issued preventing the further exercise of jurisdiction by superior courts over cases originally within their jurisdiction. In the case of Modoc, etc., Land Co. v. Superior Court, 128 Cal. 255, 60 P. 848, it was held that a writ of prohibition should issue to prevent the superior court from further entertaining an action wherein the summons had not been issued within one year and served and re-

turned within three years, as required by section 581 (now 581a) of the Code of Civil Procedure, said section expressly providing that "the court is deprived of jurisdiction to take any other action than to dismiss the case." In the case of Davis v. Superior Court, 184 Cal. 691, 195 P. 390, a writ of prohibition was issued by this court preventing the superior court from further entertaining proceedings in an action wherein section 581b had not been complied with. In referring to said section of the Code this court stated that its provisions were addressed, not only to the parties, but to the court; and this court proceeded to say (page 696 [195 P. 393]):

"In view of the fact that the superior court was then, and ever since has been, without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

[7] The case of Dungan v. Superior Court, 149 Cal. 98, 84 P. 767, 117 Am. St. Rep. 49, presents a close analogy to the instant proceeding. The superior court is by the express terms of the Constitution given jurisdiction "of all matters of probate." Const., art. 6, § 5. The Code of Civil Procedure, § 1294, subd. 3, provides that, when a decedent dies out of the state, not being a resident thereof, proceedings for the probate of his estate may be had "in the county in which any part of the estate may be." Section 1295 of said Code provides that where the estate of such decedent "is in more than one county * * * the superior court of that county in which application is first made, for letters testamentary or of administration, has exclusive jurisdiction of the settlement of the estate." In the above case proceedings had been commenced and were pending in the county of Tulare for the probate of the estate of such a decedent, leaving estate a portion of which was in Tulare county. Thereafter the public administrator of Fresno county commenced proceedings for the probate of said estate in that county, wherein also a portion of the decedent's estate was situated. Thereupon an application for a writ of prohibition was made to this court, in which it was sought to prohibit the superior court of Fresno county from taking or exercising jurisdiction over the said estate or the property thereof situate in Fresno county. The writ was granted in a decision by this court fully reviewing the authorities, holding that, when jurisdiction has attached in the superior court of a particular county, and when the statute declares that such jurisdiction when so attached is exclusive, any other superior court attempting to take or exercise jurisdiction in the same matter is acting without and in excess of its power, citing Estate of Damke, 133 Cal. 430, 65 P. 889; Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of Griffith, 84 Cal. 107, 23 P. 528, 24 P. 381; Estate of Worthington, 4 Ohio Dec. 381. The court further held that the writ should issue notwithstanding the fact that applicants might have a remedy by appeal. It may be proper at this point in the dicussion to take note of the respondents' contention that, under the express terms of section 5 of article 6 of the Constitution, "all actions for the recovery of the possession of, quieting the title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated"; that, since no part of the property of the respondent Beckwith, which is involved in the action which he has commenced in the county of Colusa, is situated in the county of Sutter, the superior court of the latter county could not be given by statute jurisdiction of such property without trenching upon the jurisdiction of the superior court of the county of Colusa. That this is altogether too narrow an interpretation of the above-quoted constitutional provision was made plain by this court in its recent decision in Re Sutter By-Pass Assessment No. 6, supra, wherein (page 670 [218 P. 35]) it was held that the foregoing provision of the Constitution was susceptible of application to actions and proceedings of the nature of that involved in that case; and that a drainage district, even though the lands embraced therein consists of several and separate parcels of land which extend over and into two or more counties, is in its very nature a single entity, and must be considered as a unit as to the lands embraced within the boundaries of such district, citing State v. Elliott, 32 Ind. App. 605, 70 N. E. 397; Denton v. Thompson, 136 Ind. 446, 35 N. E. 264; and that, conceding that this is a suit in equity to quiet title to land situate in the several counties embraced within such district, jurisdiction is given by the Constitution to the superior court in and for the county of Sutter, in which the greater part of the land affected is situated. It may be further instructive to take note of the fact that proceedings for the validation of assessments in irrigation, reclamation, drainage, and other districts of a like character have become increasingly common in acts of the Legislature providing for the formation and functioning of such districts conducting operations which are intended to redound largely to the public welfare, and that such proceedings when fairly conducted with adequate notice and opportunity for a hearing on the part of those persons whose properties are to be affected thereby, have been favored by the courts to the extent of upholding the de-

clared legislative intent that such proceedings, when so conducted and determined, should be binding and conclusive upon those persons and properties over which jurisdiction to so conduct and so determine them had been acquired. Among the many cases so deciding the following may be cited: Reclamation Dist. No. 551 v. Runyan, 117 Cal. 164, 49 P. 131; Reclamation Dist. No. 531 v. McCullah, 124 Cal. 175, 56 P. 887; Matter of Bonds of S. S. J. Irr. Dist., 161 Cal. 345, 119 P. 198; In re Sutter-Butte By-Pass Ass. No. 6, supra.

Bearing in mind the foregoing reasoning and conclusions of this court touching the subject of the power of the Legislature to regulate and control the procedure of superior courts in the course of the exercise of their constitutional jurisdiction and of the extent to which such power may be exercised, we approach the final question in this case, which is as to whether the Legislature by the provisions of the act of 1919, commonly known as the Bonding Act, above quoted, and which purport to confine the jurisdiction of the superior court to hear and determine all questions touching the validity of the assessment upon the lands lying with said drainage district to the proceeding to be instituted thereunder in the county within which the largest area of such lands is located, and to declare that such proceeding shall be exclusive and the determination therein final, and to forbid the institution of any other action or proceeding in any of the other superior courts of the state of California, is to be deemed to have the effect of trenching upon or invading the constitutional powers of such court in actions of the character of that instituted by the respondent Beckwith in the superior court of the county of Colusa. We are inclined to the opinion that it does not. The proceeding in the matter of the validation of Sutter-Butte by-pass assessment No. 6, commenced and prosecuted to judgment in the county of Sutter, which judgment has become final upon its affirmance by this court, and doubly so by the dismissal of a writ of error by the Supreme Court of the United States, was, as we have seen, a proceeding in the nature of an action to quiet title to all of the lands lying within the boundaries of said drainage district, and hence to the lands of the respondent Beckwith herein lying in the county of Colusa. That proceeding was a proceeding in rem, wherein the constitutional requirement of "due process of law" was fully satisfied by the giving of notice in the form and to the extent required by the statute authorizing such proceeding. The respondent Beckwith was a party to that proceeding, and full jurisdiction was acquired by said court over him and over his said property by virtue of such notice. He has had, therefore, his day in court, and has been accorded the equal protection of the laws. The superior court which has thus gained jurisdiction over him and his said property has also been accorded and has proceeded to exercise all of the jurisdiction which has been given to it by the provisions of the state Constitution above referred to; and it has exhausted such jurisdiction in so far as the said respondent Beckwith and his said property are concerned by its full hearing and final determination of said proceeding and of the issues litigated or litigable therein. Any further attempt on the part of said superior court in whatever county within said drainage district situated could only amount to a resumption of jurisdiction over the same parties, the same properties, and the same issues as to which its jurisdiction thus conferred has already been fully exercised. For the Legislature, therefore, to say that the superior court of the state of California functioning within one county which is embraced within the exterior boundaries of said drainage district shall not have power and jurisdiction over actions or proceedings involving the same persons, properties, and issues as those over which the said superior court, functioning in another of the counties embraced within said drainage district, has been given and exercised full and final jurisdiction, does not in any manner or to any degree trench upon, invade, or limit the constitutional grant of power to such superior court which has already been fully assumed and exercised by it. It may be said in conclusion that the respondents herein other than said respondent Beckwith stand in no better position to urge the objections to the issuance of this writ than does said Beckwith, since he is the only party in interest in the action pending in the superior court of the county of Colusa, the further maintenance of which this writ is sought to prohibit. Whatever other questions are presented or discussed by respective counsel herein are either fully covered by our previous decisions affecting the various phases of this same matter already considered by this court or are deemed sufficiently covered by our foregoing reasoning and conclusion as not to require further consideration.

Let the writ issue as prayed for.

We concur: MYERS, C. J.; LENNON, J.; LAWLOR, J; SEAWELL, J; SHENK, J.; WASTE, J.

196 Cal. 453

DOMINGUEZ LAND CORPORATION v. DAUGHERTY, State Commissioner of Corporations. (L. A. 8519.)

(Supreme Court of California. July 29, 1925.)

1. Corporations ⊂⊃99(1)—When issuance and transmutation of stock of corporation into money or property, to become actual capital of corporation, not prohibited, stated.

Const. art. 12, § 11, does not prohibit issuance and transmutation by a commercial corporation, of its stock into money or property which is to become, in whole or in part, the actual capital of the corporation, provided the corporate officials act in good faith, and the property so taken in exchange for such stock possesses a sufficient though undetermined valuable consideration to support the transfer.

2. Corporations ⊂⊃99(1)—Whether transactions of corporations affect relation between their actual and their stock capitalization is generally mixed question of law and of fact.

Whether the transactions of corporations affect the relation between their actual and their stock capitalization is not a mere question of law determinable by an inspection of the organic law, but is generally a mixed question of law and of fact to be determined from a consideration of the facts of each case.

3. Corporations ⊂⊃67—Distribution by corporation of capital assets among stockholders, subsequent to lawful reduction of stock capitalization, is not prohibited by Constitution as matter of law.

Distribution by a capital stock corporation of some portion of its capital assets among its stockholders, subsequent to a lawful reduction of its stock capitalization, pursuant to Civ. Code, §§ 309, 359, is not prohibited by Const. art. 12, § 11, as matter of law.

4. Corporations ⊂⊃61—Legislature may prescribe conditions on which corporations may deal with capital assets and amount and value of stock capitalization.

Legislature *held* not deprived, by Const. art. 12, § 11, of power properly to prescribe and regulate the terms and conditions upon which corporations may exercise their limited right to deal with their capital assets and with the amount and value of stock capitalization in relation to their capital assets.

5. Corporations ⊂⊃67—Licenses ⊂⊃22—Refusal of corporation commissioner to entertain petition for permission to distribute surplus assets to shareholders, arising from reduction of capitalization, held unauthorized.

Refusal of state corporation commissioner, based on Const. art. 12, § 11, to entertain, file, consider, and determine a petition of a corporation for permission to distribute to shareholders surplus assets arising from a reduction of its capital stock, *held* unauthorized under Code, §§ 309, 359, and Corporate Securities Act.

In Bank.

Original application for mandamus by the Dominguez Land Corporation, to be directed to Edwin M. Daugherty, as State Commissioner of Corporations, to compel him to assume jurisdiction of petitioner's application for permission to distribute surplus to shareholders. Writ granted.

See, also, 238 P. 703.

James S. Bennett, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., and Robert W. Harrison, Chief Deputy Atty. Gen., for respondent.

RICHARDS, J. The petitioner herein seeks by writ of mandate to compel the respondent as commissioner of corporations of the state of California to file and assume jurisdiction over the petitioner's application for permission to distribute to its shareholders the sum of $415,000 out of its surplus money and property on hand, which surplus has been created by the act of the petitioner corporation in reducing its capital stock from the sum of $2,000,000, divided into 20,000 shares of the par value of $100 each, to the sum of $1,000,000, divided into 20,000 shares of the par value of $50 each, which said reduction in the par valuation of its shares of capital stock had been accomplished under and in pursuance of the provisions of sections 309 and 359 of the Civil Code, and after compliance with the requirements of law as therein provided. The respondent herein has refused to accept for filing the petitioner's said application for permission to so distribute the said amount of its said surplus thus created, or to permit the same to be filed in his office, and has refused to take or exercise jurisdiction over the same, basing his said refusal upon the advice of the Attorney General to the effect that said respondent, in his capacity of commissioner of corporations, has no jurisdiction under the provisions of section 309 of the Civil Code, or of any other law, to receive or file or consider or grant any such application; and that in so far as said section of the Civil Code or any other statute of the state of California purports to confer such jurisdiction, it is void as in conflict with section 11 of article 12 of the state Constitution. In basing his refusal to receive, file, or consider the petitioner's said application, the respondent, by his return to the alternative writ issued herein, admits the facts set forth in the petition herein, which affirmatively show that if the petitioner's said application were to be permitted to be filed and considered and the permit applied for therein granted and the distribution of such surplus made as sought, the petitioner would still have sufficient remaining assets to more than equal in value its reduced stock capitalization, and also to largely exceed all of its outstanding obligations. The respondent does not question either the truth of the petitioner's said allegations or its en-

tire good faith in seeking the distribution to its shareholders of its said surplus derived from the aforesaid source. We are not, therefore, in this proceeding confronted with any question involving the exercise of discretion on the part of the respondent in his capacity of commissioner of corporations as to whether, upon the facts stated in the application or to be produced upon a hearing before him thereon, such an application should be granted or denied, the sole question for our determination being as to whether in any case a corporation organized or doing business in and under the laws of the state of California can be permitted to distribute any surplus of its actual capital in the form of money or property on hand, other than earned profits, to its shareholders, in view of the inhibitions, if any, in the section and article of the Constitution upon which the respondent bases his refusal to file or consider the petitioner's said application. Section 11 of article 12 of the state Constitution provides as follows:

"No corporation shall issue stock or bonds, except for money paid, labor done, or property actually received, and all fictitious increase of stock or indebtedness shall be void. The stock and bonded indebtedness of corporations shall not be increased, except in pursuance of general law, nor without the consent of the persons holding the larger amount in value of the stock, at a meeting called for that purpose, giving sixty days' public notice, as may be provided by law."

It is to be observed that the foregoing provision of the Constitution does not in express terms forbid corporations from distributing among their shareholders any surplus money or property of which they may come into possession. If it does so, it does so by indirection under and by virtue of the first clause in the constitutional provision above set forth. The respondent supports his contention that such is its effect by reference to the like earlier provisions in the Constitutions of certain other states from which the said provision in our Constitution of 1879 was obviously taken, and to the debates in the constitutional convention attending the adoption of said provision. He also refers to certain cases decided by the courts of last resort in said other jurisdictions which, as he contends, uphold his interpretation of the terms of our own Constitution. There does not seem to be much doubt that it was the intent of the framers of our said Constitution in adopting said provision to provide that a relation of values when once created between the stock capitalization of a corporation and its actual capital in the form of money or property or both should be maintained to the extent, at least, of requiring good faith on the part of the corporation and its governing officials in the issuance of its stock for a valuable consideration in the form of either money or property; and that a like good faith should be exacted on its part and on the part of its officials with regard to any such increase either in its stock capitalization or in its indebtedness, which would materially disturb the established relation between its capital stock and its actual capital in the form of money or property to the extent of impairing the respective rights of its stockholders and its creditors to have such established relation maintained. But the respondent herein goes to the extent of claiming that the inhibitions of the aforesaid section and article of the state Constitution are absolute, and are to that fullness of extent to be applied to the instant case. To put the respondent's interpretation of said section and article of the Constitution in his own words, he says:

"On its face it relates only to the issuance of stock and bonds, and prohibits such issue except for value received therefor by the corporation. But it has a far deeper significance. It means not only that interests or shares in a corporation shall not be created except for value received by the corporation, that the condition shall not arise of there being issued shares of stock without the corporation receiving value as against such stock so issued, but also that, such interests or shares having been created, and value received by the corporation therefor, that or equivalent value is always to remain with the corporation while those interests or shares are outstanding. It was intended thereby to benefit the corporation by securing to it capital in return for all interests created in its assets and affairs, preventing any one from sharing in those assets unless the corporation had received some valuable consideration for his interest therein. Likewise it was intended thereby to benefit those stockholders who had paid value to the corporation for their shares by preventing the depreciation of the value of their interest in the corporation which would result if others were to be allowed to share in those assets without the corporation receiving value for the interests thus created. And finally it was intended thereby to create a fund for the benefit of creditors of the corporation so that in the course of its life its assets might not be withdrawn by the shareholders, after obligations had been incurred upon the faith of the ownership of those assets, without first taking care of those creditors."

In dealing with the foregoing contention of the respondent herein, we may conveniently do so first from the standpoint of the stockholders of the corporation, in order to determine what their constitutional rights are to have the relation between the actual and the stock capitalization of their corporation rigidly established and inexorably maintained. This subject has been before this court in various forms and in a number of well-considered cases, in which it may be noted this court has quoted and referred to the decisions of the courts of certain of those states from the Constitutions of which the aforesaid provision in our own Consti-

tution was taken. The first case arising after the adoption of the Constitution of 1879 and coming to this court on appeal was Stein v. Howard, 65 Cal. 616, 4 P. 662, wherein a stockholder undertook to enjoin the trustees of the Spring Valley Water Company, a corporation, from issuing and selling 20,000 shares of its capital stock for a price much below the par value of its stock capitalization, and from providing that its stockholders might purchase said stock proportionately to their previous holdings at such reduced price. It was contended that such a transaction fell within the inhibition of section 11 of article 12 of the Constitution, and particularly of the portion thereof above set forth. This court, however, held that the transaction in question did not come within the inhibitions of said section and article of the Constitution. In the case of Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 P. 838, the plaintiff, a stockholder of the defendant corporation, brought suit against it and certain other stockholders to have canceled certain issues of corporate stock of a par valuation of $1 per share to the latter named stockholders in payment for certain oil leases of very much less valuation than the par value of said stock. This court held that the transaction was one conducted in good faith on the part of the corporation, and that this being so, and the stock having been issued for a valuable consideration, and having been consummated through proceedings duly had by and entered upon the books of the corporation, the plaintiff could not be heard to complain.

In the case of O'Dea v. Hollywood Cemetery Association, 154 Cal. 55, 97 P. 1, this court, upon the suit of a stockholder, held valid a contract whereby the stock of a corporation was issued for property of less value than the nominal or par value of such corporate stock, upon the ground that, the directors of a corporation having in good faith issued its fully paid-up stock for the purchase of such property, the action of the corporation by its stockholders could not be questioned, nor the validity of the issue assailed on the ground that the consideration received was inadequate. The case of McKee v. Title Insurance Co., 159 Cal. 206 et seq., 113 P. 140, is a leading and instructive authority upon the subject under review. In that case the plaintiff in his capacity as a stockholder of the Wentworth Hotel Company, a corporation, brought suit to have a transaction set aside wherein 275,000 shares of the capital stock of said corporation and also the bonds thereof of the face value of $275,000 had been issued and delivered over for a single consideration of $275,000. The transaction was assailed as in violation of section 11 of article 12 of the Constitution. This court, in upholding said transaction, directed attention to the fact that the case was practically identical as to its facts with the case of Memphis, etc., R. R. Co. v. Dow, 120 U. S. 299, 7 S. Ct. 482, 30 L. Ed. 595, wherein the provisions of the Arkansas Constitution from which the identical provision in our own Constitution had been taken were interpreted. After showing the substantial identity of the two cases, this court approvingly quoted from the cited case the portion of the opinion therein wherein that court said that the constitutional provision in question "does not necessarily indicate a purpose to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property, or labor actually received therefor was of equal value in the market with the stock or bonds so issued. It is not clear, from the words used, that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property, or labor, upon such terms as they deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden. * * * There was, consequently, no fictitious increase by appellant of its stock or indebtedness. Under these circumstances it cannot be fairly said that the bonds secured by the mortgage were issued without any consideration, whatever actually received in property."

[1] The foregoing review of the cases above referred to will suffice to show that, in so far as the stockholders of corporations are concerned, the constitutional provision here under review is not to be so rigidly construed as to forbid corporations formed for commercial purposes from issuing their stock for the purchase of property, the valuation of which does not bear an exact equality with the par value of the stock itself, and that so long as the corporation and its officials are acting in good faith in the issuance and transmutation of its stock into money or property which is to become, in whole or in part, the actual capital of the corporation, and so long as such property so taken in exchange for its said stock possesses a sufficient although undetermined valuable consideration to support such transfer, the transaction will not be held to be obnoxious to the said provision in the state Constitution. In the case of California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 P. 190, the question of the application of section 11 of article 12 of the Constitution to a transaction of a corporation, involving the issuance and transfer of its stock for a consideration less than the par value thereof, but in good faith and without the indicia of fraud, was involved. In a quite exhaustive consideration of the sub-

ject, wherein the authorities of this and other jurisdictions having similar constitutional provisions were quite fully reviewed, the consensus of the cases considered was thus stated by the court:

"The purpose of those provisions of the Constitution is, of course, to preserve at all times the property of the corporation and thus protect and maintain the rights of the creditors and stockholders thereof as against any such manipulation or disposal of the capital stock by the owners of a majority of such stock as might result in the serious impairment if not the complete destruction of the rights of such creditors and the minority stockholders and at the same time in advantage to such majority stockholders—a situation which experience shows could easily be brought about if the law were otherwise than as laid down by the provisions of the Constitution above quoted. In other words, the design of said provisions is among other things to prevent the corporate stock of a corporation from being transferred or disposed of by it without a sufficient consideration, either in the form of money, or property or labor performed for it. But by this we are not to be understood as meaning a consideration equal in value with the stock, for we do not think that the constitutional inhibition invoked here requires such a consideration to render valid the issue of stock by a corporation. If there is a consideration of some sort, and the transaction is one intended to redound to the benefit of the corporation in the prosecution of its corporate purposes, then we should say that, so far as are concerned the requirements of the law in that regard, the consideration is sufficient, and, in a sense, adequate, although it may not be equal in value to that of the stock."

Turning now to the question as to the rights of the creditors of commercial corporations to invoke the inhibitions of the said section and article of the Constitution against transactions on the part of corporations of a similar character to those involved in the foregoing cases, we find that a like liberality of interpretation prevails. It will not be necessary to review the considerable number of cases developing this principle, since, in the case of Lucey Co. v. McMullen, 178 Cal. 425, 173 P. 1000, the former decisions of this court upon the subject are fully reviewed, with the result of holding that a corporation was not prohibited by the provisions of section 11 of article 12 of the Constitution from engaging in good faith in a transaction wherein it issues its fully paid-up capital stock for a consideration of undetermined value but less than the par value of said stock, where the transaction was not tinged with fraud or bad faith on the part of those who were parties to it; and that in an action on the part of the creditors of the corporation to have recourse against those taking such stock under such circumstances, no such cause of action existed in the absence of averments and proof showing actual or inferable fraud in the transaction, and that the consideration for the issuance of said stock was not equal to its full actual value at the time of its issuance and transfer. In the quite recent case of Rhode v. Dock-Hop Co., 184 Cal. 379, 194 P. 11, 12 A. L. R. 437, the subject was again quite fully considered and the doctrine laid down in Garretson v. Pacific Crude Oil Co., supra, with relation to stockholders of corporations, was given application to suits by creditors assailing similar transactions. When we turn from these parallel lines of decision in this state to the decisions by the courts of other jurisdictions interpreting and applying the provisions of those other state Constitutions which are identical or similar to the like provisions in our own Constitution here under review, we find much confusion if not conflict in the varying views of these courts. This conflict and seeming confusion in these decided cases from different jurisdictions in a large measure disappears when the views expressed by the courts are read in connection with the facts of each individual case. This is well illustrated by the case of Coquard v. St. Louis Cotton Compress Co. (Mo. Sup.) 7 S. W. 176, from which the respondent quotes copiously, and upon which he strongly relies. The facts in that case disclose a transaction which would not have passed muster under the rules of interpretation laid down by our own decisions with respect to the scope and limitations of our constitutional provision, which is identical in language with that of the state of Missouri.

[2] It may be said in this connection, as having an important bearing upon the respondent's contention in the instant case, that the seeming confusion and conflict in these decisions aptly illustrate the proposition that the question as to whether the transaction of corporations affecting the relation between their actual and their stock capitalization is not a mere question of law, to be determined by an inspection of the organic law, but is in most cases a mixed question of law and fact, to be determined after a consideration of the facts of each individual case. Looking to decisions of the courts of other jurisdictions as a whole, there are certain leading cases which stand forth and commend themselves by the fullness and clarity of their reasoning to our approval, and which are in harmony with the decisions of this court upon the immediate matter in hand. Among the earlier of these cases was that of Peoria, etc., R. R. Co. v. Thompson, 103 Ill. 187, wherein the direct question was involved as to whether the provisions of the Illinois Constitution, substantially identical with those of our own organic law in the above respect, should be so construed as to prohibit an issue of the stock and bonds of a railroad corporation at less than their face value, in good faith and for the purpose of procuring money wherewith to carry on the work of con-

structing the railroad. The court held that such was not the intention of the framers of the Constitution. In the quite recent case of People v. Union, etc., El. Ry. Co., 263 Ill. 32, 105 N. E. 12, Ann. Cas. 1915C, 388, the Supreme Court of that state reaffirmed the doctrine laid down in its earlier decision, and gave it the same application to a suit on behalf of creditors, invoking the constitutional inhibition against similar transactions without an affirmative showing on their part that the stock or bond issue in question was fictitious to the extent of being fraudulent. In so doing the court quoted with approval the language of the United States Supreme Court in the case of Memphis, etc., R. R. Co. v. Dow, supra, interpreting the said provision of the Constitution of Arkansas, and applying the same to the like provision in the Illinois Constitution as follows:

"The prohibition against the issuing of stocks or bonds except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness, was intended to protect stockholders against spoliation and to guard the public against securities which were absolutely worthless. * * * It is not clear from the words used that the framers of that instrument intended to restrict private corporations—at least when acting with the approval of their stockholders—in the exchange of their stock or bonds for money, property or labor upon such terms as they deem proper, provided, always, the transaction is a real one based upon a present consideration and having reference to legitimate corporate purposes, and is not a mere device to evade the law and accomplish that which is forbidden."

As to the contention of the respondent herein that the creditors of corporations have not only an equal but a superior right to the stockholders thereof to insist upon the strict maintenance of the actual capital of the corporation, without diminution or distribution to any extent whatever among the stockholders, based upon the so-called "trust fund doctrine," that phase of the discussion is quite adequately dealt with in the decision of the District Court of Appeal in the case of Dominguez Land Corporation v. Daugherty, 45 Cal. App. Dec. 884, which has been adopted by this court in its decision of said case upon rehearing this day filed, and to which reference is hereby made. The citations therein made to the decisions of the courts of other jurisdictions touching the right of the creditors of corporations to notice of or to interference with the action of such corporations, in dealing in good faith and without fraud with their capital assets, show that the prevailing trend of authority upon this subject is in accord with the decisions of the courts of this state upon the same subject. The decisions of the courts of other jurisdictions have, however, gone much farther than the decisions of our own courts thus far rendered, touching the interpretation to be given to the section and article of our state Constitution under review, in that they have gone to the full extent of holding that corporations may, when acting in good faith and without fraudulent intent or effect, distribute surplus assets of the corporation among their stockholders, without in so doing, bringing themselves within the inhibitions of the aforesaid constitutional provisions. These authorities are collated and cited by practically all of the leading textwriters upon the powers and duties of corporations, and in which treatises the rule is uniformly stated to the effect that, after an authorized reduction of the capital stock of a corporation regularly effected, a corporation may distribute among its stockholders such amount of its corporate assets over and above the amount of its capital stock as thus reduced as will leave with the corporation an amount of assets equal to its reduced capital stock in addition to the amount of its debts. The most modern and also, perhaps, the most precise statement of this doctrine is that contained in the text of Fletcher's Cyclopedia of Corporations, § 3472, wherein it is stated:

"When the amount of the capital stock of a corporation is lawfully reduced under legislative authority, the corporation is not required to keep the excess of its actual capital over the amount of its nominal capital as reduced, nor has it any right to do so; but the stockholders have the right to have it divided among them, as in the case of a dividend, in proportion to their shares. In making such distribution, however, regard must be had to the present value of the property, and the company, instead of distributing money or property equal in value to the excess of the original nominal capital and the reduced nominal capital, must retain property equal in present value to the reduced nominal capital, after deducting its debts. In other words, the surplus, if any, which a corporation may pay to its stockholders on reducing its capital stock must, in every case, be ascertained, and depends upon the result of an examination into its affairs, and not upon the difference between the original amount of capital stock and the reduced amount. Where a corporation reduces its capital stock, and the surplus which thereby results is invested in the stock of railroad corporations, the stock itself may be distributed. It is not essential that the stock be reduced to cash and distributed in that form. Whenever, by sales of property, or by means of earnings, or otherwise, the corporation comes into possession of funds which are in excess of the amount of its reduced capital stock, it can distribute that amount among the stockholders."

See, also, Morawetz on Corporations, § 443; Cook on Corporations, § 289; Thompson on Corporations, § 3670; 14 Corpus Juris, § 741.

[3] In the light of the decisions of the courts of this state first above referred to, as well as of those of other jurisdictions, defining and limiting the intent of the framers of the aforesaid provisions of our own and of

similar Constitutions, with relation to the investment or exchange of corporate capital assets, and in view, also, of the consensus of opinion of the text-writers last above set forth and supported by abundant authority, it is our conclusion that the proposition of a capital stock corporation to distribute some portion of its capital assets among its stockholders, after a reduction of its stock capitalization has been regularly and lawfully accomplished, does not necessarily and of itself constitute a violation of the section and article of our state Constitution under immediate review herein.

[4] From this conclusion it would seem logically and necessarily to follow that the Legislature has not by virtue of the aforesaid provisions of our state Constitution or otherwise, been deprived of power to properly prescribe and regulate the terms and conditions upon which corporations may exercise their aforesaid limited right to deal with their capital assets, and as well with the amount and value of the stock capitalization of such corporations in relation to their capital assets. In the case of Ewing v. Oroville Mining Co., 56 Cal. 649, it was held that the provisions of section 11 of article 12 of the Constitution of 1879, relating to the increase in the capital stock of corporations, was not self-executing, but, on the contrary, provided for the enactment of general laws regulating such increase. Since that early decision the courts of this state have so uniformly and consistently upheld and enforced the provisions of the Civil Code enacted prior to 1917, relating to the terms and method by compliance with which corporations may increase or diminish their capital stock, that we deem it no longer open to question as to the power of the Legislature in that regard, within the limitations of the foregoing provisions of the Constitution as interpreted in those other and later decisions of this court to which reference has above been made.

[5] It may also be said to be beyond question, at least at the instance of this respondent, that the Legislature, being invested with the aforesaid power, may provide for an officer or tribunal invested with judicial or quasi judicial powers to entertain, hear, and determine certain matters relative to the exercise on the part of corporations of the right or privilege of effectuating an increase, diminution, investment, and disposition of their capital stock and also of their actual capital, having due regard to the rights of both their stockholders and their creditors, and to the protection to which each is entitled under the provisions of the state Constitution. The Corporate Securities Act (Stats. 1917, p. 673), from which the respondent herein derives his power and is invested with the duties prescribed therein, or with which he has been invested by other statutes, has been held to be constitutional in so far as it purports to invest the corporation commissioner with power to investigate the affairs and assets and proposed activities of corporations, and thereupon to issue or refuse to issue permits to do business upon a basis which is or is not unfair, unjust, or inequitable, and to issue securities and use methods in disposing of the same according as he shall determine that such transactions are or are not legitimate and lawful. In re Girard, 186 Cal. 718, 200 P. 593. We are brought by the foregoing consideration to the immediate solution before us. In the year 1917 the Legislature adopted certain amendments to section 309 of the Civil Code. Prior thereto said section provided that:

"Sec. 309, subd. 1. The directors of corporations * * * must not make dividends except from the surplus profits arising from the business thereof; * * * nor must they create any debts beyond their subscribed capital stock; * * * nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided * * * nor reduce or increase the capital stock except as herein specially provided. * * * Nothing herein prohibits a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence."

By the amendment to said section, adopted by the Legislature in 1917 (St. 1917, p. 657), it was, in so far as herein applicable, made to read as follows:

"Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, except as hereinafter provided, nor reduce or increase the capital stock, except as provided in section three hundred fifty-nine of this Code."

Subsequent to the adoption and taking effect of said amendments to section 309 of the Civil Code, the petitioner herein presented and offered for filing with the commissioner of corporations, the respondent herein, its application for permission to distribute to its stockholders $415,000, which it asserted to be a portion of a surplus of its capital assets arising out of the fact that it had theretofore, by regularly conducted proceedings under the provisions of section 359 of the Civil Code as amended in 1921 (St. 1921, p. 127), reduced its stock capitalization from $2,000,000 divided into 20,000 shares of the par value of $100 per share, to $1,000,000, divided into 20,000 shares of the par value of $50 per share. It further alleged that its actual assets and liabilities, as shown by a detailed statement thereof incorporated in its said application, were such that it was

possessed of assets in the way of money and property of a total value of $2,875,015; that its total liabilities amounted to $417,344.70; that it had a surplus of assets over its present stock capitalization and its liabilities in excess of $1,000,000, which was no longer necessary or useful in the ordinary business of the corporation, and which should, therefore, be distributed among the stockholders of the corporation. The application was verified, and was otherwise in form and substance such an application as would suffice to give the corporation commissioner jurisdiction to entertain and consider the same. The refusal of the corporation commissioner so to do was based solely upon his contention that he was not permitted so to do because of the inhibitions of section 11 of article 12 of the state Constitution. We are satisfied that for the foregoing reasons the contention of the corporation commissioner in the above respect cannot be upheld; that the transaction which the petitioner, with the permission of the commissioner, proposed to consummate was one which upon the face of its said application and upon the showing made therein did not come within the inhibitions of the Constitution upon which the latter relies, and that it was therefore his duty, under the provisions of the Corporate Securities Act, and of section 309 of the Civil Code, to entertain, file, consider, and determine the petitioner's application.

It is therefore ordered that the writ issue as prayed for.

We concur: WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; SHENK, J.

MYERS, C. J., deeming himself disqualified, does not participate in the foregoing opinion.

---

196 Cal. 468

DOMINGUEZ LAND CORPORATION v. DAUGHERTY, State Commissioner of Corporations. (L. A. 8528.)

(Supreme Court of California. July 29, 1925.)

1. Corporations ⊜67—Amount by which capital stock was reduced held properly carried in surplus capital account.

Amount by which capital stock of a corporation was reduced, pursuant to Civ. Code, §§ 309, 359, *held* properly carried in the surplus capital account.

2. Licenses ⊜22—Corporate Securities Act held to authorize commissioner of corporations to make dividends from other than surplus profits.

Corporate Securities Act construed, and *held* to authorize state commissioner of corporations to permit a corporation to make dividends from other than surplus profits only when the commissioner finds that the distribution of such dividends would still leave the corporation in a sound financial condition, safe for the interest of the creditors as well as of the stockholders.

3. Corporations ⊜60—"Capital stock" of corporation defined; "capital."

The word "capital," applied to corporations, is often used interchangeably with the words "capital stock," and both are frequently used to express the same meaning, to wit, the property and assets of a corporation, but, strictly speaking, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise; the capital stock being the consideration which Const. art. 12, § 11, requires the corporation to receive in exchange for all issued stock, whether that consideration take the form of money paid, labor done, or property actually received, and includes all subsequent transmutations of the consideration originally given or agreed to be given for the stock.

[Ed. Note—For other definitions, see Words and Phrases, First and Second Series, Capital; Capital Stock.]

4. Corporations ⊜67—Withdrawal or distribution of capital stock in strict sense falls within assumed prohibition of Constitution against withdrawal or distribution of "capital stock."

It is only the capital stock of a corporation, within the strict meaning of that term—that is, the property received in exchange for all issued stock, and not the other capital or assets of the corporation—which may not be withdrawn or divided without violating Const. art. 12, § 11, assuming that such provision prohibits the withdrawal or distribution of any of the capital stock of a corporation.

5. Corporations ⊜152—Statute permitting corporation to make dividends from assets from other than surplus profits held not violative of Constitution.

Civ. Code, § 309, permitting a corporation complying with Corporate Securities Act to make dividends from assets other than surplus profits, if such procedure is authorized by the state commissioner of corporations, *held* not violative of Const. art. 12, § 11, as applied to assets owing existence to assessments levied and collected upon stock fully paid at par.

6. Corporations ⊜544(2)—Trust fund doctrine is limited to corporate assets, contributed or required to be contributed by stockholders in payment of their stock subscriptions.

Trust fund doctrine is limited to corporate assets, contributed or required to be contributed by the stockholders in payment of their stock subscriptions, and does not apply to assets owing existence to assessments levied and collected upon stock fully paid at par.

7. Corporations ⊜544(2)—Assets to which trust fund doctrine is applicable not chargeable with enforceable trust or equitable lien on behalf of general creditor of corporation, if latter is solvent.

Assets to which trust fund doctrine is applicable are not chargeable with enforceable

trust or equitable lien on behalf of general creditor of corporation, if latter is solvent and a going concern.

8. Corporations ⊂544(2)—When court of equity will make property of corporation a trust fund in favor of creditors stated.

It is only when a corporation is dissolved or is insolvent that a trust sub modo arises in favor of creditors, and that a court of equity, at the instance of the proper parties, will make the property of the corporation a trust fund, which in other circumstances is the absolute property of the corporation.

9. Corporations ⊂438—Solvent corporation engaged in business as going concern, holds its property absolutely.

A solvent corporation, engaged in business as going concern, holds its property absolutely.

10. Constitutional law ⊂296(1)—Failure of statute, permitting corporation to distribute assets, to provide for hearing of creditors held not denial of due process of law.

Failure of Civ. Code, § 309, permitting a corporation, on obtaining approval of state corporation commissioner, to distribute assets other than surplus profits, to provide for notice to and hearing of creditors *held* not denial of due process of law, as applied to a solvent corporation duly reducing its capitalization, with intent to distribute assets owing their existence to assessments levied and collected upon stock fully paid at par.

11. Appeal and error ⊂1078(1)—Ordinarily, appellant, neglecting to present point in brief, is not entitled to consideration of such point.

Ordinarily, appellant, neglecting to present point in brief, is not entitled to a consideration of such point.

12. Mandamus ⊂172—Existence of valid reason against issuance to state corporation commissioner of mandamus to permit corporation to distribute dividends held ground for withholding writ, though such reason not called to court's attention.

The existence of a valid reason against the issuance of mandamus by court of original jurisdiction, at the request of a corporation, against the state corporation commissioner to compel him to permit the corporation to distribute assets other than surplus profits, pursuant to Civ. Code, §§ 309, 359, and Corporate Securities Act *held* ground for withholding writ, notwithstanding that the commissioner as defendant in the proceeding fails to call such reason to the attention of the court.

13. Constitutional law ⊂80(2)—Ministerial or administrative acts held not "judicial power," within constitutional provision prohibiting delegation of that power.

Ministerial or administrative acts, though involving in some degree exercise of judgment and discretion, are not judicial, within Const. art. 3, prohibiting Legislature from delegating judicial power.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Judicial Power.]

14. Constitutional law ⊂80(2)—Statute held not to confer upon state commissioner of corporations "judicial power."

Civ. Code, § 309, which authorizes the state commissioner of corporations to permit a corporation to make dividends from other than surplus profits, if he determines that the corporation will remain in a safe financial condition after such distributions, confers a ministerial or administrative function and not a judicial power, within Const. art. 3.

15. Constitutional law ⊂62—Legislature may commit to administrative officer power to determine whether facts of particular case bring it within rule or standard previously established by Legislature.

Legislature may commit to administrative officer power to determine whether facts of particular case bring it within rule or standard previously established by Legislature for his governance.

16. Constitutional law ⊂62—Statute conferring power upon commissioner of corporations to permit corporation to distribute other than surplus profits held not void as attempt to delegate legislative power.

Civ. Code, § 309, conferring upon state commissioner of corporations power to permit a corporation to distribute to its shareholders assets other than surplus profits, *held* not void as an attempt to delegate legislative power to the commissioner, when such section is, as it must be, read in connection with Corporate Securities Act, because the latter act makes the commissioner's determination to grant such permit dependent upon his determination that the distribution of such assets will leave the corporation in a safe financial condition.

In Bank.

Original application for mandamus by the Dominguez Land Corporation, to be directed to Edwin M. Daugherty, as State Commissioner of Corporations, directing him to assume jurisdiction of an application for permission to distribute money to stockholders. Writ granted.

James S. Bennett, of Los Angeles, for petitioner.

U. S. Webb, Atty. Gen., Robert W. Harrison and H. H. Linney, Deputy Attys. Gen., for respondent.

H. L. Carnahan, of Los Angeles, amicus curiæ.

RICHARDS, J. The application for a writ of mandate herein presents a companion case to that of Dominguez Land Corporation v. Daugherty (L. A. No. 8519) 238 P. 697, this day decided; for the reason that while the facts in the two proceedings differ, the same general principles of law are applicable to both. Because of the said differences as to the facts, requiring a somewhat different treatment and application of the legal principles involved in both cases, we have adopted that portion of the opinion of Mr. Presiding Justice Finlayson of the District Court

of Appeal which we deem applicable to the case in its present situation, and apposite to it in the presence of our reasoning and conclusions in the other proceeding. It is as follows:

"This is an original proceeding in mandamus to compel respondent, as commissioner of corporations, to assume jurisdiction of a written application by petitioner for permission to distribute to its shareholders the sum of $185,000. This sum does not represent surplus profits. Petitioner made its application to respondent under the provisions of section 309 of the Civil Code.

"The petition discloses the following facts: Petitioner was incorporated under the laws of this state in 1912, with a capital stock of $2,000,000, divided into 20,000 shares of the par value of $100 each. Shortly after its organization all of its stock was issued in exchange for property which, according to an appraisement thereafter made, had a value which exceeded by $1,222,187.07 the par value of the stock. Subsequently, the corporation, for the purpose of paying its debts and developing its properties, levied and collected, from time to time, assessments upon the stock so issued by it. On these assessments it collected from its shareholders amounts which aggregated $835,000. Thereafter, by proceedings duly had under section 359 of the Civil Code, petitioner reduced its capital stock to $1,000,000, divided into 20,000 shares of the par value of $50 each, and thereupon transferred $1,000,000 from its capital stock account to its surplus capital account.

[1] "The amount by which the capital stock was thus reduced, $1,000,000, was properly carried in the surplus capital account. It represented a surplus of capital. Roberts v. Roberts-Wicks Co., 184 N. Y. 257, 77 N. E. 13, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213. In New York it has been held that the surplus of capital which is thus left after a reduction of the corporation's capital stock may be distributed in dividends to the stockholders if, after that is done, there shall be left in hand actual capital available for the payment of the corporation's debts exceeding the amount to which the capital stock was reduced. Strong v. Brooklyn, etc., R. R. Co., 93 N. Y. 426. In that case, however, there does not seem to have been any constitutional ground of objection to such distribution of the surplus of capital.

"From an exhibit attached to the petition it may be gathered that, upon prior applications heretofore made to him, respondent has given petitioner permission to distribute to its shareholders $650,000 of the $835,000 collected by it from its shareholders upon assessment. This sum of $650,000 has been distributed by petitioner among its stockholders pursuant to the permission thus received, leaving of the total assessments levied and collected a balance of $185,000 undistributed. On May 24, 1924, in compliance with the provisions of the Corporate Securities Act (commonly known as the Blue Sky Law) and the rules and regulations of the commissioner of corporations, and on payment or tender of the fees allowed in such cases, petitioner presented to respondent its application for leave to distribute this sum of $185,000 to its shareholders in the form of dividends.

"Respondent has filed a general demurrer to the petition. The reason assigned by him for his refusal to accept or file petitioner's application for permission to distribute the $185,000 or to take any action thereon is that section 309 of the Civil Code, in so far as it purports to confer upon the commissioner of corporations jurisdiction to permit or authorize the making of dividends from other than surplus profits, is unconstitutional and void.

"Prior to 1917, section 309 of the Civil Code unconditionally prohibited the making of dividends except from surplus profits arising from the business of the corporation. In that year the section was amended so as to provide, in effect, that the directors of a corporation might make dividends from other than surplus profits upon receiving permission from the commissioner of corporations. The section as thus amended, and in so far as its provisions are germane to the questions here involved, reads: 'Unless they shall have been first permitted or authorized so to do by the commissioner of corporations, directors of corporations must not make dividends except from the surplus profits arising from the business thereof; nor must they create any debts beyond their subscribed capital stock; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock, * * * nor reduce or increase the capital stock, except as provided in section three hundred fifty-nine of this Code.' St. 1917, p. 657.

"The Corporate Securities Act (St. 1917, p. 673), contains the following provisions: 'The word "security" includes: (a) All shares or other interests or rights into which the capital, capital stock, or property of companies or rights of stockholders * * * are divided.' Section 2, subd. 6. 'A "sale" * * * includes * * * any issue of any security by a company; and the word "sell" * * * includes every act by which such sale is made.' Section 2, subd. 7. 'No company shall sell * * * any security of its own issue until it shall have first applied for and secured from the commissioner a permit authorizing it so to do. * * * In such application the applicant shall set forth * * * an itemized account of its financial condition, the amount and character of its assets and liabilities, a detailed statement of the plan upon which it proposes to transact business, * * * and such additional information concerning the company, its condition and affairs as the commissioner may require.' Section 3. 'Upon the filing of such application, it shall be the duty of the commissioner to examine it and the other papers and documents filed therewith, and he may, if he deems it advisable, make or have made a detailed examination, audit and investigation of the applicant and its affairs. If he finds that the proposed plan of business of the applicant is not unfair, unjust, or inequitable, that it intends to fairly and honestly transact its business, and that the securities that it proposes to issue and the methods to be used by it in issuing or disposing of them are not such as, in his opinion, will work a fraud upon the purchaser thereof, the commissioner shall issue to the applicant a permit authorizing it to issue and dispose of securities. * * *' Section 4. 'The commissioner shall at all times have the power to administer oaths and to make an examination or investigation of the books, records, accounts

and other papers and of the business of any company * * * permitted or authorized by him * * * to make dividends.' Section 17.

[2] "It is a reasonable inference from these provisions of the Corporate Securities Act that the Legislature intended that the commissioner of corporations should give his permission to make dividends from other than surplus profits only when he should find that if the dividends were made the corporation would still be left in a sound financial condition—a financial condition that would be safe for the interests of the creditors as well as of the stockholders. And to enable the commissioner to ascertain whether the corporation's financial condition would be left safe and sound the statute gives him power to examine witnesses and to investigate the corporation's books and records.

"Respondent claims that so much of section 309 as purports to confer upon him the power to permit the making of dividends from other than surplus profits conflicts with that part of section 11 of article 12 of our state Constitution which declares that 'no corporation shall issue stocks or bonds except for money paid, labor done or property actually received,' and that 'all fictitious increase of stock or indebtedness shall be void.' It also is suggested that this part of section 309 violates other constitutional guarantees. We shall consider respondent's objections in the order of their presentation:

"In support of his claim that so much of section 309 as grants to the commissioner of corporations power to permit the distribution of other than surplus profits is violative of section 11 of article 12, respondent argues substantially as follows: The design of this constitutional provision is to prevent the issuance of 'watered stock'; to accomplish that end it is the purpose of the Constitution to prohibit the issuance of stock unless the money, property, or labor given in exchange therefor possesses a value corresponding with the face value of the stock or at least equals the reasonable worth of the stock; to prevent this beneficent purpose of the Constitution from being circumvented, and to thwart the accomplishment by indirection of that which cannot be done directly, no part of the consideration received by the corporation for its stock, whatever form that consideration may have taken, should ever be distributed to the stockholders prior to the corporation's dissolution, for, as was said in Hospes v. Northwestern Mfg., etc., Co., 48 Minn. 174, 50 N. W. 1117, 15 L. R. A. 470, 31 Am. St. Rep. 637, 'If the assets of a corporation are given back to stockholders, the result is the same as if the shares had been issued wholly or partly as a bonus. The latter is merely a short cut to the same result.' To this argument the learned counsel who has appeared as amicus curiæ makes a reply, the substance and effect of which, as we understand it, is this: The courts of this and other states have held that the inhibition against the issuance of stock except for money paid, labor done or property actually received is applicable and effective only when the issue is entirely fictitious, i. e., when nothing of value whatever is received or agreed to be received in exchange for the stock; in so holding the courts have practically deprived this constitutional inhibition of all efficacy, or, to employ the language of the amicus curiæ, it has become for all practical purposes 'innocuous'; it follows as a necessary sequence, says amicus curiæ, that there is no constitutional reason why a corporation should be required to maintain any ratio between its assets and the face value of the stock which it has issued in exchange for the money, property or labor received by it.

"It will be recalled that petitioner is not asking permission to distribute to its stockholders any part of the $1,000,000 which it caused to be transferred to its surplus capital account when it reduced its capital stock from $2,000,000 to $1,000,000. From the allegations of the petition it may reasonably be inferred that all of petitioner's capital stock was issued as fully paid stock, and that it was issued for property the value of which equaled, if it did not exceed, the par value of the shares. The stock having thus been paid for in full, the assessments which the corporation thereafter levied and collected from time to time, and which aggregated $835,000, were not made as 'calls.' These assessments, therefore, or rather the sums collected thereon, cannot in any sense be viewed as any part of the consideration which was agreed to be given or paid by the shareholders when they subscribed for their shares of stock. It follows, therefore, that the money which petitioner is now seeking to distribute to its shareholders in the form of dividends—the balance on hand of the total assessments levied and collected—is not and never was any part of the property which the corporation received in exchange for its nominal or share capital of $2,000,000. This sum of $185,000 is, of course, a part of the corporation's general capital; and prior to the amendment of section 309 in 1917 it could not have been distributed as dividends, for the reason that, until then, the interdiction of this code section against the making of dividends from aught but 'surplus profits' was absolute and unconditional. But that was but a statutory, not a constitutional, restraint upon the power of the directors to make dividends.

[3] "The 'capital stock' of a corporation, in the strict sense of the term, consists of the consideration which section 11 of article 12 requires to be received in exchange for all issued stock, whether that consideration take the form of money paid, labor done or property actually received, and it includes all subsequent transmutations of the consideration originally given or agreed to be given for the stock.

[4] " 'The word "capital" applied to corporations is often used interchangeably with the words "capital stock," and both are frequently used to express the same thing—the property and assets of the corporation. Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enterprise.' Christensen v. Eno, 106 N. Y. 97, 12 N. E. 648, 60 Am. Rep. 429. It is only the 'capital stock' in this strict sense of the term, and not the other capital or assets of the corporation, which may not be withdrawn or divided without indirectly frustrating the purpose of section 11 of article 12—assuming, without deciding, that the withdrawal or distribution of any of the capital stock would be tantamount to an indirect violation of that provision of our organic law.

[5] "With the possible exception of so much of the corporation's capital as consists of the consideration furnished by the shareholders in

exchange for the stock received by them, or is the product of that consideration, the assets of a corporation always could be divided among its shareholders without violating the constitutional inhibition against issuing stock except for money paid, labor done, or property actually received. With this possible exception, there never was aught but a statutory inhibition against dividing, withdrawing, or paying to stockholders any part of the capital stock. This being the case, there is no reason why the Legislature could not amend section 309 so as to permit dividends to be made from so much of the surplus capital as owes its existence to assessments levied and collected upon fully paid stock, even though such surplus capital may not represent 'surplus profits arising from the business' of the corporation.

"We conclude, therefore, that the provision of section 309 which, in effect, permits dividends to be made from other than surplus profits, if authorized by the commissioner of corporations, does not violate section 11 of article 12, in so far at least at it is sought to apply the permissive provisions of that code section to the situation presented by the petition now before us.

"It next is contended by respondent that the method provided for securing the permission of the corporation commissioner to a distribution of assets other than surplus profits lacks the essential element of notice to the creditors of the corporation and a hearing at which they may be present. As we understand respondent's contention, it is presented in two aspects. As a first basis for the contention, it is claimed that it is the purpose of section 11 of article 12 to provide a fund in the nature of a trust fund for the benefit of creditors, and that therefore the Legislature has no power to authorize a distribution of any part of that fund without notice to the creditors and a hearing accorded to them. As a second ground for the claim that provision for such notice and hearing is an indispensable prerequisite, it is argued that under what is commonly known as the 'trust fund doctrine' all the assets of a corporation constitute a trust fund for the benefit of the creditors; and that, therefore, unless a hearing be accorded to creditors, after due notice, none of the assets of the corporation, other than its surplus profits, may be distributed to the stockholders without violating the creditors' constitutional rights. In other words, it is claimed that, as to the creditors of the corporation, the withdrawal of any assets other than surplus profits amounts to a taking of property without due process of law.

"For reasons already stated, the facts of this case furnish no ground for the claim that the money which this petitioner is seeking to distribute among its stockholders is any part of the assets which section 11 of article 12 requires to be received by the corporation. The only assets which, by any stretch of that provision of our organic law, may be said to be within its purview are those which are formed of or are traceable to the consideration given or agreed to be given by the stockholders in exchange for the shares of stock issued to them. But those assets are entirely separate and apart from the fund which petitioner seeks permission to distribute—a fund which had its genesis in assessments levied and collected upon stock which was wholly paid for at its par value.

[6] "Equally without merit is the claim that the trust fund doctrine, so called, entitled the creditors to notice and to a hearing. In the first place, the doctrine commonly known as the 'trust fund doctrine' is, in strictness, limited in its application to those assets which were contributed or should be contributed by the stockholders in payment of their stock subscriptions. That is to say, the doctrine is based upon the idea that, as to creditors without notice of the circumstances under which the stock was subscribed, the corporation is conclusively presumed to have sought credit upon its subscribed capital stock at its par value, either actually paid in or due from stockholders—that unpaid subscriptions are assets to which corporate creditors may look for payment, and that they have the right to insist upon their collection, the same as any other debt due the corporation. But here, as we repeatedly have had occasion to point out, it is not sought to declare a dividend from those assets which represent the consideration contributed or agreed to be contributed by the stockholders in exchange for their shares of stock. The doctrine which respondent probably contends for, if we rightly apprehend his position, is that *all* the assets of a corporation (other than surplus profits earned in the business) from whatever source derived, must be regarded as a fund pledged for the security of creditors; and that therefore the whole capital of a corporation, that which represents assessments levied and collected as well as that which represents the consideration given or agreed to be given in exchange for stock, constitutes a trust fund held in trust for the corporation's creditors. We do not think that such a doctrine is supported either by reason or by the weight of authority.

[7] "It is uniformly held by the federal courts, and likewise by some state courts, that even those assets to which the so-called trust fund doctrine is applicable are not charged with any enforceable trust or with any equitable lien on behalf of any general creditor of the corporation, if it be a solvent, going concern, and that such creditors have no vested right of any nature whatever in or to the property of such a corporation. McDonald v. Williams, 174 U. S. 397, 19 S. Ct. 743, 43 L. Ed. 1022; Ratcliff v. Clendenin, 232 F. 61, 146 C. C. A. 253; Carlisle v. Ottley, 143 Ga. 797, 85 S. E. 1010, Ann. Cas. 1917A, 573. That this is also the law in this state results inevitably from the reasoning of our Supreme Court in Rhode v. Dock-Hop Co., 184 Cal. 367, 194 P. 11, 12 A. L. R. 437, where it is held that fraud, and not the idea of a 'trust,' in any proper sense of that word, is the true basis of the so-called trust-fund doctrine. See also, Hospes v. Northwestern Mfg., etc., Co., supra, where the court says: 'The phrase that "the capital of a corporation constitutes a trust fund for the benefit of creditors" is misleading. Corporate property is not held in trust, in any proper sense of the term. A trust implies two estates or interests—one equitable and one legal, one person, as trustee, holding the legal title, while another, as the cestui que trust, has the beneficial interest. Absolute control and power of disposition are inconsistent with the idea of a trust. The capital of a corporation is its property. It has the whole beneficial interest in it, as well as the legal title. It may use the income and profits

of it and sell and dispose of it, the same as a natural person. It is a trustee for its creditors in the same sense and to the same extent as a natural person, but no further.'

"If the doctrine which, for convenience, is commonly referred to as the 'trust-fund doctrine' does not impress with a trust those assets which represent the capital stock contributed or agreed to be contributed by the stockholders of a solvent, going corporation in exchange for their stock, then, a fortiori, does no trust in favor of creditors attach to the other assets of such a corporation, such, for example, as moneys collected on assessments levied on the subscribed capital stock.

[8, 9] "It is only when a corporation is dissolved or is insolvent that a 'trust', sub modo, arises in favor of creditors. Then a court of equity, at the instance of the proper parties, will make those funds trust funds which, in other circumstances, are as much the absolute property of the corporation as any man's property is his. In Wabash, etc., Ry. Co. v. Ham, 114 U. S. 587, 594, 5 S. Ct. 1081, 1084 (29 L. Ed. 235), the court says: 'The property of a corporation is doubtless a trust fund for the payment of its debts, in the sense that when the corporation is lawfully dissolved and all its business wound up, or when it is insolvent, all its creditors are entitled in equity to have their debts paid out of the corporate property before any distribution thereof among the stockholders.' But a solvent corporation, engaged in business as a going concern, holds its property as absolutely as an individual can hold his. Its estate is the same; its interest is the same; its possession is the same. In Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 14 S. Ct. 127, 37 L. Ed. 1113, the court, speaking of the theory of the capital of a corporation being a trust fund, said: 'In other words, and that is the idea which underlies all these expressions in reference to "trust" in connection with the property of a corporation, the corporation is an entity, distinct from its stockholders as from its creditors. Solvent, it holds its property as any individual holds his, free from the touch of a creditor who has acquired no lien; free also from the touch of a stockholder who, though equitably interested in, has no legal right to, the property. Becoming insolvent, the equitable interest of the stockholders in the property, together with their conditional liability to the creditors, places the property in a condition of trust, first, for the creditors, and then for the stockholders. Whatever of trust there is arises from the peculiar and diverse equitable rights of the stockholders as against the corporation in its property and their conditional liability to its creditors. *It is rather a trust in the administration of the assets after possession by a court of equity than a trust attaching to the property, as such, for the direct benefit of either creditor or stockholder.*' (Italics ours.) See, also, Graham v. La Crosse, etc., R. Co., 102 U. S. 148, 26 L. Ed. 106.

"In McDonald v. Williams, supra, it was held that the receiver of a national bank could not recover a dividend paid to a stockholder, not out of the profits but entirely out of the capital, when the stockholder receiving such dividend acted in good faith, believing the same to be paid out of profits, and when the bank, at the time such dividend was declared and paid, was not insolvent, notwithstanding a statutory provision that 'no association, or any member thereof, shall, during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital.' The court said: 'The complainant bases his right to recover in this suit upon the theory that the capital of the corporation was a trust fund for the payment of creditors entitled to a portion thereof, and having been paid in the way of dividends to the shareholders that portion can be recovered back in an action of this kind for the purpose of paying the debts of the corporation. * * * When a corporation is solvent, the theory that its capital is a trust fund upon which there is any lien for the payment of its debts has in fact very little foundation. No general creditor has any lien upon the fund under such circumstances, and the right of the corporation to deal with its property is absolute so long as it does not violate its charter or the law applicable to such corporation.' After referring to and quoting from a number of United States Supreme Court decisions, the court continues: 'These cases, while not involving precisely the same question now before us show there is no well-defined lien of creditors upon the capital of a corporation while the latter is a solvent and going concern, so as to permit creditors to question, at the time, the disposition of the property. The bank being solvent, although it paid its dividends out of capital, did not pay them out of a trust fund. Upon the subsequent insolvency of the bank and the appointment of a receiver, an action could not be brought by the latter to recover the dividends thus paid on the theory that they were paid from a trust fund, and therefore were liable to be recovered back.'

[10] "We conclude, therefore, that since the money which petitioner is seeking permission to distribute is not impressed with any 'trust' in favor of creditors, and since therefore the creditors have no vested right therein, they will not be deprived of any property without due process of law merely because the statute has made no provision for notice to them of petitioner's application for a permit to divide the $185,000 among its stockholders, and that, therefore, notice to and a hearing by the creditors are not indispensable prerequisites under the state of facts presented by this petition.

[11, 12] "One more objection remains to be considered, although it has not been urged by respondent; at least it has not been directly urged by him. The objection is suggested by a reading of the brief filed by amicus curiæ. Anticipating that the point would be raised by respondent, amicus curiæ has presented an argument to refute any claim that the Legislature improperly delegated legislative or judicial powers to the commissioner of corporations when it empowered that officer to permit dividends to be made from assets other than surplus profits. If the matter before us were an appeal from the judgment or order of an inferior court, we might not feel constrained to consider a point not urged by the party upon whom rests the burden to point out error in the judgment or order. Ordinarily, an appellant who has neglected to pre-

sent a point in his brief may be precluded from insisting that the court consider the matter when deciding the case—though even on an appeal this is not a hard and fast rule. Schubert v. Lowe, 193 Cal. 291, 223 P. 550. But where, as here, we are asked to issue our writ as a court of original jurisdiction, we do not think that the rule should apply. We do not think we should issue our writ in any case if we believe there is good reason why it should not issue, regardless of whether that reason is or is not called to our attention by the defendant in the proceeding. We shall therefore consider the point suggested by the brief of amicus curiæ.

[13, 14] "The power which section 309 confers upon the commissioner of corporations is not a judicial power of a character which may not be delegated. In determining whether the directors of a corporation shall be permitted to make dividends from other than surplus profits the commissioner no doubt exercises some discretion, which in a strict sense is in its nature judicial; but the exercise of purely administrative functions quite often calls for that kind of discretion. What section 309 requires the commissioner to do is, not to adjudicate—unless every exercise of judgment is to be called a judicial act—but to perform a duty of ascertainment—to determine, by an examination of witnesses and the books and records of the corporation and from a consideration of values, whether, if the dividends be made, the corporation will remain in a safe financial condition. This is a ministerial or administrative function. It is well settled that such acts, though involving in some degree an exercise of judgment and discretion, are not so far judicial that the Legislature may not place the power elsewhere than in the courts. See County of Los Angeles v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217, where it was held that the power which the Horticulture Act of 1881 gives to the horticultural commissioners to determine whether any particular place is a nuisance and to abate it is not a judicial power within the meaning of the inhibition of article 3 of the state Constitution.

[15] "A more difficult problem is involved in the question whether there is an improper delegation of legislative power. It is well settled that the Legislature may commit to an administrative officer the power to determine whether the facts of a particular case bring it within a rule or standard previously established by the Legislature for his governance. A familiar illustration is where the Legislature enacts a law prescribing that the rates to be charged by a public utility shall be 'reasonable,' and creates a commission with power to investigate and fix the rates. If, however, no standard by which the officer is to be governed be prescribed by the lawmakers, then there is an attempt to intrust a mere administrative officer with the plenary power of the Legislature, and there will then be no guard against possible arbitrary action. Thus, in State v. Great Northern Ry. Co., 100 Minn. 445, 111 N. W. 289, 10 L. R. A. (N. S.) 250, the court having before it an act of the Minnesota Legislature which empowered a railroad corporation to increase its capital stock if it secured the approval of the railroad and warehouse commission, held that so much of the act as required the approval of the commission was unconstitutional and void, for the reason that the manner in which and the terms upon which the commission might authorize the increase of stock to be made were entirely committed to the unrestrained judgment of the commission, without any standard having been prescribed by the Legislature to govern the commission in the exercise of its judgment. See, also, People v. C. Klink Packing Co., 214 N. Y. 121, 108 N. E. 278, Ann. Cas. 1916D, p. 1051.

[16] "If section 309 were the only enactment to which we could look to ascertain the exact nature of the power conferred upon the commissioner of corporations in such cases as this, we probably should feel constrained to hold that there had been an attempt to delegate legislative power to the commissioner in violation of the principle that the lawmaking function is assigned exclusively to the Legislature. But section 309 can and should be read in connection with and in the light of the Corporate Securities Act. When so read, we think it clear that the Legislature has prescribed a sufficient standard for the guidance of the commissioner. The leading idea which seems to run through the Corporate Securities Act is that in all cases the commissioner is to consider whether the action which he is asked to sanction—the making of dividends from other than surplus profits, for example—will leave the corporation in a safe financial condition. This, therefore, is the standard prescribed by the Legislature for the guidance of the commissioner, and the one by which he is to be governed in the exercise of his discretion whether to permit dividends to be made from other than surplus profits. We believe it to be a sufficient standard and an adequate guard against arbitrary action. In Iowa L. Ins. Co. v. Eastern Mut. L. Ins. Co., 64 N. J. Law, 340, 45 A. 762, it was held that a statute providing that it shall not be lawful for any life insurance company to contract for reinsurance of its own risks or to reinsure the risks of another company, unless two-thirds in number of the holders of the policies proposed to be reinsured shall assent thereto in writing, and that the contract for such reinsurance shall be utterly invalid and of no force until it shall have been approved by the secretary of state, which he shall do only after due inquiry and upon satisfactory evidence that the interests of the policy holders are fully protected, and that the proper consent has been given, is not unconstitutional as attempting to delegate to the secretary of state a legislative power, since it merely requires him to enforce a prescribed rule upon ascertaining, by an examination of values and mathematical relations, whether a safe financial situation exists, and whether a certain document has been properly signed.

"What section 309 and the Corporate Securities Act call upon the commissioner to do is, not to legislate by laying down a new rule, but to enforce a prescribed rule, the rule of safe financial condition. Legislative power was exercised when the Legislature, through the Corporate Securities Act and section 309, declared, in substance and effect, that dividends might be made from assets other than surplus profits if the proposed division of the as-

sets would be fair, just, and equitable, and would leave the corporation in a sound financial condition. The commissioner is made the mere agent of the lawmaking department to ascertain and declare the facts upon which its expressed will is to take effect.

"The line of demarcation between legislative and administrative functions is not always easily discernible, the one often running into the other. But, as was said by Mr. Justice Brewer in Chicago & Northwestern R. Co. v. Dey (C. C.) 35 F. 866, 1 L. R. A. 744: 'The law books are full of statutes unquestionably valid, in which the Legislature has been content to simply establish rules and principles, leaving execution and details to other officers.' Thus in Trustees of Saratoga Spring v. Saratoga Gas, etc., Co., 191 N. Y. 123, 83 N. E. 693, 18 L. R. A. (N. S.) 713, 14 Ann. Cas. 606, it was held that where a statute provides that a commission shall fix the maximum price of gas and electricity 'within the limits prescribed by law,' the intention is to include both the common law and statutory law; and, as the common law prescribes that the rates shall be 'reasonable,' it was held that the statute prescribed reasonableness as the standard for the guidance of the commission, and that such standard is not too general. See, also, State v. Railroad Commission, 137 Wis. 80, 117 N. W. 846; Ex parte McManus, 151 Cal. 331, 90 P. 702; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; Union Bridge Co. v. United States, 204 U. S. 364, 27 S. Ct. 367, 51 L. Ed. 523; Sears R. Co. v. Federal Trade Commission, 258 F. 307, 169 C. C. A. 323, 6 A. L. R. 358; Railroad Commission v. Central, etc., Ry. Co., 170 F. 225, 95 C. C. A. 117; Klafter v. State Board, 259 Ill. 15, 102 N. E. 193, 46 L. R. A. (N. S.) 532, Ann. Cas. 1914B, p. 1221; Insurance Co. v. Welch, 49 Okl. 620, 154 P. 48, Ann. Cas. 1918E, p. 471; Idaho Power, etc., Co. v. Blomquist, 26 Idaho, 222, 141 P. 1083, Ann. Cas. 1916E, p. 282.

"We find no difficulty in holding that section 309 may be read in the light of the provisions of the Corporate Securities Act, and that when so read there will be found in it a sufficient criterion or standard prescribed by the Legislature for the guidance of the commissioner. Indeed, the courts have often gone so far as to hold that an act may be construed so as to read therein an implied declaration of an adequate standard whereby the administrative body or officer is to be governed. Thus, in Ex parte McManus, supra, Mr. Justice Shaw, in his concurring opinion, says: 'The statute does not expressly prescribe any standard of qualification in the applicant. It must be construed as at least an implied declaration that no person shall be entitled to a certificate as a licensed architect, unless he has such ordinary knowledge of the principles and science of that art or profession, and such ordinary skill in the practical application of those principles and that science, as are usually possessed by those engaged therein. It is the usual standard implied in law, where no different standard is expressed by the statute.' 151 Cal. 338, 90 P. 705. See Laurelle v. Bush, 17 Cal. App. 409, 415, 416, 119 P. 953; also Trustees of Saratoga Springs v. Saratoga Gas, etc., Co., supra, where it was held that the statute, by implication, incorporated into itself the common-law rule that rates shall be 'reasonable.'

"This proceeding undoubtedly involves questions of much importance to corporate and general interests, and we have endeavored to give to them that careful consideration which is commensurate with their gravity, with the result that we have arrived at the conclusion that section 309, in so far at least as it is sought to apply it to the facts of this case, does not contravene any constitutional requirement or guarantee."

Let the writ issue as prayed for.

We concur: WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; SHENK, J.

MYERS, C. J., deeming himself disqualified, does not participate in the foregoing opinion.

---

196 Cal. 488

DEL MONTE LIGHT & POWER CO. v. JORDAN, Secretary of State. (S. F. 11328.)

(Supreme Court of California. July 29, 1925. Rehearing Denied Aug. 27, 1925.)

Corporations ⊂⊃62 — Refusal of secretary of state to accept for filing amended articles of incorporation, providing for shares of preferred stock of designated par value and shares of common stock of no par value held proper.

Refusal of secretary of state to accept for filing amended articles of incorporation of public utility corporation, within St. 1917, p. 1367, § 3, providing for shares of preferred stock of a designated par value and shares of common stock of no par value *held* proper, under Const. art. 12, §§ 3, 12; Civ. Code, §§ 290, 307, 322, 362, despite sections 290b–290f, added in 1923, the Constitution contemplating a capitalization represented by shares of a single par value.

In Bank.

Original application for mandamus by the Del Monte Light & Power Company, to be directed to Frank C. Jordan as Secretary of State. Application denied.

Chickering & Gregory and Garret W. McEnerney, all of San Francisco, for petitioner.

U. S. Webb, Atty. Gen., and Robert Harrison, Deputy Atty. Gen., for respondent.

RICHARDS, J. The petitioner herein applies for a writ of mandate, whereby it seeks to have the respondent in his capacity as secretary of state filed the petitioner's amended articles of incorporation, a copy of which is attached to its petition herein, the respondent having refused to receive or file the same for certain specified reasons which are fully set forth in said petition. The facts upon which the petitioner relies as furnishing a

sufficient basis for its claim of right to have its said amended articles of incorporation filed in the office of said respondent and to have this writ issued to compel such filing, are also embraced in its said petition and may be stated in brief as follows: The petitioner was duly organized as a corporation in and under the laws of the state of California on or about the 12th day of May, 1919, for the purpose of engaging in such activities in the way of the distribution of light, heat, and power as would constitute it a public utility corporation, with a declared stock capitalization of $25,000, divided into 250 shares, each of the par value of $100, of which 125 shares were to consist of preferred stock entitled to certain preferences as specified in its articles of incorporation, and of 125 shares of common stock.

The law as it read at the date of the organization of said corporation provided that the preferred and common shares of a corporation should be of the same par value. Civ. Code, § 290. In the year 1923 the Civil Code was amended by the addition thereto of sections 290b, 290c, 290d, 290e, and 290f, wherein it was for the first time enacted that corporations existing or thereafter to be organized might in their original or amended articles of incorporation provide for the issuance of shares of stock without any nominal or par value, and that the articles of incorporation, in either their original or amended form, might provide for the issuance of a specified number of shares of stock with a nominal or par value, and for the issuance of a specified number of shares of stock without a nominal or par value; that the nominal or par value of shares of stock having a nominal or par value should be the same, and that, as to the shares of stock having no nominal or par value, each share thereof should be equal to every other share thereof. By these amendments to the Civil Code it was also provided that corporations organized or amending their articles of incorporation thereunder should state therein the amount of capital stock with which the corporation would begin business; and further provided that no corporation authorized thereunder to issue shares with no nominal or par value should begin business until the amount of capital with which it would begin business as stated in the articles of incorporation should have been fully paid in. There are certain other provisions in these amendments to the Code which do not need to be considered in this opinion. Acting under these provisions of the Code as thus amended in 1923 the petitioner herein, in August, 1924, proceeded to amend its articles of incorporation so as to provide that the amount of stated capital with which it would begin business was $25,000; that the number of its shares with a nominal or par value was 125, which were designated as and were to be preferred shares with the preferences particularly specified in its said amended articles of incorporation, and with a nominal or par value of $100 per share; and that the number of its shares without a nominal or par value was 250, designated as common shares. It was these amended articles of incorporation which the petitioner herein, after the due preparation thereof by its officers, and authorization thereof by its stockholders, as required by the foregoing provisions of the Civil Code, offered for filing to and in the office of the secretary of state, and which the respondent herein, for the reasons specifically stated by him, refused to file. Wherefore the petitioner herein demands this writ.

The first specific objection which the respondent presented to the filing of the petitioner's said amended articles of incorporation was that the same were in violation of section 362 of the Civil Code, which relates to the amendment of articles of incorporation, and which contains the provision, "that both the common and preferred shares shall be of the same par value." The same provision is to be found in section 290 of the Civil Code, which relates to the contents of original articles of incorporation. In response to this objection the petitioner contends that the foregoing requirement found in each of these sections of the Civil Code was inserted therein by amendment thereto in the year 1915, but that the provisions of said Code relating to par value and nonpar value stock were inserted in said Code in 1923, and that they effected a change in the law in the above regard by necessary implication, since, in permitting corporations to so organize or so amend their articles of incorporation as to provide for both par and nonpar stock, the Legislature, of necessity as to such corporations, did away with the requirement that common and preferred shares of stock, if the former were also nonpar stock, should have the same par value. The argument of the petitioner in this regard is plausible and might be effectual, except for the fact that it lies in the face of the decision by this court in the case of Film Producers, Inc., v. Jordan, 171 Cal. 664, 154 P. 605, and the petitioner herein, realizing that fact, insists that this court should now overrule that decision, or at least should confine its application to the particular facts of that case and to the particular state of the law at the time it was written. This insistence renders necessary a reconsideration of the basic principles underlying that case. In that case, as in this there was an application to this court for a writ of mandate to compel the secretary of state to file the petitioner's articles of incorporation. Said articles thus tendered in that case stated that:

"The capital stock of this corporation is $1,000,000, divided into 50,000 shares of common stock of the par value of $1 each, and 47,500 shares of preferred stock of the par value of $20 each."

At the time said articles of incorporation were presented for filing to the secretary of state, sections 290 and 362 of the Civil Code had not been so amended as to require "that both the common and preferred shares shall be of the same par value." The decision of this court was not, therefore, predicated upon this requirement in these sections of the Civil Code, but was based upon the provisions of sections 307 and 322 of the Civil Code. The latter of these is the section of said Code which provides that:

"Each stockholder of a corporation is individually and personally liable for such proportion of all its debts and liabilities contracted or incurred during the time he was a stockholder as the amount of stock or shares owned by him bears to the whole of the subscribed capital stock or shares of the corporation."

Section 307 of said Code is the section thereof which regulates corporate elections, and provides that:

"All elections must be by ballot and every stockholder shall have the right to vote in person or by proxy the number of shares standing in his name * * * for as many persons as there are directors to be elected, or to cumulate said shares," etc.

The learned writer of the opinion in the said case held that these two sections of the Civil Code were correlated, and were to be read together, and the words and phrases employed in each given the same interpretation. He then proceeded to point out that these sections of the Civil Code were framed upon the theory of a corporate capitalization represented by shares of stock of a single par value. Based upon this premise the opinion states that:

"It was the clear design of our law that liability should be imposed in proportion to the ownership of the capital stock, and where the shares of capital stock had the same par value, it was a matter of indifference whether the law declared that the liability should be in proportion to the owned shares or in proportion to the owned capital stock. The law, however, uses both phrases. When it comes to the stockholder's voting power in a corporation, it may not be questioned for a moment but that that fundamental right to vote is based upon ownership of the capital stock as distinguished from shares and not merely upon shares, which are but representations of value. And as little can it be questioned but that the voting power should be given to stockholders in proportion to their interest in the capital stock of the corporation."

Applying the foregoing principle to the case then in hand, the court held that to permit a corporation to so frame or amend its articles as to provide that one body of stockholders, designated as preferred stockholders, should be permitted to have shares of the capital stock of the corporation of the par value of $20 per share, while another body of the stockholders might have stock, designated as common stock, of the par value of $1 per share, would be violative of the above declared policy of the law, since under such a plan of stock capitalization the stockholder owning one share of the common stock of such a corporation, of the par value of $1 per share, would, under section 307 of the Civil Code, be entitled to the same vote and voice in the election of directors of the corporation as the stockholder of one share of the preferred stock of the corporation having a par value of $20 per share would have, or, in other words, with relation to the capitalization of the corporation, would have 20 times the voting power in voting his single share or in cumulating his share of the common stock over that of the owner of a share or shares of preferred stock; and since, on the other hand, in considering the liability of the stockholder of the corporation under section 322 of the Civil Code, the owner of one share of the preferred stock of the corporation would be subjected to the same liability to the creditors of the corporation for the proportion which his share of stock bore to the entire subscribed capital stock as would the owner of one share of common stock, although the interest of the owner of the share or shares of preferred stock was 20 times greater than was that of the owner of an equal share or shares of common stock. These consequences, as pointed out in the opinion, would be hostile to the policy of the law in accord with which the correlated sections 307 and 322 of the Civil Code were framed, and which by requiring each share of the capital stock of corporations to have the same par value served to maintain an equality of voting power and of proportionate liability among all of the stockholders of the corporation.

If we adopt as correct the conclusion of this court in the foregoing case to the effect that a right interpretation of sections 307 and 322 of the Civil Code requires a capitalization of corporations, represented by shares of a single par value, and if we apply to the instant case the reasoning as to the consequences which would flow from a departure from that principle, it would follow irresistibly that the amended articles of incorporation which the petitioner herein has presented for filing to the secretary of state also violates the same principle, and is subject to similar consequences, and this for the reason that there can be no ratio of equality between the holders of shares of preferred stock of a fixed par value and the holders of shares of common stock of no par value; and this is perfectly illustrated by what the petitioner herein is proposing to do by its amended articles of incorporation, since its main purpose in such amendment of its articles is to enable it, while maintaining constant that portion of its capital stock which is represented in its 125 shares of preferred stock with a par value of $100 per

share, to increase the number of its shares of common stock of no par value to 250 shares. The effect of this change would inevitably be to give to the holders of the increased number of shares of the common stock of the petitioner a doubled vote for directors of the corporation over that of the holders of the preferred stock thereof; and this result if once permitted might go on indefinitely through further amendments of its articles of incorporation until the voting influence of the holders of the preferred stock of the corporation under section 307 of the Civil Code would be practically destroyed; or, on the other hand, by a like increase in its shares of common stock the liability of the holders of the latter to the creditors of the corporation, under section 322 of the Civil Code, would correspondingly part company with the liability of the holders of the preferred stock but in the reverse ratio. The petitioner herein, as one answer to the foregoing reasoning and consequences of the decision in Film Producers, Inc., v. Jordan, supra, points out that, as sections 307 and 322 of the Civil Code are statutory enactments, they were subject to change as to their purpose and consequences by the Legislature, and that such change was effectuated by the adoption of sections 290a et seq. of the Civil Code, providing for the issuance of nonpar stock by corporations; and that such change also had the effect of repealing that portion of sections 290 and 362 of the Civil Code wherein it is provided that the preferred and common shares of corporations shall be of the same par value. The difficulty with this argument lies in a misconception of what is really determined by our decision in said case. This misconception is in part at least due to the fact that the writer of the opinion in that case rested his conclusions upon the language of sections 307 and 322 of the Civil Code. But the language of these sections of the Civil Code is but a reproduction in statutory form of the identical language found in section 3 of article 12 and section 12 of article 12, respectively, of the Constitution, and hence the decision in that case is to be given the same effect as though its reasoning and conclusions had been predicated upon these corresponding provisions in the state Constitution, which, of course, no later statutory enactment could change. As to the provisions in sections 290 and 362 of the Civil Code, declaring that the preferred and common stock of corporations should have the same par value, it is apparent that the amendment of these sections of the Civil Code in this particular respect was made in conformity with the same principle which was declared by this court in the case of Film Producers, Inc., v. Jordan, supra, viz., that it was the intent of the framers of both the organic and the statutory law, embodied in sections 307 and 322 of the Civil Code, that the capitalization of corporations should be represented by shares of a single par value.

In order, therefore, to agree with the petitioner herein that it is entitled to have filed with the respondent its proposed amended articles of incorporation, it is undeniable that we must overrule the decision of this court in the case of Film Producers, Inc., v. Jordan, to the extent of holding that it was not the intent of the framers of the Constitution in placing therein the provisions of sections 3 and 12 of articles 12 thereof, to require that the capitalization of corporations should, for the purpose of giving effect thereto, be represented in shares of a single par value. We are not prepared so to do. The Constitution of 1879 was adopted at a time in the history of the state, and in fact of all the states, when such a concept as the existence of corporate stock having no par value was a thing unknown to the laws relating to the organization and functioning of business corporations, and also at a time when the actual or possible evils of favoritism among the stockholders of corporations, both in respect to voting influence and to liabilities, had become apparent in the history of corporate development in the opinions of textwriters and in the decisions of courts. It was in order to guard against these and certain other consequences of actual or potential danger existing or foreshadowed in that marvelous expansion of corporate growth in varied and widening fields of activity and of influence which mark that epoch in our state and national history, that the provisions of article 12 of our state Constitution were adopted, covering many pages thereof, and consisting largely of limitations upon corporate powers, definitions of corporate liabilities, and restrictions upon the otherwise unlimited right of the Legislature to unduly extend the one or to remove or qualify the other. We are, as above stated, not prepared to hold that the purpose of the framers of our Constitution was not that indicated in the decision of Film Producers, Inc., v. Jordan, supra, or with respect to this particular case to overrule or qualify that decision. In so stating we are not to be understood as indicating any view as to whether the recent and yet somewhat widely adopted idea of forming corporations with shares of stock in whole or part of no stated par value is or is not a wholesome development of the law and policy of corporations in that particular regard. This is as yet a much-disputed question among those jurists and textwriters who are disposed to philosophize upon the subject. We do not enter that field.

We only conclude in this decision that it was the intent of the framers of our state Constitution in inserting the provisions therein above referred to touching the relative voting influence and proportional liability of the stockholders of corporations to require that corporations organized thereunder should have their capitalization represented in

shares of a single par value, and that such must be required of those seeking to organize corporations or to amend the articles of corporations already organized in this state so long as the aforesaid provisions of our state Constitution remain unchanged. This conclusion renders unnecessary an extended discussion of the other objections urged by the respondent against the filing of the petitioner's amended articles of incorporation and also renders needless any further consideration of the effect of section 11 of article 12 of the Constitution upon the immediate questions involved in the instant case, other than a reference to the light cast thereon by our decision in the two cases of Dominguez Land Corporation v. Daugherty, 238 P. 697, 703, this day filed; and also renders unnecessary a discussion of the question as to whether the petitioner herein, in its capacity as a public utility corporation is precluded by the provisions of section 3 of chapter 713 of the Statutes of 1917 (Stats. 1917, p. 1367), from so amending its articles of incorporation as to provide for shares of its stock having a nominal or par value, and for shares of its stock without nominal or par value, or to file with the secretary of state amended articles of incorporation containing such provisions, since our conclusions upon the main question covers also such a case.

The application is denied.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; SHENK, J.; LENNON, J.

196 Cal. 534

BROWNRIGG v. DE FREES.
(L. A. 7363.)

(Supreme Court of California. July 30, 1925.)

1. Trial ⟸395(7)—Finding, not supported by statement as basis of conclusion, held insufficient.

Finding of court disallowing recovery, in an action on contract for support of minor, that plaintiff was guilty of laches, *held* insufficient, where no fact was stated as a basis of such conclusion.

2. Equity ⟸84—Laches is a creature of equity and no defense in an action at law.

Laches is a creature of equity and no defense in an action at law.

3. Limitation of actions ⟸15—Agreement, waiving running of statute of limitations, held not without consideration.

Agreement in contract for support of deaf and dumb child, to waive running of statute of limitations, *held* not without consideration.

4. Limitation of actions ⟸15—Agreement, to waive privilege of the statute of limitations, is valid.

Agreement, to waive privilege of the statute of limitations, is valid.

5. Limitation of actions ⟸180(6), 182(5)—Statute of limitations is deemed waived, unless raised by demurrer or plea.

Statute of limitations being a personal privilege is deemed to be waived, unless debtor asserts his right under it by demurrer or plea.

6. Limitation of actions ⟸15—Agreement, including waiver of privilege of statute of limitations, by father for support of minor child, held binding.

Agreement, including waiver of privilege of statute of limitations, by father to support child, *held* binding.

7. Divorce ⟸297—Evidence held to show that monthly allowance had not been paid according to agreement.

Evidence, in action on contract made by father in divorce suit for support of minor child, *held* sufficient to show that monthly allowances had not been paid according to agreement.

In Bank.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Proceeding by Mollie A. De Frees Brownrigg for allowance of a claim against the estate of John M. De Frees, deceased. From a judgment for Carrie De Frees, administratrix of the estate, claimant appeals. Reversed.

Welles Whitmore, of Oakland, for appellant.

Balaam & Balaam, of Lompoc, and C. Roy Garnett, for respondent.

SEAWELL, J. This appeal is presented by a bill of exceptions. Appellant, Mollie A. De Frees Brownrigg, is the issue of the marriage of John M. De Frees, deceased, and his former wife, Susan M. De Frees. In the year 1888, the wife brought an action against her husband for a decree of divorce. Mollie, who is a mute, was then a minor of about the age of 15 years. The ground of the divorce action was cruelty and a decree of divorce was awarded the wife on that ground. She was also awarded the custody of said deaf and dumb minor child. As a consideration of the wife's forbearance in the matter of alimony, and her consenting to the fixing of the amount that should be paid by the husband for the care and maintenance of said minor by contract, rather than by the court's decree, the following contract or agreement of maintenance as to said minor was executed by said John M. De Frees:

"In the Superior Court of the State of California, in and for the County of Alameda. Susan S. De Frees, Plaintiff, v. John M. De Frees, Defendant. No. 5008.

"Whereas, a decree of divorce was this day granted in favor of plaintiff in the above-entitled action; that in said decree no alimony

is allowed and no provision is made for the care and maintenance of Mollie A. De Frees, minor daughter of plaintiff and defendant:

"Now, therefore, I, John M. De Frees, hereby promise and agree to pay to my said daughter $10 per month, on the 1st day of each and every month, commencing on the 1st day of September, 1888, until said Mollie A. De Frees arrives at the age of 21 years, on to wit: The 27th day of January, 1894. Said payments are to be made to her mother, Susan S. De Frees.

"I further promise and agree not to plead the statute of limitation to any payment that may become due under this contract, and I hereby, on behalf of myself, my heirs, executors and administrators, waive the statute of limitations as to any and all claims that may accrue aginst me under this contract for the period of 99 years.

"Dated: August 9, 1888.

"John M. De Frees.

"Witness: Welles Whitmore."

The foregoing contract was received as a part of the evidence in the case. None of the payments provided therein was ever made except one, in the sum of $10, which was paid September 1, 1888. John M. De Frees remarried and became the father of several children by a subsequent marriage to the administratrix herein and died September 1, 1918. A claim was duly presented by plaintiff to the said administratrix of the estate of John M. De Frees, deceased, which included the full amount claimed to be due under the contract with interest to the date of his death. Said claim was rejected by said administratrix, and the present action was brought to recover the principal with interest thereon, amounting to the sum of $2,036.80.

The complaint was demurred to on the ground that the action was barred by section 337, subd. 1, Code of Civil Procedure. Said demurrer was overruled, and defendant answered, but did not plead the bar of the statute as a defense to the action. Neither was laches pleaded, either specially or generally, as a defense.

The defendant, upon information and belief, alleged as a special defense to the action, that on June 7, 1889, John M. De Frees and his wife duly executed and delivered to plaintiff (appellant) a deed to certain described property, situated in the county of St. Joseph, state of Indiana. It is alleged that said conveyance was made by John De Frees and his wife and was accepted by plaintiff as and in full satisfaction of any and all claims then existing or which might thereafter exist against the said John M. De Frees on account of said agreement dated August 9, 1888, and made for the support and maintenance of said minor.

The court found that the contract was made and executed as alleged in the complaint. It further found, contrary to the allegations of the complaint, that it was not true that the said John M. De Frees did not pay the amounts therein provided, or any of them, save and except the sum of $10; also that it was not true that said monthly payments contracted and agreed to be paid by said John M. De Frees under said contract, were unpaid and past due. The finding, as to the payments under the contract having been made, is absolutely unsupported by any evidence in the case and is unsupportable upon any principle of law applicable to the facts disclosed by the record. It was further found by the court that claim made at the trial by respondent that a conveyance of certain real property, executed by John M. De Frees and his wife to plaintiff some years prior to the death of the former, was made in full satisfaction of the claim now pressed, was not true. There is evidence in the record to support this finding made in appellant's favor. Finally, it was found that plaintiff had been guilty of laches in delaying the commencement of her action. As a conclusion of law, doubtless based on the theory of laches, the court concluded that judgment should go against the plaintiff and for the defendant. No finding whatever was made on the bar of the statute of limitations, a question raised by the demurrer, but the following appears in the findings of fact:

"(10) That it is true that the plaintiff has been guilty of laches in commencing the above-entitled action."

[1] It will be observed that said purported finding of fact amounts to nothing more than a conclusion of law. No fact is stated or suggested as the basis of the conclusion, and no other reference to laches is anywhere to be found in the pleadings, findings, or record of the case. This being so no sufficient finding, as to appellant being guilty of laches, was made. Mere delay in commencing an equitable proceeding without a showing of inequitable conduct or prejudice suffered thereby is not sufficient to bar the action. Dufour v. Weissberger, 172 Cal. 223, 155 P. 984; McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460.

This action is one at law by which plaintiff sought to recover certain payments owing by reason of a breach of contract by the defendant's intestate, and it has been held in this state, and generally elsewhere, that the defense of laches is a creature of equity. Trail v. Firth, 186 Cal. 68, 198 P. 1033; 10 Cal. Jur. 522; 21 C. J. 214.

"It is scarcely necessary to say that complainants cannot avail themselves as a matter of law of the laches of the plaintiff in the ejectment suit. Though a good defense in equity, laches is no defense at law." Wehrman v. Conklin, 155 U. S. 314, 15 S. Ct. 129, 39 L. Ed. 167.

See, also, Anzar v. Muller, 90 Cal. 342, 27 P. 299; Waits v. Moore, 89 Ark. 19, 115 S. W. 931; Wells v. Western Union Tel. Co., 144 Iowa, 605, 123 N. W. 371, 24 L. R. A. (N.

S.) 1045, 138 Am. St. Rep. 317; Commercial Security Co. v. Archer, 179 Ky. 842, 201 S. W. 479.

[2] In an action at law, or where the plaintiff asserts no equitable rights, "the statute of limitations, rather than the doctrine of laches, furnishes the rule of decision." 10 Cal. Jur. 526. Respondent insists that the defense may be pleaded in bar to an action at law as well as an action in equity, but the cases, such as Stevinson v. San Joaquin etc., 162 Cal. 141, 121 P. 398; Elliott v. Bunce, 10 Cal. App. 741, 103 P. 897; Emerson v. Kennedy Min., etc., 169 Cal. 718, 147 P. 939, and others cited to support her contention, are actions of an equitable nature.

No showing was made that the delay had been productive of any hardship or injustice to the defendant or to the other heirs at law of decedent. If the decedent had complied with his contract and had paid the monthly allowances in accordance with his agreement, his estate would have been proportionately reduced. The question of laches is always relative to the circumstances of each particular case. Dufour v. Weissberger, 172 Cal. 223, 155 P. 984. No circumstance, even considered as an equitable question, appears in aid of respondents in this case.

[3] We next come to a consideration of the effect of the clause in the contract which waives the running of the statute of limitations. Placing one's self in the position of decedent, at the time the contract was made, it is not difficult to understand the considerations that moved him to freely waive the bar of the statute as against his afflicted daughter's claims upon him for care, maintenance, and education, until she should attain the age of 21 years, a period of about 6 years. He owed her a legal and moral duty, and it is inconceivable that a normal parent should harbor a desire to evade, if he could, the first obligation of parental duty, especially when that duty is rendered doubly imperative by the heavy hand of affliction. The question of want of consideration for the execution of the contract is clearly out of the case. An agreement on the part of a parent under the circumstances of this case, to contribute $10 per month for the support, maintenance, and education of his child, who is deprived of the sense of hearing and unable to speak and without means, until she should attain the age of 21 years, and to waive the bar of the statute on his own delinquencies or inability to make prompt payments, as by contract provided, cannot be regarded as a mere gratuitous act.

[4] In view of the circumstances in which the contract was made, it is not to be questioned that the decedent meant to waive the statute of limitations so long as he should live, and if upon his death any of the monthly allowances remained unpaid to make such payments, notwithstanding the privilege of the statute, a charge upon his estate. The fixed period of 99 years was inserted in the agreement upon the suggestion of the attorney in the divorce proceeding. Pending the settlement of the divorce action, decedent expressed himself as being willing to waive the statute of limitations as to his daughter "forever." The term "forever" was used relatively, of course, with reference to his mortal existence. Upon the suggestion of the attorney that a fixed period of 99 years be inserted as the limit of the statute, decedent readily assented thereto. He was satisfied, beyond question, that he had no such expectancy of life. But he was doubtless aware of the duty which the law of this state imposed upon a parent as to his liability for the support and education of minor children, and also as to his duty to adult children when they become sick or disabled, or from any cause become unable to maintain themselves. He agreed to do no more than the law ordinarily would have compelled him to do, except as to the agreement to waive the privilege of the statute. This he voluntarily did. In so doing he was merely exercising a personal right for the benefit of the individual which may be waived. Tebbets v. Fidelity & Casualty Co., 155 Cal. 137, 99 P. 501.

[5] The privilege of the statute, being a personal privilege, is deemed to be waived, unless the debtor asserts his right under it by demurrer or plea. 16 Cal. Jur. 603. The law will not plead the statute for him. It is well settled by the decisions of this state, as well as by the courts of some other jurisdictions which have a statute similar to our section 3513, Civil Code, that no law established for a public reason is contravened by a private agreement to waive the statute of limitations. Said section provides as follows:

"Any one may waive the advantage of a law intended solely for his benefit. But a law established for a public reason cannot be contravened by a private agreement."

It has been expressly held by this court in numerous decisions that the privilege conferred by the statute of limitations is not a right protected under the rule of public policy, but it is a mere personal right for the benefit of the individual which may be waived. In Tebbets v. Fidelity & Casualty Co., supra, the authorities, sustaining the view that the statute may be shortened or waived by private agreement, as well as those which take the opposite view and hold that the statute cannot be so shortened or waived, because of the question of public policy involved, are collated, reviewed, and distinguished. No doubt can longer exist as to the rule in this state. 16 Cal. Jur. 570.

A degree of uncertainty finds expression in some of the decisions of this state as to whether the courts will place a limit of time beyond which the statute could not be suspended. Doubt on this question finds its first expression in this state so far as our investigation has gone aided by the industry of counsel, in the case of Wells Fargo. Co. v. Enright, 127 Cal. 669, 60 P. 439, 49 L. R. A. 647. That was a case wherein an agreement not to plead the statute of limitations was made in consideration of a promise by the creditor to refrain from instituting suit for the period of six months, before the expiration of which period the bar of the statute would otherwise have attached, and the plaintiff in that case forebore bringing suit for the period of time agreed upon. The court there held that the action, under the terms of the agreement, was brought within time inasmuch as the statute is one for the benefit and repose of individuals, and not to secure general objects of policy or morals. By way of argument, intermixed with possible dicta, the court further said:

" 'Its protection may, therefore, be waived in legal form, by those who are entitled to it; and such waiver, when acted upon, becomes an estoppel to plead the statute.'—citing numerous cases to the same effect. We think this a correct statement of the law.

"The Supreme Court of the United States regarded such an agreement as operating by way of estoppel in pais to a defense under the statute of limitations. Randon v. Toby, 11 How, 493 [13 L. Ed. 784]. Respondent cites cases from the District of Columbia, Maine, South Carolina, Vermont, Texas, Mississippi, New Jersey, Tennessee, and New York. We find that they support its position. See, also, Wood on Limitations, § 76, where it is stated that if the promise be made before the debt is barred, and in consideration of forbearance to sue and the creditor forbears 'it is binding upon the debtor, and at least has the effect to keep the debt on foot until the statutory period, dating from such promise, expires, either by way of estoppel or as a conditional promise to pay the debt in case the plaintiff proves it.' Conceding that some of the cases cited by appellant tend to support its contention, they do not convince us that there is any rule or principle of public policy violated by an agreement to waive the statute of limitations under the circumstances here disclosed. It is probably true that after an agreement to waive the statute has been entered into, in consideration of forbearance to sue, the courts would place some limit of time beyond which the statute would not be suspended. In the case of 147 Massachusetts [Kellogg v. Dickinson, 147 Mass. 432 (18 N. E. 223, 1 L. R. A. 346)], cited by appellant, the action was brought after 40 years. Some of the cases, as Mr. Wood does, place this limit within the statutory period, dating from the agreement, and this seems to be a reasonable limitation. But we are not called upon to decide, and do not decide any further than that in our opinion the present action was brought in time."

The agreement in that case to waive the statute was in consideration of forbearance to sue, and what is there said with reference to the time limit beyond which the statute, possibly, would not be suspended is nothing more than the expression of questionable probability on a matter not necessary to a decision in that case, as the last clause of the quoted paragraph makes emphatic.

State Loan, etc., v, Cochran, 130 Cal. 245, 62 P. 466, 600, was a case wherein the sureties on a bond, who, upon being sued on account of the defalcation of their principal, promised, in writing, pending the running of statute of limitations, in consideration that no further proceedings be taken against them for the collection of any of the obligations arising out of their suretyship, to take no advantage of delays thereafter incurred until they (said sureties) should "request that such proceedings be taken." Suit was brought more than seven years after the occurrence of the breach of the bond. It is there said:

"With regard to the policy of the law, there may be a question as to the validity of an agreement to waive the statute, made as part of the original contract, or a subsequent agreement to waive the statute for all time; and on this point we have authorities both ways. Crane v. French, 38 Miss. 531, 532; Quick v. Corlies, 39 N. J. Law, 11. But in the former case—which holds such a contract to be against public policy—the validity of such agreements for a definite or limited time is admitted; nor has any case to the contrary been brought to our attention except that of Wright v. Gardner, 98 Ky. 454 [33 S. W. 622, 35 S. W. 1116], which does not commend itself to our consideration. The general rule is embodied in the maxim, Pacta legem faciunt inter partes; and no reason, on the score of [public] policy or otherwise, can be suggested why an exception should be made in this case. In this state, at least, the validity of such agreements must be regarded as established. Wells Fargo v. Enright, 127 Cal. 669 [60 P. 439, 49 L. R. A. 647]."

It was held that the agreement on the part of the plaintiff never to sue, until requested by the defendants, was invalid as to plaintiff. But as there was a written request from the defendants that proceedings should not be taken until requested by them, accompanied by a written promise to waive the statute if the plaintiff would forbear legal proceedings, nevertheless the compliance of the plaintiff with the request constituted a sufficient consideration for the promise. The statute was held not to run from the date of the written agreement, but from the time the parties ceased to act upon it, which was at a subsequent time.

Kemper v. Industrial Accident Commission, 177 Cal. 618, 171 P. 426, is also a "forbearance to sue" case. It merely holds, and no case in California states a contrary rule, that:

"It is undoubtedly true that parties to a controversy may enter into an agreement to forego the statute of limitations for a definite period and that such an agreement may operate as an estoppel to a plea of the statute. Wells Fargo & Co. v. Enright, 127 Cal. 669 [60 P. 439, 49 L. R. A. 647]; State Loan & Trust Co. v. Cochran, 130 Cal. 245 [62 P. 466, 600]."

There is, however, direct authority to the point that the statute can be continuously waived by private agreement. Such a case is State Trust Co. v. Sheldon et al., 68 Vt. 259, 35 A. 177. As a part of the promises and undertaking in the declaration therein mentioned, and at the time of making the same, the defendants agreed in writing to waive the statute of limitations in respect to such promises and undertaking. Relying upon the agreement, the plaintiff did not bring its action within the time limited by the statute. The question before the court was whether the defendants were estopped by the agreement from pleading the statute of limitations in bar of the action. It was there urged that the agreement to waive the statute was void because, by private agreement, it undertook to avoid a statute, and was against public policy. The court in disposing of the questions before it said:

"The statute limiting the time within which actions shall be brought is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form by those who are entitled to it, and such waiver, when acted upon, becomes an estoppel to plead the statute. Sedgw. Stat. and Const. Law (2d Ed.) 86, 87; Quick v. Corlies, 39 N. J. Law, 11; Burton v. Stevens, 24 Vt. 131 [58 Am. Dec. 153]; Gay v. Hassom, 64 Vt. 495 [24 A 715]; Randon v. Tobey, 11 How. [U. S.] 493 [13 L. Ed. 784]. When such waiver is made it is *continuous*, unless by its terms it is *limited to a specified time*. There was no such limitation in the waiver of the defendants. We, therefore, hold that they are estopped from pleading the statute of limitations in bar of plaintiff's action." (Italics supplied.)

See, also, Mann v. Cooper, 2 App. D. C. 226; Parchen v. Chessman, 49 Mont. 326, 142 P. 631, 146 P. 469, Ann. Cas. 1916A, 681; Jordan v. Jordan, 85 Tenn. 561, 3 S. W. 896; Lyndon Sav. Bank v. International, etc., 78 Vt. 169, 62 A. 50, 112 Am. St. Rep. 900; Andrews v. Cosmopolitan Bank, 183 App. Div. 787, 171 N. Y. S. 875; City of Springfield v. Deming, 215 Mo. App. 309, 252 S. W. 91; Wood on Limitations, §§ 41, 42, 53e.

Admittedly there is a line of cases which hold that the statute cannot be waived. Crane v. French, 38 Miss. 503; Nunn v. Edmiston, 9 Tex. Civ. App. 562, 29 S. W. 1115; Bridges v. Stephens, 132 Mo. 524, 34 S. W. 555; Smith v. Gillette, 59 Tex. 86; Young v. Sorenson, (Tex. Civ. App.) 154 S. W. 676; Moxley v. Ragan, 10 Bush (Ky.) 156, 19 Am. Rep. 61. Those cases, however, are contrary to the declared doctrine of this state and to most of the states which have a statute similar to ours. The decision of the states, which recognize the right to waive the statute by private contract, turn upon the interpretation given by the courts to the promise or agreement upon which the waiver is asserted. The intention of the parties must always be considered in the light of the circumstances of each particular case. A promise not to take advantage of the statute pending negotiations for allowing further time to arbitrators to report, or pending negotiations for the adjustment of the difference between litigants, will not be construed to be an agreement never to take advantage of the statute, but an agreement that the statute should not run while the settlement was pending. After negotiations have concluded, the statute will begin to run. Cowart v. Perrine, 21 N. J. Eq. 101. So, too, it has been held in cases where the circumstances seem to justify the inference that it was not intended that the statute was to be suspended for all time, it is suspended for a reasonable time only.

[6] The language of the agreement to waive the statute in the instant case leaves no room for the indulgence of inferences or implication. The intention of the decedent is expressed in clear, unequivocal language. There can be no doubt as to what he meant to do. If no rule of public policy or morals is violated by an agreement to waive the statute, and if the rule is embodied in the maxim, Pacta legem faciunt inter partes, as was held by this court in State Loan, etc., Co. v. Cochran, supra, no sufficient reason is shown in the instant case why the agreement made by the parties thereto should not be respected. No decision of this state holds to the contrary. That the daughter forbore to sue her father, or harass him with legal process, should not, considering the relationship existing between them, be now urged against her. She relied upon his promise that the bar of the statute would never be pleaded against his obligations to her.

[7] Respondent makes the point that the evidence was not sufficient to show that the decedent had not paid the monthly allowances according to his agreement, and under some authorities (1 A. L. R. 781; Gage v. Downey, 79 Cal. 140, 21 P. 527, 855), in the absence of rebutting circumstances, debts will be presumed paid after the lapse of 20 years from the time they become due. Such a presumption cannot be indulged here. The appellant, doubtless because of her afflictions, was not called as a witness in the case. The mother, however, with whom appellant had resided during the greater part of her lifetime and who had the burden of her support, testified that no moneys except the first monthly allowance of $10, had been paid by the father in accordance with his

agreement; that had he made any further or other payments she would have had knowledge of them. The agreement provided that all payments should be made to the mother. The attorney for the wife in the divorce proceeding, who is also attorney for appellant in this proceeding, testified that he had upon many occasions covering a series of years attempted to collect the unpaid monthly allowances, but had repeatedly met with failures. The decedent, said attorney testified, told him that all remittances would be sent to him to be delivered to the wife. No remittances were received except the first monthly allowance. No serious claim was made at the trial or is made here that any payments, except the first payment of $10, have actually been made. There is no merit in the contention that the evidence is insufficient to show that the amount sued for, or any part thereof, was at any time paid by decedent.

The judgment appealed from is reversed.

We concur: MYERS, C. J; SHENK, J.; RICHARDS, J; LENNON, J; LAWLOR, J.; WASTE, J.

---

73 Cal. App. 189

BELL v. KELLY. (Civ. 5184.)

(District Court of Appeal, First District, Division 2, California. June 10, 1925. Hearing Denied by Supreme Court, Aug. 6, 1925.)

1. Libel and slander ⟸121(2)—Damages of $8,000 held not excessive for slander.

In action for damages for slander, damages of $8,000 for charging plaintiff with running a house of prostitution and calling her a prostitute, and declaring that she had stolen some tables and chairs, *held* not excessive.

2. Trial ⟸112—Trial court has sound discretion as to amount of time to be allowed for argument.

Amount of time to be allowed for argument is a matter resting in sound discretion of trial court.

3. Appeal and error ⟸925(3)—Reviewing tribunal cannot presume that more lengthy argument would have caused jury to see facts differently.

In action for damages for slander, with trial court restricting argument of counsel, reviewing tribunal could not presume that a more lengthy argument upon the facts would have caused jury to see them differently than it did.

4. Appeal and error ⟸1050(1)—Any error in permitting plaintiff's witness to testify that persons heard defendant's slanderous statements of plaintiff held not prejudicial.

In action for damages for slander, any error in permitting witness to state his conclusion that persons two or three feet away heard slanderous statements *held* not prejudicial, where on cross-examination witness testified to situation of different persons, and that defendant talked as loud as witness while on stand, and plaintiff testified that she heard defendant's remark.

Appeal from Superior Court, Los Angeles County; John M. York, Judge.

Action by Mary Jane Bell against Mike Kelly. Judgment for plaintiff, and defendant appeals. Affirmed.

John L. Richardson, T. E. Parke, and Anderson & Anderson, all of Los Angeles, for appellant.

Weber & Crawford, of Santa Monica, for respondent.

LANGDON, P. J. This is an appeal by the defendant from a judgment against him for $8,000, in an action brought to recover damages for slander. The allegations of the complaint were denied, and as a separate defense numerous incidents in the conduct of plaintiff's hotel business were set forth as a justification for some of the slanderous remarks alleged to have been made by defendant.

The complaint contained a number of counts, but the ones upon which the jury brought in a verdict for the plaintiff were counts 4, 6, and 7, reading, in part, respectively, as follows:

"That on or about the month of August, 1921, at Los Angeles, Cal., the defendant maliciously, falsely, and with the intent of injuring the plaintiff, stated to Mr. Charles H. Magee, as follows: 'She (meaning Mary Jane Bell, the plaintiff herein) is running a house of prostitution down there (meaning the Winnipeg Hotel), and I am going to get her out under the Red Light Abatement Act. She is permitting all kinds of immorality, and I am going to have the district attorney put her out, and if I can't get her out one way, I will another.' That on or about the 1st day of September, 1921, at the city of Ocean Park, Cal., and while the plaintiff was passing the place of business of the defendant, the defendant called out in a loud tone of voice at the plaintiff, the following: 'Prostitute.' That on or about the 1st day of March, 1921, at Santa Monica, Cal., the defendant maliciously, falsely, and with the intent of injuring plaintiff, stated to one Van Tyne that the plaintiff had stolen from the defendant tables and chairs."

[1] Since the jury found upon substantial evidence that the foregoing allegations of the complaint were true, we think their finding as to damages is not excessive. Five thousand dollars was given on the fourth count, $2,000 on the sixth count, and $1,000 on the seventh count. The larger amount was given upon the fourth count, probably because the language therein recited tended to injure plaintiff not only personally, but in the conduct and management of her business, which was that of operating a hotel.

[2, 3] In addition to the claim that the damages are excessive, appellant contends that error was committed by the trial court in restricting the time for argument by counsel before the jury to 35 minutes for each party. The plaintiff and respondent was satisfied with this allotment of time, and it is a matter resting within the sound discretion of the trial court. We may not presume that a more lengthy argument upon the facts would have caused the jury to see them differently than it did.

[4] Complaint is made of the ruling of the trial court in permitting a witness to testify that on the occasion when the defendant made one of the slanderous statements about plaintiff, persons passing by on the street about two or three feet away from his doorway could hear it. If error was committed in thus permitting the witness to state his own conclusion, it was not prejudicial, because upon cross-examination defendant caused this witness to testify in detail regarding the occurrence, and he stated that on the occasion in question he was standing on the side of a counter opposite from where defendant was standing in defendant's store, near the front of the store; that persons were passing; that defendant pointed to plaintiff as she came down the street and called her a "prostitute"; that in doing so he talked as loud as the witness was talking then upon the witness stand. The jury thus had an opportunity to judge whether or not persons two or three feet away could hear the remark. Plaintiff also testified as to this incident, and that she heard the language of defendant as she was passing along the street in front of his store.

There are a few other objections made to rulings upon evidence, but we can find no merit in any of the contentions made with reference to them; most of them relate to matters which could not constitute prejudicial error even though theoretically incorrect.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

73 Cal. App. 388

GRANGER v. RAJE. (Civ. 4413.)

(District Court of Appeal, Second District, Division 1, California. June 25, 1925.)

1. Appeal and error ⟸1011(1)—Weight to be given conflicting evidence as to contents of lease contract held question for trial court.

In action for unlawful detainer, in which evidence as to whether lease contract contained provision for option for renewal at time it was written was conflicting, weight to be given such evidence was for trial court.

2. Appeal and error ⟸1010(1)—Appellate court will not disturb findings of trial court sustained by evidence.

In action for unlawful detainer, where evidence as to whether lease contract contained option for renewal sustained trial court's findings, appellate court will not disturb such findings.

3. Costs ⟸260(4)—Appeal held not frivolous, so as to justify penalizing appellant.

In action for unlawful detainer, defended on ground that lease of premises in question contained option for renewal, which defendant had exercised, where evidence as to whether lease contract contained such provision was conflicting, appeal by defendant *held* not frivolous, so as to justify penalizing him.

Appeal from Superior Court, Los Angeles County; Leslie R. Hewitt, Judge.

Action for unlawful detainer by Paul H. Granger against Thor Raje. From the judgment for plaintiff, defendant appeals. Affirmed.

Walters & Mauk, of Los Angeles, for appellant.

Schweitzer & Hutton, of Los Angeles, for respondent.

CURTIS, J. Action in unlawful detainer. Plaintiff acquired the real property in controversy as a gift from his father, Ralph Granger, a few months prior to the commencement of the action. Prior to conveying this property to his son, Ralph Granger had leased it to the defendant. According to the contention of plaintiff and his father, the term of this lease was one year, beginning on March 15, 1921. A copy of such a lease was attached to the complaint and the original produced in court at the trial. It bore the signatures of the parties thereto and no question is made as to the genuineness of such signatures. Both plaintiff and his father testified in effect that this lease was the only lease they, or either of them, had given to the defendant of the premises in question. The defendant claimed that his lease was for a period of one year, with an option of two years additional upon the same terms as the first year, and that he had given due notice to the plaintiff of his desire to avail himself of the right given him under the option. Defendant produced at the trial a purported lease, in most respects a copy of the lease produced by plaintiff, but with the difference that it contained a paragraph reading as follows:

"And the said party of the second part shall have the right to renew and extend this lease for two years on same terms and conditions after the expiration of first year as provided herein."

Both copies of the lease were on printed forms with the blanks therein filled in, in

the main, in typewriting, with the exception of the above paragraph, which was in the handwriting of the wife of the defendant, and this paragraph was written in one of of the blank spaces of the printed form used in preparing the lease. The real controversy in this action revolves around these two instruments; the plaintiff claiming that the one produced by him was the only lease which had been given to the defendant, while the defendant contends that the one produced by him and containing the two-year option paragraph was the real lease of the parties.

[1, 2] Assuming that the explanation given by the defendant and his wife, as to how the disputed paragraph came to be written by Mrs. Raje in the copy of the lease produced by the defendant, was both reasonable and plausible, yet the plaintiff, who acted for his father in the negotiations leading up to the execution of the lease, and Ralph Granger, the father, each gave testimony in direct conflict with that of the defendant and his wife. It may be that this testimony on behalf of plaintiff may not be in all respects free from objection, yet the weight to be given it was for the trial court. Evidently the court accepted the statements of plaintiff and his father in preference to those of the defendant and his wife, and we are not prepared to say that it was not justified in doing so. The evidence on plaintiff's behalf unquestionably sustains the findings. This being the case, this court will not disturb them.

[3] The question of whether plaintiff acted as the agent of his father in procuring the lease and agreeing to the terms thereof is not involved in this appeal, in view of the admission of respondent that such agency existed and that every act of plaintiff in connection with the lease was binding upon his father, Ralph Granger.

We are not prepared, however, to hold that the appeal is frivolous, and that, therefore, appellant should be penalized for taking the same.

Judgment is affirmed.

We concur: CONREY, P. J.; HAHN, Justice pro tem.

---

73 Cal. App. 302

WASHBURN v. MANN et al. (Civ. 2844.)

(District Court of Appeal, Third District, California. June 22, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

Schools and school districts ⟸65—Purchase of school site for union school district held invalid as having been based on inapplicable statute.

Pol. Code, § 1611, is not applicable to purchase of a school site for union school district, despite section 1589a giving boards of trustees in such districts the powers and duties of boards of school trustees, except as otherwise provided, as section 1585 et seq. contains special provisions for selection of sites in union school districts.

Appeal from Superior Court, Yuba County, Eugene P. McDaniel, Judge.

Suit by E. T. Washburn against C. O. Mann and others. Judgment for plaintiff, and defendants appeal. Affirmed.

W. P. Rich, of Marysville, for appellants.
W. H. Carlin, of Marysville, for respondent.

SHIELDS, Judge pro tem. The question involved here is the manner in which a school or schools are located in union school districts. In this case a union school district, later known as "Feather River Union School District," was organized as required by law by merging two existing school districts in Yuba county. Shortly after the formation of the union school district the defendants Mann, Beard, Hanson, Parsons, and Shaver qualified as trustees of the district, and later proceeded and attempted to select and purchase a site for the union schoolhouse and grounds. In doing this they adopted the procedure provided by section 1611 of the Political Code, deeming this section applicable because of section 1589a, Political Code, which provides:

"The powers and duties of boards of trustees in union * * * school districts shall be such as are now, or may hereafter be assigned by law to boards of school trustees, except as otherwise provided in sections one thousand five hundred eighty-five to one thousand five hundred ninety-one c, inclusive of this Code."

Under the procedure adopted, that provided by section 1611 of the Political Code, the trustees selected a tract of three acres of land owned by the defendant J. F. Michel which they proposed to purchase. The price agreed upon was $1,500, which was paid to J. F. Michel and he, together with his wife, Emma Michel, thereupon executed a deed to the trustees for the above mentioned three-acre tract.

Thereafter and on February 19, 1924, the plaintiff, the respondent herein, began this action asking that the attempted purchase be declared void; that the deed be canceled; and that J. F. Michel be directed to repay to the trustees the purchase price of the land. Defendants filed an answer admitting that they had followed the procedure provided for by section 1611 of the Political Code and justifying their action thereby. Thereupon plaintiff moved for judgment on the pleadings, which motion was granted by the trial court. This case comes here upon appeal from that judgment. The appeal is not well taken.

The very section of the law which provides for the formation and organization of union school districts (section 1585, Pol. Code) very clearly provides a system by which the newly formed school shall be named and how the location of the school or schools therein shall be determined. This system is complete, and must be held to be exclusive.

Under it and succeeding sections, additional schools may be located in any union school district, and changes of location of any existing school may be effected. Section 1589, Pol. Code. The general law relating to school trustees is made applicable to union school trustees only as to such particulars as are not specially provided for in the law relating to union school trustees. With reference to the cases where there is a special provision, there is an exception and the general school law does not apply. Section 1589a, Pol. Code. Sections 1585 et seq. do make a special provision relating to union school trustees and the method by which they locate a union school and purchase a site, and therefore the general law as contained in section 1611 of the Political Code does not apply in this respect to union schools.

Other points raised in the appeal are not necessary to the decision of the case. The wrong method having been adopted in the attempted location and purchase of the school site, it follows that the judgment so declaring should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

---

73 Cal. App. 225

ENTERPRISE FOUNDRY CO. v. POLLY.
(Civ. 2900.)

(District Court of Appeal, Third District, California. June 15, 1925.)

Appeal and error ⊜1071(3)—Judgment based on sufficient ultimate findings held not subject to attack because additional findings of probative facts were not sufficient.

Judgment in action to recover possession of engine, based on findings that plaintiff was not the owner and entitled to possession of the engine, that it was not wrongfully detained from plaintiff, and that defendant was the owner and entitled to the possession, *held* not subject to attack on appeal because additional findings that defendant had purchased the engine from plaintiff's agent and paid therefor were not sufficient to establish payment or agency.

Appeal from Superior Court, Mendocino County; H. L. Preston, Judge.

Action by the Enterprise Foundry Company against A. Polly. From a judgment for defendant, plaintiff appeals. Affirmed.

Pierson & Stone and Charles Kasch, of Ukiah, for appellant.

M. H. Iverson, of Ukiah, for respondent.

PLUMMER, J. This is an appeal upon the judgment roll alone, in an action wherein the plaintiff sought to recover possession of a certain gasoline engine, or the value thereof. The defendant had judgment, and the plaintiff appeals.

The only points relied upon for reversal are the alleged inconsistencies in the findings, and that therefore the judgment is not supported by the findings of facts.

At the conclusion of the trial, the court made the following findings of fact:

"(1) The court finds that the plaintiff, on August 16, 1921, was not and is not now the owner of and entitled to the possession of that certain 8 horse power gasoline engine No. 370, which said engine was and is now in a certain boat being used in fishing out of Ft. Bragg, Mendocino county, Cal.

"(2) The court further finds that said personal property is not now and was not at the time of filing the complaint in this action wrongfully detained or detained at all by the defendant from the plaintiff.

"(3) The court further finds that on August 16, 1921, and for a long time prior thereto, the defendant, A. Polly, was and now is the owner of and entitled to the possession of the said gasoline engine described and referred to in paragraph 1 of these findings.

"(4) The court finds that said defendant, A. Polly, became the owner of said property by purchase from one E. Karnaiss, and that he has fully paid said E. Karnaiss the full purchase price of said engine prior to the commencement of the action herein.

"(5) The court further finds that at the time of purchasing the said engine from the said E. Karnaiss, and at the time of paying him for it, the said Karnaiss was the agent of the plaintiff, Enterprise Foundry Company, a corporation."

By findings 1, 2, and 3 the ultimate fact is determined that the defendant was, prior to the time of the trial, at the time of the trial, and at the date of making the findings and entering judgment, the owner of the gasoline engine in controversy. By findings 4 and 5 certain probative facts, which appeared in the case, are set forth, and it is on the ground that these findings, in setting forth probative facts, do not set forth sufficient to establish payment or agency.

The law is well settled in this state that where ultimate facts are found, which are sufficient in themselves to support the judgment entered, the mere fact that the trial court also makes findings in which probative facts are incorporated, which indicate that the ultimate facts are not sufficiently proven, and an appeal is made upon the judgment roll alone, the probative facts set forth in the findings must be disregarded. In Gill v. Driver, 90 Cal. 72, 27 P. 64, in considering this very question, the Supreme Court held as follows:

"Ultimate facts were found which do support the judgment; and they are not question-

ed, nor could they be, without bringing up the evidence in a statement or bill of exceptions. The rule has long been settled that 'when the ultimate fact is found, no finding of probative facts, which may tend to establish that the ultimate fact was found against the evidence, can overcome the finding of the ultimate fact' "—citing, Smith v. Acker, 52 Cal. 217; Pio Pico v. Cuyas, 47 Cal. 174.

In the case of Breeze v. International Banking Corporation, 25 Cal. App. 437, 143 P. 1066, this court, speaking through Justice Hart, thus decides the same question:

"Where the trial court makes both probative and ultimate findings and the one set is inconsistent with the other, the general rule is as it is declared in the case of Perry v. Quackenbush, 105 Cal. 299, 38 P. 740, as follows: 'Findings of probative facts will not, in general, control, limit, or modify the findings of the ultimate fact. The province of the trial court is to find the ultimate facts, and not probative facts. If, from a consideration of the probative facts, this court should determine that they did not justify the finding of the ultimate fact, it would determine that the evidence did not justify the decision. This, it has been repeatedly held, cannot be done in this mode.' "

And further quoting from the case of Pio Pico v. Cuyas, supra, it is there said:

"It has been repeatedly held that a finding of the court cannot be impeached upon the ground that it is contrary to the evidence, otherwise than by a motion for a new trial, and statement of evidence upon the motion. We can consider, upon appeal from the judgment, only the ultimate facts found by the court, and not the probative facts, which have no proper place in the findings"—citing Smith v. Acker, 52 Cal. 217; Frazier v. Crowell, 52 Cal. 399; Gill v. Driver, 90 Cal. 72, 27 P. 64; Rankin v. Newman, 107 Cal. 602, 40 P. 1024, 41 P. 304; Commercial Bank v. Redfield, 122 Cal. 405, 55 P. 160, 772; Brown v. Mutual Reserve Fund Life Ass'n, 137 Cal. 278, 70 P. 187.

These cases are conclusive of all questions presented upon this appeal.

The judgment of the trial court is affirmed.

We concur: FINCH, P. J.; THOMPSON, Judge pro tem.

---

73 Cal. App. 379

FARMER v. BARNES. (Civ. 4885.)

(District Court of Appeal, Second District, Division 2, California. June 24, 1925.)

1. Mortgages ⇐32(6)—Deed held to be intended as mortgage.

Following application for and agreement to make loan, borrower executed deed to lender, agreeing to buy back property for sum advanced; allowance having been made for interest at time of advance, with bonus in case of repurchase. Property transferred was worth from one-sixth to one-fourth more than sum advanced. *Held*, that deed was intended by both parties as mortgage.

2. Trial ⇐165—Opposing evidence may not be weighed, on motion for a nonsuit.

In determining whether plaintiff has made a case, on motion for nonsuit, opposing evidence may not be weighed.

Appeal from Superior Court, Los Angeles County; Paul Burks, Judge.

Action by Frank E. Farmer against D. Barnes. From judgment of nonsuit, plaintiff appeals. Reversed.

Loucks & Phister, of San Pedro, for appellant.

Irving S. Baltimore, of Los Angeles, for respondent.

WORKS, J. This action was commenced for the purpose of having a grant deed decreed to be a mortgage. At the conclusion of plaintiff's evidence the trial court ordered a nonsuit, apparently on the ground that there was no evidence from which the court could find that the deed was intended by the parties as a mortgage, and judgment went accordingly. Plaintiff appeals.

There was evidence tending to prove the following facts: Appellant owned, or had an agreement under which he could acquire certain real property. Respondent, acting as the agent of one Alice M. Flood, although there was evidence that he also was the agent of appellant, brought the latter and Mrs. Flood together on paper. As a result of respondent's activity, a lease, signed by both the principals, was executed, whereby appellant demised to Mrs. Flood his real property for a term, to commence 30 days after the completion of a hotel which he contracted, as a part of the agreement of lease, to erect upon the premises. It was necessary for appellant to borrow money with which to construct the hotel, and, following the execution of the lease, Mrs. Flood entered into an agreement to lend him $12,000 for that purpose, payment of the amount to be secured by a trust deed on appellant's property. This agreement was evidenced by certain escrow instructions, signed by both Mrs. Flood and appellant, which were lodged with the title company already mentioned. These instructions were dated May 11, 1923, but were apparently not deposited with the title company until about June 1. At any rate, certain papers called for by the instructions were dated on that day. Mrs. Flood never placed the $12,000 in the custody of the title company, as contemplated by the escrow instructions. Appellant testified that a "grant deed was demanded in place of this trust deed"; that it was demanded by "D. Barnes, for Mrs. Flood"; and that the demand was made in a conversation which occurred "along about July." Appellant testified further:

"Q. State just the conversation you had as nearly as you can. A. Well, Mr. Barnes said,

'We don't want to have the expense of foreclosure and we will take a grant deed, placed with the title company.' I needed the $12,000 and I submitted to the grant deed and placed it with the title company for Mrs. Flood and Mr. Barnes. * * *

"Q. Now exactly what had Mr. Barnes told you respecting this grant deed? A. That he would not consider taking the trust deed; he would have to have the grant deed.

"Q. Why did he say he wanted a grant deed? A. On account of foreclosure proceedings, the expense of foreclosure proceedings in case I could not pay.

"Q. He wanted title to the property? A. In case he had to foreclose—

"Q. At the end of 90 days? A. At the end of 90 days if I could not pay. * * *

"Q. In this conversation * * * was there anything said about the time in which you were to pay this money back? A. Yes; it was to be about 90 days, October 5th, that was the date as I remember it, because I had in mind that I must raise the money by October 5th.

"Q. Was there anything said about interest at that time? A. I allowed him for interest. In the conversation we just made it a full 2 per cent. on top of the $12,000, or $240. That was deducted from the $12,000, and I only received $11,760 into the title company, and that was disbursed to parties whom I owed, * * * that was considered interest * * * for 90 days, and a bonus was to be paid him of a hundred dollars in case I gave him the $12,000 back for Mrs. Flood, the hundred dollars was to be for Mr. Barnes, and the $12,000 for Mrs. Flood, as I understood it. However, Mr. Barnes—I signed the deed in Mr. Barnes' name."

Following this conversation, although appellant ran into it matters which occurred later, the deed was placed in escrow with the title company, which still held the escrow instructions of date May 11 between appellant and Mrs. Flood. The deed was from appellant, as grantor, to respondent, as grantee, and was dated July 5, 1923. Under the same date appellant signed and delivered to the title company a paper which, omitting the description of the real property described in the deed, was as follows:

"D. Barnes: I, the undersigned, hereby agree and promise to buy of you [the real property in question] for the sum of ($12,100.00) twelve thousand one hundred dollars all cash on or before October 5th, 1923, without interest."

The title company having received the $11,760, the deed was delivered to respondent. The latter was called as a witness under section 2055 of the Code of Civil Procedure. He testified, in part, after referring to the original escrow between Mrs. Flood and appellant:

"Q. But she did not put up any $12,000? A. No, she refused to make the loan.

"Q. And some two months subsequent to that time you put $12,000 in there? A. In a different transaction.

"Q. Was it in the same escrow? A. The same escrow.

"Q. You had carried on all negotiations for Mrs. Flood? A. Yes, sir.

"Q. She had never been present at any time? A. No; I had been transacting her business."

A real estate broker testified that appellant's property was worth $14,000 or $15,000 on July 5, 1923. The lease between appellant and Mrs. Flood does not show what was to have been the cost of the hotel to be erected upon the property, but it was recited that it was to "be built of brick, containing about 100 guest rooms, lobby, 2 stores, and basement, and automatic elevator."

It is too plain for argument that this evidence made a strong prima facie case for appellant. If the grant deed had run to Mrs. Flood instead of to respondent, and if there had been no evidence other than that which we have recited, the court could have made no finding but that the instrument was a mortgage. We cannot see that the making of the deed to respondent, coupled with the fact that the transaction which resulted in its execution may have been one between him and appellant—and respondent now claims that to have been the case—can make any material difference. If we take this claim of respondent as a factor to be considered, as he is the sole defendant in the cause—although some of the testimony of appellant indicates that Barnes was acting for Mrs. Flood to the end—and meet respondent on his own ground, it would appear still that there was a strong prima facie case under the complaint. It is not difficult to perceive a showing under the evidence that respondent, having conducted all the negotiations for Mrs. Flood, stepped into her place at last and made the loan with the grant deed as security instead of the trust deed originally contemplated. He knew that appellant wanted to borrow a certain sum on his property and he paid to appellant practically that amount. His intervention in the last analysis as a principal, if we meet him on his own claim that he did so intervene, seems not to affect the substantial merit of appellant's cause under the evidence adduced by him.

[1, 2] We apparently have here, under the evidence above stated, a typical case of the execution of a deed with the intention of both parties that it should operate as mortgage. The entire chain of transactions originated in an application for a loan, followed by an actual agreement that the loan would be made. Appellant agreed to buy the property back for the sum advanced; an allowance having been made for interest at the time of the advance, and a "bonus" having been provided for in case of "repurchase," and at the time of the execution of the deed the property was worth from one-sixth to one-fourth more than the sum advanced, and had a higher prospective value. Under these circumstances appellant's prima facie case

was complete. Holmes v. Grant, 8 Paige (N. Y.) 258; Turner v. Wilkinson, 72 Ala. 361; Daniels v. Lowery, 92 Ala. 519, 8 So. 352. In fact the case was so perfect under the general and well-understood principles affecting the subject that the citation of authority is a work of supererogation. We are unable to understand the conclusion reached by the trial court, except upon the theory that, there having been conflicting evidence in the record, the court adopted the view that opposing evidence may be weighed on motion for a nonsuit. Such a view was, of course, erroneous. Estate of Arnold, 147 Cal. 583, 82 P. 252; Reaugh v. Cudahy Packing Co., 189 Cal. 335, 208 P. 125.

Judgment reversed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

73 Cal. App. 357

PEOPLE v. SCHIAFFINO. (Cr. 844.)

(District Court of Appeal, Third District, California. June 23, 1925.)

1. Criminal law ⟸1023(8)—Order, denying motion in arrest of judgment, not appealable.

An order, denying a motion in arrest of judgment, is not appealable.

2. Burglary ⟸19—Indictment for burglary by means of explosives, which merely charges that accused intended a "crime," held defective.

Indictment for burglary by means of explosives, under Pen. Code, § 464, which merely charged accused with willfully and burglariously breaking and entering a store building with intent to commit a crime, and which did not specifically charge crime intended, *held* defective on its face; "crime" being a general term including treason, felony, and misdemeanor, and defined as an act in violation of such law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Crime.]

3. Criminal law ⟸1186(4)—Defect in indictment apparent on its face held to require reversal.

Failure of indictment for burglary with explosives to contain one of material elements necessary to charge of the offense *held* to require reversal, in view of Const. U. S. Amend. 14, notwithstanding Const. art. 6, § 4½, sustaining a conviction, where error complained of does not result in miscarriage of justice.

Appeal from Superior Court, Lake County; H. L. Preston, Judge.

Charles Schiaffino was convicted of burglary by means of explosives, and he appeals. Reversed.

See, also, 232 P. 719.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

THOMPSON, Judge pro tem. The defendant was convicted, pursuant to section 464 of the Penal Code, December 21, 1918, of burglary by means of explosives. The indictment charged him with "wilfully, unlawfully, feloniously, and burglariously breaking and entering the store building * * * with intent to commit a crime. * * *" The indictment failed to allege either the name or nature of the crime which it was alleged he intended to commit. No demurrer was filed. Upon conviction the defendant was sentenced to state's prison for a term of from 25 to 40 years prescribed by this section. He served 6 years of this sentence. The statute failed to designate whether commitment under this section should be made to the state's prison or to the county jail. For this reason, upon a writ of habeas corpus, the appellate court of the first district held that the sentence was void, and remanded the prisoner with directions to the trial court to resentence him to the county jail. 232 P. 719. Accordingly, on December 24, 1924, he was resentenced by the trial court to imprisonment in the county jail for a term of 25 to 40 years. This sentence was then suspended, and he was released on probation. A motion in arrest of judgment was made and denied. From the final judgment of commitment, the defendant has appealed.

The defendant claims this judgment is void because (1) the indictment fails to specifically designate the name or nature of the crime he was charged with entering the building to commit; (2) that the indictment fails to show that the grand jury, which presented the charge against him, had been first duly sworn according to law; (3) that the defendant, having served a substantial portion of his sentence in the state's prison, was thereby placed in jeopardy.

[1] An appeal does not lie from an order denying a motion in arrest of judgment. That motion could not reach the defects complained of. People v. Matuszewski, 138 Cal. 533, 71 P. 701; People v. Swenson, 49 Cal. 388; People v. Williams, 43 Cal. App. 60, 184 P. 498.

[2] The indictment was defective on its face, and was therefore subject to demurrer or motion to quash. The offense with which the accused was charged was burglary by means of explosives. The "crime" which he was charged with intending to commit upon his entry of the building was a mere incident to the major offense of burglary, and yet it was a necessary element. The term "crime" is a general one, and has been said to include treason, felony, and misdemeanor. Johnson

v. State, 29 N. J. Law, 453. It is defined as an act in violation of a public law. 2 Words & Phrases, First Series, p. 1736; Black's Law Dict. 299. It is even more general than the term "felony." Yet in the case of People v. Nelson, 58 Cal. 104, it was held that a complaint for burglary charging that the accused had entered a building "with intent to commit the crime of a felony," failed to state facts sufficient to constitute a public offense, and was open to attack even in the absence of a demurrer. The authorities are fairly uniform to the effect that the particular offense which the accused is charged with intending to commit must be named or at least its principal elements must be described. People v. Goldsworthy, 130 Cal. 600, 62 P. 1074; People v. Mooney, 127 Cal. 339, 59 P. 761. In the last case cited, it is said:

"It is a rule, universal and without exception, that every intent, like everything else which the law has made an element of the offense, must be alleged."

Nor is the failure to demur or move in arrest of judgment a waiver of this defect. 8 Cal. Jur. 500; People v. Smith, 103 Cal. 563, 37 P. 516; People v. Nelson, 58 Cal. 104. Where the intent is a necessary element of a crime, as it is in the charge of burglary by means of explosives, the particular offense with which the accused is charged with intending to commit, upon the entry of the building, must be alleged, or the indictment fails to state facts sufficient to constitute the offense. In the Nelson Case last cited, where the complaint charging the defendant with burglary in breaking and entering a building "with intent to commit a felony," was held to be fatally defective, it was said this complaint failed to state facts sufficient to constitute a public offense. It was further intimated that this defect would leave the accused wholly in the dark with respect to the particular charge which he might anticipate the prosecution might attempt to prove against him.

[3] The attorney general urges the application of article 6, § 4½ of the Constitution of California, to overcome this defect in the indictment. This provision reads:

"No judgment shall be set aside * * * for any error as to any matter of pleading * * * unless, after an examination of the entire cause, including the evidence, * * * the error complained of has resulted in a miscarriage of justice."

While it has been repeatedly held that this clause of the Constitution will cure mere "error as to any matter of pleading," it has not been held to be a cure for an absolute absence of material elements necessary to charge a public offense, or a cause of action. Such a construction would be destructive of all rules of pleading and procedure. It would violate the provision of the Fourteenth Amendment to the Constitution of the United States, which declares that:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor * * * deprive any person of life, liberty, or property, without due process of law."

To place a man on trial upon a complaint or indictment which utterly fails to state facts sufficient to constitute any cause of action against him, and having secured a verdict of conviction, to substitute for the void pleading which is open to attack at any stage of the proceeding, this constitutional remedy, would upset and defeat the wise rules of procedure which are the result of the crystallization of ages of judicial wisdom. This construction would violate the very spirit and purpose of the amendment which was intended to prevent a miscarriage of justice. This amendment was evidently intended to enable the courts to enforce justice in spite of unimportant or unsubstantial errors of pleading or procedure. But it was not intended to abrogate or dispense with the recognized and adopted rules of procedure and evidence.

In the case of Evans v. Wixom, 38 Cal. App. 542, 176 P. 873, the court says with reference to the application of this section of the Constitution to a complaint which failed to state a cause of action:

"We are satisfied that the constitutional provision above mentioned was not intended to carry the protection of judgments to any such extreme length [contended for by respondent]. The phrase, 'any error as to any matter of pleading,' in said section 4½ is entitled to very liberal construction, but not to a construction which will destroy pleading as a necessary element in legal procedure."

In the J. I. Case Threshing Machine Co. v. Copren Bros., 32 Cal. App. 194, 162 P. 647, Mr. Justice Chipman said, with relation to the application of this section of the Constitution to a complaint which lacked material allegations, and where material proof of essential facts was also lacking:

"We think it would be giving to section 4½ of article 6 unwarranted scope to permit its application to such a state of facts as we have here. To do so we must, in effect, say that it is not necessary to state facts sufficient to constitute a cause of action, or, having stated a cause of action, it need not be supported by sufficient evidence. The section was not intended to abrogate or dispense with rules of procedure and evidence. It would, in our opinion, effect a miscarriage of justice to sustain the ruling of the trial court upon the record before us."

For the reason that the indictment in this case fails to state a cause of action, and that this defect will not be cured by application of the provisions of article 6, § 4½, of the Constitution, it becomes necessary to reverse the judgment. It is therefore unnec-

essary to pass upon the other points involved in the appeal.

The judgment is reversed.

We concur: FINCH, P. J.; PLUMMER, J.

---

73 Cal. App. 204

YOAKUM v. GRIMES et al. (Civ. 4372.)

(District Court of Appeal, Second District, Division 1, California. June 10, 1925.)

1. Appeal and error ⇐1010(1)—Finding, supported by evidence, must be sustained, notwithstanding evidence which would have authorized different finding.

A finding, that deceased intended to assign shares of stock in trust for the benefit of his heirs, must be sustained, if supported by the evidence, notwithstanding presence of some evidence which would have supported different finding.

2. Trusts ⇐61(2)—Property held to become property of heirs of trustor on his death.

Where there was no duty imposed upon trustees other than to hold shares of stock for the heirs of trustor, on the death of the trustor, the stock became the property of those heirs.

3. Trusts ⇐345—Administratrix could sue to enforce trust for benefit of heirs.

Where trust created by deceased was in nature of testamentary trust, administratrix could sue to enforce trust for benefit of heirs, in same way and to same extent that she might sue to recover any property vested in deceased at his death.

Appeal from Superior Court, Los Angeles County; Arthur Keetch, Judge.

Suit by Alma R. Yoakum, special administratrix of the estate of John E. Yoakum, deceased, against Clyde Grimes and others. From an adverse judgment, first-named defendant and certain others appeal. Affirmed.

Dana R. Weller and W. W. Kaye, both of Los Angeles, for appellants.

Randall, Bartlett & White, of Los Angeles, for respondent.

CONREY, P. J. The judgment in this case determines that certain shares of stock of the John E. Yoakum Company, a corporation, are property of the estate of John E. Yoakum, and that plaintiff is entitled to possession thereof and orders that the several defendants transfer to plaintiff the shares of stock held by them, as evidenced by their certificates of stock.

The findings of fact, which closely follow the allegations of the complaint, are to the effect that on the 4th day of June, 1915, John E. Yoakum was the owner of 14,960 shares of the capital stock of the John E. Yoakum Company, a corporatioin; that on that date he executed a written instrument in the following terms:

"For and in consideration of ten dollars and other valuable considerations from Mary A. Grimes, I hereby assign to Clyde Grimes one of her heirs, as trustee for the heirs of the John E. Yoakum Company, 11,000 shares of stock in the above said company, No. 82.

"John E. Yoakum, Pres.

"Clyde Grimes.

"Also this day I have assigned the following stock in above said company to John V. Yoakum, 1,000 shares—No. 86, Queenie (Yoakum) Graves, 1,000 shares—No. 85, Jennie Y. Dickenson, 1,000 shares—No. 84, Valentine S. Yoakum, 1,000 shares—No. 83."

Here it should be explained that the evidence shows that at the same time an apparently intended duplicate of this instrument was separately written, on which the signatures in addition to those above shown included the individual signature of John E. Yoakum at the bottom of the instrument. Clyde Grimes also signed both papers. The second instrument to which we refer was not an exact duplicate, for the reason that in the first paragraph the number of shares was given as 10,000 instead of 11,000. There is no dispute about this discrepancy. The judgment assumes that the true number of shares assigned to Grimes was 10,000, and the plaintiff in fact claims nothing more so far as that item is concerned.

The findings are further to the effect that on said 4th day of June, 1915, the said John E. Yoakum caused the corporation to cancel his certificate for 14,960 shares, and caused a new certificate to be issued to Clyde Grimes for 10,000 shares, and to each of the four other parties named in the written instrument a certificate for 1,000 shares, and likewise caused a new certificate to be issued to John E. and Alma R. Yoakum for the remaining 960 shares; that the certificate No. 82, which was for 10,000 shares, was delivered to Clyde Grimes during the month of June, 1922, but that the certificates numbered 83, 84, 85, and 86 were delivered to John E. Yoakum and retained by him, and were never delivered to any of the parties named in the certificates until after his death.

The court further finds that by said written instrument of June 4, 1915, John E. Yoakum intended to assign the said stock in trust for the benefit of his heirs; that John E. Yoakum died on or about the 1st day of July, 1922, and that the plaintiff is the duly appointed and qualified special administratrix of his estate; that the plaintiff has demanded of the defendants that they and each of them transfer to her, as such special administratrix, the said several shares of stock, together with the certificates issued to them in evidence thereof, which demand has been refused by them; that the defendants and each of them denied that they were holding

said stock or any part thereof in trust for the benefit of the heirs of John E. Yoakum; that said defendants and each of them claimed absolute ownership of such stock as appearing in their respective names on the books of the company. There are further findings relating to the organization and business of the corporation.

The principal grounds of appeal presented by appellants Clyde Grimes, Jennie Y. Dickenson, and John V. Yoakum are that the complaint fails to state a cause of action, and that the findings are not supported by the evidence. Particularly, it is contended that there is no evidence to sustain the finding that by the the instrument set forth in the complaint John E. Yoakum intended to assign said stock in trust for the benefit of his heirs. Manifestly, there could be no heirs of the corporation, and we may assume that the written instrument does not by its terms describe any beneficiaries of the trust, if any trust was intended. But there is testimony sufficient to prove that the transfers were in fact made in trust for John E. Yoakum's heirs. With reference to the transfers other than that to Clyde Grimes, the plaintiff testified that at the time when the transfers were made, the statements of her husband were to the effect that the shares were to be held in trust for his heirs. And with reference to the stock transferred to Clyde Grimes, Mrs. Yoakum's testimony is that, at the time when the instrument of transfer was made, John E. Yoakum said to Clyde Grimes:

"Now, remember that you are to hold this stock for Alma and the children."

The instrument was at the time written out by Clyde Grimes, in response to Yoakum's request that he "write out a receipt for this stock." According to this testimony, it is apparent and fairly may be inferred that by the phrase "heirs of the John E. Yoakum Company," Mr. Yoakum understood that the trust was for his own heirs.

[1] The evidence being thus plainly sufficient to sustain the finding that John E. Yoakum intended to assign all of the stock in trust for the benefit of his heirs, that finding must be sustained, notwithstanding that there is some evidence which would have supported a different finding.

Appellants contend that the complaint does not state a cause of action and that their demurrer should have been sustained. The argument is that the action is brought to revoke a trust; that John E. Yoakum could not have revoked the trust and that the plaintiff's right cannot be any better than that of the trustor. But we agree with respondent that the purpose of the action is to enforce, and not to revoke a trust.

[2, 3] Since there was no duty imposed upon the trustees other than to hold the stock for the heirs of the trustor, it follows that upon his death it became the property of those heirs. Whether or not under the facts shown by the evidence and found by the court, the administratrix is the right party to compel the trustees to perform their duty, is a question which has not been raised or discussed by counsel. The only objection made by appellants, touching this phase of the action, is that the beneficiaries have not been made parties. But it does not appear that there is any beneficiary who is not a party to the action. We are assuming therefore without any attempt to examine into the question thoroughly, that since the trust is one resembling or having the nature of a testamentary trust, the administratrix is entitled to maintain this action for the benefit of the heirs, in the same way and to the same extent that she might maintain an action to recover any property legally vested in the deceased at the time of his death. We deem this disposition of the matter to be satisfactory, because it is apparent that the merits of the matter in dispute have been tried and determined no differently than if the designation of parties had been precisely correct.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

---

73 Cal. App. 218

BLANKMAN v. PARSONS. (Civ. 5230.)

(District Court of Appeal, First District, Division 2, California. June 13, 1925.)

1. New trial ⟹90—Testimony that payments to decedent were made under "grubstake" agreement held to constitute "surprise" entitling plaintiff to new trial.

In suit in which administrator counterclaimed for money loaned, testimony of defendant that payments to decedent were made under a "grubstake" agreement *held* to constitute "surprise" entitling plaintiff to a new trial, in view of Code Civ. Proc. § 657, subds. 3, 4, where he subsequently obtained documentary evidence showing payments were on loan.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Surprise.]

2. New trial ⟹10—Stipulation held not to waive right to ask for new trial.

Stipulation by which plaintiff agreed to proceed with trial on date named, whether or not he was ready to proceed, *held* not to waive his right to ask for new trial.

3. Appeal and error ⟹966(1), 977(1)—Ordinarily discretion of trial court to expedite trial of cases and to avoid new trials not disturbed.

Ordinarily discretion of trial court to expedite trial of cases and to avoid unnecessary continuances and new trials will not be disturbed.

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Harold G. Blankman against Frederick D. Parsons, administrator, etc., of the estate of Susan H. Parsons, deceased, with cross-complaint by defendant. From a judgment on the cross-complaint, plaintiff appeals. Reversed with instructions.

O. P. Stidger, of San Francisco (J. H. Sapiro, of San Francisco, of counsel), for appellant.

Samuel J. Chase, of Oakland, for respondent.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against him for something over $1,500, upon a cross-complaint filed by defendant as administrator with the will annexed of the estate of Susan H. Parsons, deceased, in an action in which the plaintiff sought to recover from defendant, as such administrator, $985, alleged to have been advanced to decedent upon an open book account.

The extremely unsatisfactory character of the record from the standpoint of either party, and from the standpoint of any court called upon to administer justice and equity, demands from us more than the mere technical decision of the abstract right of plaintiff to a continuance of the case and to a new trial after judgment against him. Some idea of the aimlessness and indefiniteness of the record made in the trial court will be gathered from the following statement of facts:

On June 9, 1923, an amended complaint was filed by plaintiff, setting up a claim against defendant's decedent for $807 and interest upon an open book account for money had and received during the years 1918 and 1919. A demurrer was filed and overruled, and defendant answered denying the indebtedness of decedent to plaintiff, and setting up as a counterclaim an indebtedness of plaintiff to decedent, amounting to $1,000. An answer was filed to the cross-complaint, alleging that said indebtedness of $1,000 from plaintiff to decedent had been fully paid and discharged during the lifetime of decedent.

On January 4, 1924, the following order was made by the court:

"By consent of both parties, it is by the court ordered that the above-entitled cause be, and the same is hereby, continued to March 13, 1924, at 10 o'clock a. m. In this matter it is stipulated by H. L. Corson, Esq., as counsel for the plaintiff that the cause may proceed and defendant proceed with his testimony on this date, regardless of whether the plaintiff is ready to proceed or not."

On March 13 the matter came on for hearing. The first witness was the defendant, F. D. Parsons. The record shows that he was called to the stand for the defendant, but he was first questioned by counsel for plaintiff and disclosed that his mother, the decedent, had received a letter from plaintiff in August, 1916, asking for a loan of $1,000. The court then interrupted, asking the purpose of these questions, in view of the allegations of the complaint with reference to the open book account. After a discussion, counsel stated to the court: "We will not take up the time of the court. We have no evidence to offer through that view of it." Counsel for defendant then examined the witness and introduced in evidence a letter written by plaintiff to decedent during her lifetime, dated at Alaska on August 5, 1916, and asking for a loan of $1,000, to be paid the following June. Witness also stated that his mother had received various sums of money from plaintiff up to the time of her death, that in 1897 she had loaned plaintiff about $370 to go to Alaska, and plaintiff had stated that it was to be a "grub stake" and that he would "split fifty-fifty" with Mrs. Parsons on anything he got in Alaska, and would also repay the loan. At this point the court called counsel's attention to the fact that the pleadings had admitted the loan of $1,000 from decedent to plaintiff, and that the answer to the cross-complaint had as stated that it was to be a "grubstake" and proof had been offered upon the question of payment, and the burden of showing same was upon plaintiff and cross-defendant, judgment would have to go against him, and there was no case to rebut by any testimony on the part of defendant and cross-complainant. Thereupon counsel for cross-complainant rested his case. Counsel for plaintiff and cross-defendant then took up the burden and elicited from the witness the following facts: That Mrs. Parsons had sent plaintiff a telegram on August 22, 1916, as follows:

"Money sent today by draft in letter."

That on the same day she had sent him a letter reading:

"Your letter of 5th August received. I inclose herewith draft for $995—proceeds of $1,000 loan, less bank exchange. The rate of interest is 7 per cent. I will write you very soon."

So far the testimony merely covered an admission in the pleadings—the making of the loan for $1,000. Witness then testified that plaintiff had sent his mother money since 1916, sometimes by check and sometimes through a Canadian bank; that these payments were generally in amounts of $50; that witness knew these payments were made in 1918; that his mother had told him she received nothing upon the $1,000 loan in question; that every little while his mother would come to him and say that plaintiff was not doing as he had agreed to do, and he would advise his mother to write to plain-

tiff; that his mother had told him on several occasions, and particularly on one occasion shortly before her death, that the $1,000 loan had not been paid. The witness was questioned about a transaction in which his mother had deeded a house to plaintiff, and asked if the parties had not struck a balance at that time and settled their claims against each other, and he stated he did not know.

With the record in this condition, counsel for plaintiff stated that he would like to bring the officials of the bank through which the payments had been made into court to testify in regard to them. The court stated that a continuance would not be granted because counsel had entered into a binding stipulation to try the case on that day. Counsel protested that he had no way of showing payment except by the books of the bank through which the payments had been made. Counsel for defendant and cross-complainant then took the position that, assuming payments of $50 a month had been made, and that they aggregated about $1,800, these payments from 1917 on were under the "grubstake" agreement; that they were made before the deed to the house was executed and after it was executed and after the $1,000 was borrowed. The court took the position that the issues were known to the parties at the time of the stipulation as to the continuance to March 13, and refused a further continuance. Attorney for plaintiff then attempted to testify with relation to the transfer of the house by Mrs. Parsons to plaintiff; he having acted as Mrs. Parsons' attorney in the transaction. This testimony was objected to upon the ground that it was a privileged communication between lawyer and client, and the objection was sustained. That ended the case, except for the renewed request of counsel for plaintiff that he be allowed to show by the bank officials the amount of money that had been paid by plaintiff to Mrs. Parsons. This request was again denied. Thereupon judgment was given for the defendant upon the cross-complaint. No other judgment could have been entered, as the plaintiff proved none of the allegations in his complaint, and failed to show payment of the debt set up in the cross-complaint, the incurring of which was admitted in the pleadings.

In April, 1924, there was a substitution of attorneys, and in May a motion for a new trial was made. It was supported by the affidavit of the former attorney. Some of the statements contained therein are certainly entirely immaterial, such as the statement that a witness had promised to testify for plaintiff and had refused to do so a month before the trial; that a continuance had been obtained to try to persuade her to give her testimony, and counsel had not succeeded in so persuading her, and desired another continuance to accomplish this result. The law provides means for compelling a witness to testify, and the facts recited give no right to a continuance nor a new trial. However, in this affidavit, there is also the statement that the testimony regarding the so-called "grubstake" agreement was a complete surprise to the attorney for the plaintiff, who had never heard of the existence of such an agreement; that plaintiff was in Alaska and could not furnish information to counsel to refute the testimony of defendant regarding the making of such an agreement; that plaintiff had informed his counsel that the payments made by him were to discharge his indebtedness to decedent and as an advance to her to enable her to pay her living expenses.

[1, 2] There was nothing in the pleadings that would have given warning to plaintiff or his counsel that this testimony would be introduced, and, if it came as a surprise to plaintiff's counsel, justice and equity demanded that he be given an opportunity to dispute the claim put forth. The peculiar circumstances of this case, the plaintiff being in Alaska and the other party to the transaction being dead, coupled with the fact that much of the testimony introduced on behalf of defendant and cross-complainant was hearsay testimony and would not have been admissible had its admission been opposed, require, perhaps, a little more leniency to enable the parties to have the case decided upon its merits and to do justice between the parties.

In support of the motion for a new trial, there was also the affidavit of B. M. Aikens, the attorney who was substituted of record in the action, to the effect that in April, 1924, he had obtained from the plaintiff, through the Canadian Bank of Commerce, a large number of documents relating to the matters in dispute in the action, including 27 drafts signed by decedent, drawn upon plaintiff through the Bank of British North America, all of which had been paid by plaintiff in due course; that the first of these drafts was dated August, 1916, and the last of them January 31, 1919, and the others were dated at various times between said dates; that each of said drafts was for $50, and they aggregated $1,350; that among said documents were various letters from the decedent to plaintiff, relating to their financial transactions, and acknowledging the receipt of various remittances; that the said letters and signatures to the said drafts are in the handwriting of said decedent, and that it can be shown upon a new trial that the plaintiff actually paid to the decedent the said loan of $1,000 set up in the cross-complaint; that a certain written statement referred to in the testimony of Parsons, showing that plaintiff had borrowed $370 from Mrs. Parsons, was a statement sent by plaintiff to Mrs. Parsons, together with a letter demanding attention to the same, and

in response thereto Mrs. Parsons deeded the house mentioned in the testimony to plaintiff; that among the letters written by decedent to plaintiff, which would be produced at a new trial, is one mentioning certain remittances received by her from plaintiff and speaking of such remittances as "on the $1,000."

All the testimony referred to in this affidavit was pertinent upon the issue raised at the trial with reference to the so-called "grubstake" agreement. There was nothing in the pleadings to inform plaintiff that such an agreement would be urged against him. He relied upon proving the monthly payments of $50 each, aggregating over $1,000, in extinguishment of his debt to Mrs. Parsons. He proved these payments by the testimony of the defendant, but such testimony also went further, to his surprise, and applied these payments to an agreement alleged to have been made 25 years previously. This was a surprise that ordinary prudence could not have guarded against, and plaintiff and cross-defendant was entitled to an opportunity to meet this testimony. Had plaintiff himself been in court, the situation might have been somewhat different, but, as we have said, he was in Alaska, and his attorney, knowing nothing of this alleged agreement, was powerless to meet this issue without time to communicate with his client. After the judgment against the cross-defendant, the attorney discovered documentary evidence to meet the claim which he had never had an opportunity to answer, and, in view of all the circumstances of the case, we think a new trial should have been granted to afford him this opportunity. It cannot be argued with reason that these documents should have been obtained earlier because the attorney for plaintiff had no means of knowing that the so-called "grubstake" agreement would be set up to explain these monthly payments. The situation is brought squarely within the provisions of section 657, Code of Civil Procedure, subdivisions 3 and 4, and the plaintiff was entitled to a new trial. The remaining consideration is as to whether or not the stipulation hereinbefore set forth, by which plaintiff agreed to proceed with the trial on March 13, whether or not he was ready to proceed, affects his right to a new trial. It is not necessary for us to pass upon the question of whether an attorney has the power to make so improvident a stipulation on behalf of his client—to practically stipulate all his rights away—because such stipulation does not, in terms, waive the right to ask for a new trial.

[3] The effort to expedite the trial of cases and to avoid unnecessary continuances and new trials is certainly commendable upon the part of a trial court, and under ordinary circumstances the exercise of its discretion will not be disturbed, but the peculiar handicap of the plaintiff in this case and the general unsatisfactory condition of the record, which leaves one unconvinced of the merits of the case, seem to demand special consideration and greater leniency to the end that justice may be done between the parties.

The judgment is reversed, with instructions to the trial court to grant the plaintiff and cross-defendant a new trial.

We concur: STURTEVANT, J.; NOURSE, J.

---

73 Cal. App. 260

PEOPLE v. CRAPPA. (Cr. 864.)

(District Court of Appeal, Third District, California. June 17, 1925.)

1. Judges ⟸47(1)—Person acting as district attorney in prosecution for grand larceny held disqualified to act as trial judge in revoking probation.

Person who acted as district attorney in prosecution of defendant for grand larceny wherein defendant was convicted and admitted to probation for a term of 10 years *held* disqualified, under Code Civ. Proc. § 170, to act as trial judge, in revoking order granting probation and sentencing defendant.

2. Criminal law ⟸1207—Judgment fixing minimum and maximum time for crime committed prior to enactment of indeterminate sentence law held void.

Where defendant was convicted for crime of larceny, committed prior to enactment of Indeterminate Sentence Law, judgment, sentencing him to state prison for a term of not less than minimum and not greater than maximum time provided by law *held* void.

Appeal from Superior Court, Madera County; Stanley Murray, Judge.

Frank Crappa was convicted for grand larceny and admitted to probation for a term of 10 years. From a judgment revoking order granting probation and sentencing defendant to punishment by imprisonment in the state prison, he appeals. Reversed.

Conley, Conley & Conley, of Fresno, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

FINCH, P. J. The defendant was charged with the crime of grand larceny alleged to have been committed on the 4th day of December, 1916. He was arraigned on the 9th day of December, 1916, and entered a plea of guilty. December 29, 1916, he was admitted to probation for a term of 10 years. April 11, 1925, the order granting probation was revoked and the court entered judgment "that the said Frank Crappa be punished by imprisonment at San Quentin in the state prison of the state of California, for the term of

not less than the minimum and no greater than the maximum time provided by law." This appeal is from the judgment.

[1] Appellant contends that—

"The trial judge who revoked the probation of the defendant and imposed sentence was absolutely disqualified to act, since, as district attorney, he had previously represented the plaintiff * * * in the same case."

Judge Murray, who revoked the order granting probation and sentenced defendant to imprisonment, was district attorney of Madera county at the time the information was filed. As such district attorney he appeared for the people at the arraignment and at the hearing of defendant's application for probation.

"No justice, judge, or justice of the peace shall sit or act * * * in any action or proceeding, * * * when in the action or proceeding, or in any previous action or proceeding involving any of the same issues, he has been attorney or counsel for either party." Code Civ. Proc. § 170.

This provision is too plain to admit of controversy, and the disqualification of the trial judge is clear.

[2] The crime charged was committed prior to the enactment of the Indeterminate Sentence Law (section 1168, Penal Code), and therefore the judgment is void. People v. Booth, 37 Cal. App. 650, 174 P. 685.

Upon the going down of the remittitur herein, the question of whether the order admitting defendant to probation shall be revoked and, if so, the term of imprisonment to be imposed must be determined by a judge who is not disqualified to act in the matter.

The judgment is reversed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 193

In re LAUREL HILL CEMETERY ASS'N.

LAUREL HILL CEMETERY ASS'N v. SARGENT et al.

(Civ. 5094.)

(District Court of Appeal, First District, Division 2, California. June 10, 1925. Hearing Denied by Supreme Court Aug. 3, 1925.)

1. Corporations ⊂=439—Corporation, empowered to purchase and own land, may sell such land.

Corporation, which is empowered to purchase and own land, may sell such land.

2. Dedication ⊂=41—Party asserting dedication must show that all calls of statute have been followed.

Party asserting dedication must show that all calls of statute have been followed.

3. Cemeteries ⊂=13—Cemetery held entitled to sell lands.

A cemetery incorporated under Act April 18, 1859, §§ 2, 3 (St. 1859, p. 281), codified upon the adoption of the Codes, and appearing therein as Civ. Code, § 608 et seq., *held* entitled to sell lands bought pursuant to section 3, subd. 3, but never mapped nor platted pursuant to section 4, and use of which for burial purposes was prohibited by an ordinance of the board of supervisors, in view of sections 3, 4, 9, 10; Civ. Code, § 615, not adding to or subtracting from the existing powers of such cemetery.

Appeal from Superior Court, City and County of San Francisco; Warren V. Tryon, Judge.

Petition by the Laurel Hill Cemetery Association for leave to sell real property, contested by George Clark Sargent and others. From an order granting the application, contestants appeal. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., and Houser, Justice pro tem., dissenting.

George Clark Sargent, of San Francisco, for appellants.

Haven, Athearn, Chandler & Farmer, of San Francisco, for respondent.

STURTEVANT, J. This is an application for leave to sell real property. The application was made by Laurel Hill Cemetery Association. In the lower court George Clark Sargent and others appeared as contestants. A hearing of the application was had, and thereafter the trial court made an order granting the leave. From that order the contestants have appealed, and have brought up the judgment roll and a bill of exceptions.

[1-3] In this court the appellants contend that the petitioner has not been given the power, and, in view of the contractual rights that have been established, the petitioner may not legally be granted power to sell any of the lands of the corporation. On the other hand, the respondent concedes that lands which have been mapped and platted, or lands in which interments have been made, may not legally be sold; but, in this behalf, the respondent shows to the court that the lands for which the respondent asks leave to sell are only a portion of the holdings of the respondent, and that such lands are not and never have been mapped or platted, and that at the present time, by reason of certain ordinances heretofore enacted by the board of supervisors, the lands in question may not hereafter be used for the purpose of therein burying the body of any dead person. As to such lands, the respondent contends that under the act approved April 18, 1859 (page 281, c. 267 of the Statutes of 1859), the respondent had the right to sell such lands, that when the Codes were enacted said statute was codified, and the respondent elected in the man-

ner prescribed by law to continue its existence under the Codes, and that under the provisions of the Codes the respondent's said right was not curtailed or diminished in any respect. In this contention we think the respondent is correct.

Looking at the statute as a whole, it is perfectly clear that when the respondent corporation organized and thereafter filed and caused to be recorded the certificate mentioned in section 2 and section 3 of the statute, it thereupon became vested with power—

"to purchase, hold, sell, and convey, such real and personal estate as the purposes of the incorporation shall require." Section 3, subd. 3.

It also provided that—

"Any association incorporated under this act, may take, by purchase or devise, and hold, * * * not exceeding 320 acres of land, to be held and occupied exclusively for a cemetery for the burial of the dead. Such land, or such parts thereof as may from time to time be required for that purpose, shall be surveyed and subdivided into lots or plats of such size as the trustees may direct, with such avenues, paths, alleys, and walks, as the trustees deem proper; and a map or maps of such surveys shall be filed in the office of the county recorder of the county in which the land shall be situated. And after filing such map, the trustees may sell and convey the lots or plats designated upon such map, upon such terms as shall be agreed upon, and subject to such conditions and restrictions, to be inserted in or annexed to the conveyances, as the trustees shall prescribe. The conveyances to be executed under the common seal of the association and signed by the president or vice president, and the treasurer of the association. Any association incorporated under this act, may hold personal property to an amount not exceeding $5,000, besides what may arise from the sale of lots or plats." Section 4.

Except as restricted or limited in the section just quoted, the statute does not contain any expressed restriction or limitation upon the power of the association to sell its real estate. On the other hand, the provisions quoted from section 3, as well as portions of section 4, clearly vested in the association power to purchase at least 320 acres. When, as here, a corporation clearly has the power to purchase and own land, it has the same right as a natural person to sell such land. This is so because the most important attributes of a natural person are his absolute dominion over his property and his right of disposition thereof, and the same may be said of a corporation aggregate as to its corporate property. Hearst v. Putnam Min. Co., 28 Utah, 184, 77 P. 753, 66 L. R. A. 784, 107 Am. St. Rep. 698, 704, 708; 14a C. J. 521, § 2416.

As to lots in which bodies had been interred, and as to lands which had been mapped and platted, the map recorded, and from which maps lots had been sold, it is quite patent that the statute never contemplated that such lands should be sold except as provided expressly by the statute; on the other hand such property was "* * * to be held and occupied exclusively for a cemetery for the burial of the dead." However, when that is stated, the full purpose of the act is stated. But when, by ordinance or statute, a cemetery is closed so far as the interment of bodies in the future, then and in that event the statute does not purport to extend the rule.

The passage contained in section 4, supra:

"Such land, or such parts thereof as may from time to time be required for that purpose, shall be surveyed and subdivided into lots or plats of such size as the trustees may direct, with such avenues, paths, alleys, and walks, as the trustees deem proper; and a map or maps of such surveys shall be filed in the office of the county recorder of the county in which the land shall be situated. And after filing such map, the trustees may sell and convey the lots or plats designated upon such map, upon such terms as shall be agreed upon," etc.

—is a passage that is commonly contained in acts authorizing the creation of public cemeteries and church grounds. It is also commonly found in statutes providing for the regulation of the sale of town lots, the dedication of streets, and the dedication of public squares. He who would assert that a dedication has been made must show that all of the calls of the statute have been followed because such provisions have been held to be of the substance of the creation of a dedication. Woodyer v. Hadden, 5 Taunton, 125; Town of Pawlet v. Clark, 9 Cranch. 292, 3 L. Ed. 735; McConnell v. Town of Lexington, 12 Wheat. 582, 585, 586, 6 L. Ed. 735; Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521; Price v. Methodist Church, 4 Ohio, 515, 543.

It will be borne in mind that the statute before us was enacted when the Constitution of 1849 was in effect. Under section 4 of the statute the association was authorized to purchase not exceeding 320 acres, and under the same section it was authorized to hold personal property to an amount not exceeding $5,000, besides what may arise from the sale of lots or plats. Under section 9 of the statute it was authorized to take and hold any property, real or personal, bequeathed or given upon trust to apply the income to the improvement, etc., of the cemetery. Finally, under section 10, it was provided:

"The cemetery lands and property of any association, formed pursuant to this act, shall be exempt from all public taxes, rates, and assessments, and shall not be liable to be sold on execution, or be applied in payment of debts due from any individual proprietors. But the proprietors of lots, or plats in such cemeteries, their heirs, or devisees, may hold the same exempt therefrom, so long as the same may remain dedicated to the purpose of a cemetery; and, during that time, no street, road, avenue, or thoroughfare, shall be laid through such cemetery, or any part of the lands held by such association, for the purposes aforesaid, without

the consent of the trustees of such association, except by special permission of the Legislature of the state."

Turning to the provisions regarding surveying, platting, and recording, it becomes clear at a glance that the properties actually dedicated to cemetery purposes, and no others, are to become exempt. If any person should give or bequeath to the association a business block, or a farm, the income therefrom could be used for the beautification of the cemetery; but certainly no one would contend that the business block or farm were "cemetery lands" within the meaning of the exemption, nor that the business block or farm would be protected so that "no street, road, avenue, or thoroughfare" should be laid through it. Under a statute quite similar in language, it was held that the portion of the property not mapped and platted did not come within the meaning of such an exemption. Woodlawn Cemetery v. Everett, 118 Mass. 354. Under the same facts, doubtlessly the same rule would have been declared in California. Los Angeles County F. C. Dist. v. Hamilton, 177 Cal. 119, 130, 169 P. 1028; In re Bull, 153 Cal. 715, 718, 96 P. 366.

It is argued that, if such lands as those described in the complaint are sold, they may be used for unsightly purposes. That is true, but there is not a word in the statute to the effect that the association ever undertook the burden of controlling either the use of, or the future improvements on, properties adjacent to the cemeteries, whether such adjacent properties were once owned by the cemetery or otherwise.

It therefore appears to us that under the provisions of chapter 267 of the Statutes of 1859 the power existed under certain circumstances which would authorize the corporate authorities to sell the lands in question. When the Codes were adopted, the statute just mentioned was codified. Civ. Code, § 608 et seq. In the Code sections no language was inserted which purported to take away the power. When, in 1889, section 615 was enacted, it neither added to nor subtracted from the powers that already existed. That section merely purported to regulate the manner in which the power of sale might be exercised.

The appellants claim that section 615 of the Civil Code is unconstitutional if it is construed as granting the power of sale to the respondent when, in the absence of that section, the respondent would not have had the power, but, in view of the construction which we have placed upon the provisions of section 615 of the Civil Code, it is not necessary for us to dwell on that point.

As the whole subject before us is one purely of statutory construction, the holdings of other courts in other jurisdictions are of little assistance, but no case has been cited to us that is at variance with anything herein stated. 2 C. J. p. 58, § 19.

The order appealed from is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

73 Cal. App. 199

MELONE CO. v. ACQUISTAPACE et al.

(Civ. 2769.)

(District Court of Appeal, Third District, California. June 10, 1925.)

Landlord and tenant ⊜233(3)—Receipt held not to show, as matter of law, that landlord consented to surrender, or was estopped from disputing alleged surrender.

In action to recover installment of rent, receipt, executed by landlord, acknowledging payment by third person on lease to include land leased to defendants, such instrument being made subject to land being vacant at future date *held* not to show as a matter of law, that plaintiff consented to surrender of premises, or that it was estopped from disputing the alleged surrender.

Appeal from Superior Court, Napa County; Percy S. King, Judge.

Action by the Melone Company against Emil Acquistapace and another. From a judgment for plaintiff, defendants appeal. Affirmed.

E. L. Webber, of Napa, for appellants.
Henry C. Gesford, of Napa, for respondent.

FINCH, P. J. Plaintiff leased certain lands to defendants for a term of five years commencing on the 1st day of December, 1921, at a "rental for first two years of $2,000 per year and rental for the three years following at $2,500 per year, payable semiannually, every six months, in advance." Defendants went into possession under the lease and paid the first two installments of rent. They vacated the premises in August or September, 1922. This action was commenced for recovery of the third installment of rent. The plaintiff was given judgment, and the defendants have appealed.

The complaint alleges the terms of the lease and is in the usual form of an action for the recovery of rent. The answer sets up a lease containing terms essentially different from those alleged in the complaint. The court found, from conflicting evidence, that the terms of the lease were as alleged in the complaint. Appellants do not contend that the evidence is insufficient to support this finding.

By the terms of the lease, appellants were to plant 12 acres of the land to alfalfa and respondent was to furnish water for the irrigation thereof "at $5 an acre each irrigation." Appellants planted the alfalfa and commenced to irrigate the same. Respondent

refused to permit them to continue the irrigation on the ground that "it was wrong to do it" before the seed was sprouted, "and at that time over half of the seed had not sprouted." Respondent notified them not to use the fruit upon a few trees growing in the alfalfa field. Appellants contend that respondent's foregoing acts gave appellants "the right to abandon the property, when they were not receiving that which the lease gave them the right to receive." The lease provided:

"Tenant to upkeep premises and run same to full satisfaction of owners."

If it be conceded that the foregoing acts of respondent constituted a breach of the terms of the lease, neither such breach, nor any breach, was alleged in the answer, the defense set up therein being that the lease was canceled by mutual agreement.

In appellants' brief it is said:

"The appellants' position is this, that there was a surrender and a cancellation of the lease between the respondent and appellants and that the respondent on the 22d day of September, 1922, recognized and consented to the surrendering of the premises by the appellants, such surrender to take effect on or before the 1st day of December, 1922."

At the trial, the defendants introduced in evidence the following writing, admittedly executed by the president of the plaintiff company:

"Sept. 22, 1922.

"Received from M. Luiz & Co. $100 dollars, deposit on 3 yr. lease outside pasture lands and canyon field $500.00 a yr. fr Dec. 2/22, subject to land being vacant at that time.

"Melone Co."

The lands described in the foregoing instrument are included, with other lands, in the lease in controversy here. M. S. Luiz testified that, in September, 1922:

"I talked with Mr. Melone in regard to a lease of some property of Mr. Melone's; and so we come to an agreement on the property; I gave him a deposit of $100, and he handed me a receipt for it; when I was going to take possession. So Mr. Melone told me, 'No; the property isn't vacant, and it won't be vacant until some time in December. * * * In the first part of December.' I told Mr. Melone I was hard up for pasture, but I would like to dispose of it. Mr. Melone told me he had some pasture, so I brought my cattle down; I got some stubble. He says, 'I can use the stubble that time,' so I brought my cattle right down and put them in the stubble field. Later on Mr. Melone said, 'See the Acquistapaces, if Mr. Acquistapace is willing to let you in possession, all right.' So I went to see Mr. Acquistapace and Mr. Acquistapace told me as far as they were concerned I can get right in there; 'I haven't got anything else to do, we are through.' So I came down and put my cattle on the property. * * * I was going to get that lease some time in December."

The witness also testified that the amount of the deposit for which the receipt was given him was returned to him late in November or early in December, 1922. H. C. Melone, president of the plaintiff company, testified:

"He (Luiz) offered me a check for $100 and insisted on my taking it, and I said, 'I can't take it, Luiz, because there is a lease on the place; I would like to rent it to you if the place becomes available.' So I turned the check over to my attorney, who advised me not to cash it. * * * A lease was all drawn up to be signed between ourselves, and I never executed the lease. * * * Mr. Luiz never executed the lease, and this whole matter was put in abeyance subject to the prior claim of the Acquistapaces. * * * I told Mr. Luiz I could not execute a lease. * * * I referred Mr. Luiz to the Acquistapaces and told him he would have to deal with them. * * * The Melone Company leased to Mr. Luiz some stubble and hay land which was ours, and in no way connected with the Acquistapaces and their land."

Emil Acquistapace testified:

That prior to the time the defendants vacated the premises, he said to Melone, "I give you back your ranch right away, * * * because you promised to furnish all tools. * * * I cannot go ahead now if I don't get those things; if I have to buy everything I can't go ahead"; and that Melone replied, "Take your blankets and get out on the road if you feel like it"; and that "I went, I left the place, because I got mad"; that he never talked with Melone thereafter; that "I told him I couldn't stay there; it was too much rent."

Charles Acquistapace gave similar testimony. Melone denied the foregoing statement attributed to him and testified that the plaintiff did not agree to a cancellation of the lease or the vacation of the premises by the defendants, and that the plaintiff had not taken possession of the premises or leased any part thereof to others.

While the aforesaid receipt from plaintiff to M. Luiz & Co. tends to support appellants' contention that the plaintiff had accepted their surrender of the premises, it is not conclusive. The terms of the instrument are conditional, being expressly "subject to land being vacated by that time," December 2, 1922. The defendants had left the premises prior to the time the receipt was executed. The terms of the instrument imply a recognition of their right to resume possession under their lease. No lease to Luiz, or M. Luiz & Co., was ever executed. Melone testified that plaintiff did not resume possession of the land or put Luiz in possession thereof. It cannot be said, as a matter of law from the foregoing evidence, either that the plaintiff consented to the surrender of the premises or that it is estopped from disputing the alleged surrender. In Welcome v. Hess, 90 Cal. 507, 512, 27 P. 369, 370 (25 Am. St. Rep. 145) cited by appellants, it is said:

"A surrender is the yielding up of an estate for life or years to the reversioner or remainderman. Under the statute of frauds it can be done only by express consent of the parties in writing, or by operation of law when the parties do something which implies that both have consented. These acts are such as would estop the parties from disputing the fact of surrender, and which would not be valid unless the term were ended; as, for instance, a new lease accepted by the tenant, or the resumption of possession by the landlord if the tenant acquiesces, or the giving of a lease to another. * * * And while it is said that a surrender by operation of law is by acts which imply mutual consent, it is quite evident that such result is independent of the intention of the parties that their acts shall have that effect. It is by way of estoppel. * * * The tenant, subject to the covenants of his lease, is the owner for the term. If he leaves the demised premises vacant, and avows his intention not to be bound by his lease, his title still continues, unless the landlord has accepted the offer of surrender."

"Merely attempting to secure a new tenant, without taking possession or in fact reletting, is not an acceptance of the surrender." 15 Cal. Jur. 798; Chase v. Oehlke, 43 Cal. App. 435, 185 P. 425.

"Where a lease is repudiated and the premises abandoned, the landlord may pursue one of two courses: He may rest upon his contract and sue his tenant as each installment of rent, or the whole thereof, becomes due, or, he may take possession of the premises and recover damages." Bradbury v. Higginson, 162 Cal. 602, 604, 123 P. 797; Oliver v. Loydon, 163 Cal. 124, 126, 124 P. 731.

The judgment is affirmed.

We concur: THOMPSON, Justice pro tem.; PLUMMER, J.

---

73 Cal. App. 229

SOUTHERN PAC. CO. v. SWANSON.
(Civ. 4992.)

(District Court of Appeal, First District, Division 2, California. June 17, 1925.)

1. Trial ⟸165—Motion of nonsuit admits truth of plaintiff's evidence and every inference legitimately deducible therefrom, and requires evidence to be interpreted most strongly against defendant.

Motion of nonsuit admits truth of plaintiff's evidence and every inference legitimately deducible therefrom, and requires evidence to be interpreted most strongly against defendant.

2. Executors and administrators ⟸134—Promise of executrix to pay rent of premises leased by her testator created relation of landlord and tenant.

A promise of an executrix to pay the rent of premises leased by her testator, pursuant to which she thereafter remained in possession, created relation of landlord and tenant, which continued during possession of executrix.

3. Landlord and tenant ⟸183—Implied obligation to pay reasonable rental held to arise from mere occupancy as tenant without express agreement to that effect.

Implied obligation to pay reasonable rental *held* to arise from mere occupancy as tenant without express agreement to that effect.

4. Executors and administrators ⟸134—Death of tenant under lease did not terminate lease, but made estate liable for payment of rent for remainder of term of lease.

Death of tenant under lease did not terminate lease, but made estate liable for payment of rent for remainder of term of lease, to be collected as any other claim against it.

5. Executors and administrators ⟸134—Executrix agreeing to pay rent of premises leased by testator is liable for reasonable value of use and occupation of premises.

Executrix agreeing to pay rent of premises leased by testator is liable for the reasonable value of the use and occupation of the premises, notwithstanding lease did not terminate upon death of testator.

6. Executors and administrators ⟸96—Executrix is personally liable on her contracts, though made in representative capacity and for benefit of estate.

Executrix is personally liable on her contracts, though made in representative capacity and for benefit of estate.

7. Executors and administrators ⟸96—General powers of executrix do not empower her to make contract binding estate and authorizing judgment de bonis decedentis.

General powers of executrix do not empower her to make contract which will bind the estate and authorize a judgment against the goods of decedent.

8. Executors and administrators ⟸96—Executrix must look to assets of estate under her control to indemnify her for incurring personal obligation for benefit of estate.

Executrix must look to assets of estate under her control to indemnify her for incurring personal obligation for benefit of estate.

9. Executors and administrators ⟸96—Assets of estate are primarily bound for debts contracted by deceased, and not those contracted by his administrator or executor.

Assets of estate are primarily bound for debts contracted by deceased, and not those contracted by his administrator or executor.

10. Frauds, statute of ⟸17—Promise of executrix to pay rent obligation incurred after testator's death held not "special promise" to answer for debt of testator.

Oral promise of executrix to pay original rent obligation, incurred after testator's death, *held* not special promise within Code Civ. Proc. § 1612, to answer for the debt of testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Special Promise.]

Appeal from Superior Court, City and County of San Francisco; Edmund P. Mogan, Judge.

Action by the Southern Pacific Company, a corporation, against Elsie Ann Swanson. From a judgment of nonsuit, plaintiff appeals. Reversed.

H. W. Hobbs, of San Francisco, for appellant.

Richard S. Flaherty, of San Francisco, for respondent.

PRESTON, Justice pro tem. The plaintiff, Southern Pacific Company, a corporation, brought this action to recover from defendant, Elsie Ann Swanson, $1,350, alleged to be due it as rent for a certain store building at 36 Steuart street, San Francisco. The case was tried by the court without a jury, and, at the conclusion of plaintiff's case, defendant made a motion for a nonsuit, which was granted. Judgment for defendant followed; from this judgment the plaintiff prosecutes this appeal.

The facts developed at the trial are these: In August, 1917, Charles J. Swanson, the husband of the defendant, Elsie Ann Swanson, entered into a written lease with the Southern Pacific Company for a store building situated at 36 Steuart street, San Francisco, for the term of five years, ending August 31, 1922, at a monthly rental of $150. The premises were used by Charles J. Swanson for a general merchandise store up to the time of his death, which occurred February 26, 1922. Within a very few days after his death special letters of administration upon his estate were issued to one W. H. Stark, who demanded possession of the premises, and then and there took possession of the premises and the stock of goods therein. He remained in possession as such special administrator until some time in March, 1922, when the defendant, Elsie Ann Swanson, was appointed executrix of the last will and testament of decedent. Mrs. Swanson, after her appointment as executrix, took possession of the premises and the merchandise. She did not attempt to conduct the business, but used the building as a storage place for the stock of goods, and remained in possession of the building during the remainder of the term of the lease, which, as above stated, expired August 31, 1922, and thereafter holding over for the months of September, October, and November, 1922. The stock of goods was inventoried during this time, and Mrs. Swanson finally sold it at auction on the premises.

Many personal demands were made by plaintiff's agents upon Mrs. Swanson for the rent during the time she occupied the premises, and, in addition to this, each month during the same period, the plaintiff mailed her statements or bills for the rent at the rate of $150 per month. These statements were made in the name of Charles J. Swanson. In response to these demands for rent from plaintiff, Mrs. Swanson stated to its representatives that she would pay the rent out of the proceeds of the sale of the merchandise when sold. The attorney for plaintiff, in charge of the collection department, also made efforts to collect the rent, and was informed by Mrs. Swanson's attorney that it was necessary for the estate to retain possession of the premises, and that he would use his best endeavors to have the rent paid as an expense of administration. In pursuance of this last suggestion, a petition was filed jointly by Mrs. Swanson and plaintiff, asking the probate court to allow the rent as an expense of administration. This petition, for some reason not shown by the record, was denied by the court.

The plaintiff, relying upon these promises, refrained from serving notice to oust Mrs. Swanson from the premises and terminate the lease, but permitted her to remain there from March, 1922, to some time after November 1, 1922, when she vacated the premises, after disposing of the stock of merchandise. The rent was not paid. A claim against the estate for the rent due at the time of the death of Charles J. Swanson was presented and allowed and paid, but no claim for the rent following his death was presented. The estate is wholly insolvent.

After many unsuccessful attempts by the plaintiffs to collect its rent, the present action against Mrs. Swanson, individually, was commenced on April 19, 1923. Plaintiff seeks to recover, at the rate of $150 per month, rent for the premises from March to November, 1922, inclusive, which covers the period that Mrs. Swanson was in possession of the store after the death of her husband. Testimony was also given that $150 was a reasonable rental per month for the premises during this time.

After witnesses produced by plaintiff had testified to the foregoing facts, and plaintiff had rested its case, Mr. Wilson, attorney for defendant, made the following motion:

"If the court please, the defendant moves for a nonsuit on the ground that it is not shown that any contract was ever entered into between the Southern Pacific Company and Elsie Ann Swanson as an individual; that it is not shown that Elsie Ann Swanson at any time has occupied these premises as an individual or that she has ever guaranteed the payment of this money personally, or that any of the allegations of this complaint have been proven in this case."

The record does not reveal the ground upon which the motion was granted; all that is shown is, "Thereafter and upon the 14th day of January, 1924, the court made and entered its order granting defendant's motion for nonsuit herein."

[1] We are of the opinion that the trial court erred in granting the motion. The

court's power and limitations with reference to the granting of a nonsuit are clear and well defined. The motion admits the truth of plaintiff's evidence and every inference which can be legitimately drawn therefrom, and upon such motion the evidence should be interpreted most strongly against the defendant. Stieglitz v. Settle, 175 Cal. 131, 165 P. 436; Goldstone v. Merchants Cold Storage Co., 123 Cal. 625, 56 P. 776; Estate of Arnold, 147 Cal. 583, 82 P. 252; Bloom v. Allen, 61 Cal. App. 28, 214 P. 481.

[2, 3] After a careful examination of all the evidence in this case, with the above well-established rules of law in mind, it seems to us that the only logical and reasonable inference to be drawn therefrom is that there is both an express and an implied personal obligation on the part of Mrs. Swanson to pay the value of the use and occupation of these premises. Her express contract to pay rent is gathered from the uncontradicted testimony that she made the direct promise to plaintiff's agents to pay the rent "when the merchandise was sold, or out of the first money received by her as executrix." Plaintiff accepted these promises and allowed her to remain in possession of the store, thereby creating the relation of landlord and tenant, which relation existed during all of the time for which plaintiff claims rent in this action. Her implied obligation to pay a reasonable rental arises from the mere occupancy as tenant of the premises, without an express agreement to that effect. Tiffany on Real Property (2d Ed.) vol. II, § 414; Samuels v. Ottinger, 169 Cal. 209, 146 P. 638, Ann. Cas. 1916E, 830.

[4] The lease did not, however, terminate upon the death of Charles J. Swanson, but his estate became liable for the payment of the rent for the remainder of the term of the lease, to be collected as any other claim against it. Shepperd v. Tyler, 92 Cal. 552, 28 P. 601. The estate's liability arises out of privity of contract, based upon the lease from plaintiff to Charles J. Swanson. The defendant's liability to pay plaintiff the reasonable value of the use and occupation of said premises, while she occupied them, arises out of the privity of estate thereby created and entirely apart from the lease itself.

[5] The liability of the estate of Charles J. Swanson under the lease is one thing; the liability of Mrs. Swanson under the evidence in this case an entirely different and distinct thing. It was therefore perfectly proper to sue Mrs. Swanson personally for the reasonable value of the use and occupation of said premises, notwithstanding the fact that the lease did not end upon the death of Charles J. Swanson. Bonetti v. Treat, 91 Cal. 223, 27 P. 612, 14 L. R. A. 151; Schehr v. Berkey, 166 Cal. 157, 135 P. 41.

[6, 7] It must be conceded, as contended by respondent, that her use and occupation of appellant's premises was as executrix of the estate of Charles J. Swanson and for the benefit of said estate, but this alone would not relieve her of personal liability, for it is well-settled law in this state, and in many other jurisdictions, that an executrix is personally liable on all her contracts, although she is acting in a representative capacity and such contracts are made for the benefit of the estate. It is likewise well established that plaintiff could not maintain this action against the defendant in her representative capacity (except upon a proper claim duly presented for rent under the original lease); for under her general powers as executrix she could not make any contract which will bind the estate and authorize a judgment de bonis decedentis. Schouler on Executors and Administrators, § 256; 3 Woerner on Administration, § 356; Sterrett v. Barker, 119 Cal. 495, 51 P. 695; Melone v. Davis, 67 Cal. 281; 7 P. 703; Eustace v. Jahns, 38 Cal. 21; section 1582, Code Civ. Proc.; Austin v. Munro, 47 N. Y. 360; McKee v. Hunt, 142 Cal. 526, 77 P. 1103; Briggs v. Breen, 123 Cal. 657, 56 P. 633, 886; Renwick v. Garland, 1 Cal. App. 237, 82 P. 89.

[8, 9] Mrs. Swanson no doubt intended, in good faith, to create a debt against the estate for the rental of this store, but the effect of such attempt was not to bind the estate, but to bind her individually, and she in turn must look to the assets of the estate under her control to indemnify her for incurring this obligation. Renwick v. Garland, supra. The assets of an estate are primarily bound for the debts which deceased himself contracted during his lifetime, and not those contracted by his administrator or executor. Schouler on Executors and Administrators, § 256; Austin v. Munro, supra.

[10] It is contended by respondent that no individual liability attaches by her oral promise to pay the rent from the proceeds of the sale of the stock of merchandise, for this would be in effect a special promise to answer for the debt of her testator, which must be in writing, and cites section 1612 of the Code of Civil Procedure. This contention is erroneous; section 1612, Code of Civil Procedure, has no application under the facts of the case at bar, because, as we have already seen, this is not an action upon the lease itself, and not, therefore, a debt of Charles J. Swanson, but an original obligation of Mrs. Swanson, incurred after his death and growing out of the relation of landlord and tenant.

From the conclusions that we have reached in this case, it is unnecessary to pass upon the other grounds urged by appellant for a reversal of the judgment.

It follows, therefore, that the motion for a nonsuit should have been denied and the defendant put to her proofs.

Judgment reversed.

We concur: LANGDON, P. J.; NOURSE, J.

73 Cal. App. 293

DENNIS v. MILLER AUTOMOBILE CO. et al. (Civ. 2765.)

(District Court of Appeal, Third District. California. June 22, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

Master and servant ⊜332(2)—Whether driver of truck was within scope of employment held for jury.

In action for injuries to pedestrian when struck by truck delivering packages to express office, evidence that driver of truck deviated from usual route to express office to drive fellow employees home to lunch, for their convenience, *held* to make question for jury whether he was acting in course of employment and to sustain verdict for plaintiff.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by Belle Dennis against the Miller Automobile Company and others. Judgment for plaintiff against defendant named, and latter appeals. Affirmed.

Hearing denied by Supreme Court; Myers, C. J., Waste, J., and Houser, Justice pro tem., dissenting.

Irving D. Gibson, of Sacramento, for appellant.

George A. Work, of Sacramento, for respondent.

PLUMMER, J. On the 6th day of December, 1922, the plaintiff was injured as the result of a collision between two automobiles, one owned by the appellant Miller Automobile Company and the other by the defendant S. S. Albright Company. The collision occurred at the intersection of Tenth and S streets in the city of Sacramento. Plaintiff obtained judgment against the appellant Miller Automobile Company for the sum of $1,800. From this judgment the Miller Automobile Company appeals. No issue is raised as to the sufficiency of the evidence to justify the findings of negligence on the part of the driver of the Miller Automobile Company, nor is any issue tendered as to the extent of the injuries suffered by the plaintiff; it being apparent that the amount of the damages awarded are very reasonable in view of the extent of the injuries suffered by the plaintiff. At the conclusion of the introduction of the plaintiff's testimony the trial court granted a nonsuit to the S. S. Albright Company, and continued the action against the appellant Miller Automobile Company. The only question tendered for decision upon this appeal is whether or not the driver of the Miller Automobile Company, one Arthur W. Stephen, a boy of 19, employed in appellant's stockroom, was at the time of the accident performing duties within the scope of his employment.

The transcript shows that Arthur W. Stephen, the driver of appellant's car, was in the employ of the appellant on the day of the accident; that as part of his ordinary duties he regularly took express packages belonging to the appellant to the American Express company situate at Second and B streets, in the city of Sacramento; that he ordinarily started on one of his trips to deliver express packages at the hour of about 11:30 a. m.; that in making these trips he used a delivery truck, which was kept in the alley at Sixteenth street, between L and M streets; that on the day in question he had gone to the place where the delivery truck was kept; had placed in the truck two packages belonging to the Miller Automobile Company for the purpose of delivering the same at the express office above mentioned; that he had started his car and was about to proceed on his mission when two boys, employees of the Miller Automobile Company, came out of the building where the truck was kept, and asked Stephen to drive down past their homes. In reply Stephen told them he would go down with the packages, but would take them to their homes, and then deliver the packages afterwards. The homes of the two boys who accompanied Stephen were situate on Sixth and S streets. After the boys had gotten into the automobile Stephen drove south on Sixteenth street to S street, and thence westerly on S street until he reached the intersection of S and Tenth streets, where the collision resulting in the injuries to the plaintiff, who was a pedestrian on the sidewalk at that place, occurred.

So far as this action is concerned, it may be said that the streets of the city of Sacramento from B to S streets, inclusive, running easterly and westerly are all lettered; and the streets running northerly and southerly are numbered from Second to Sixteenth. All streets running westerly within the letters above named intersect streets running northerly and southerly, so that the express office of the American Express Company, located at Second and B streets, may be readily reached. It further appears from the transcript that the driver of the appellant's car, in taking express matter from the point on Sixteenth street, between L and M streets, ordinarily traveled northerly on Sixteenth street to J street, thence westerly on J street to the intersection of Second street, and thence northerly to the express office at B street; that on the day in question he first drove the machine southerly to S street on Sixteenth street, a distance of six and one-half blocks, and then turned westerly on S street, and was proceeding on his journey to the express company's office, having with him the two express packages and the two boys; that this departure or deviation from his usual course to the express office was for the purpose of accommodating the two boys

in taking them to their homes, where they were going to get their lunches.

As the argument of both appellant and respondent is based principally upon the testimony of the driver of appellant's automobile, we will set forth the salient portions thereof:

"I was working for the Miller Automobile Company on the 6th day of December, 1922. I was working in the storeroom. I was driving an autmobile owned by the Miller Automobile Company. The collision occurred at the corner of S and Tenth street in the city of Sacramento. I was proceeding west on S street. I had come from Sixteenth street between L and M, that is where we kept our trucks. There were two boys, Clarence Logan and Melvin Bowen with me. I entered my car at almost 12 o'clock. I entered the car first to take my express down to the office. I had a couple of parcels to deliver, and I started the machine, and was just about to leave when these two boys came out. I was originally going by himself when these two boys came out and asked me if I would take them down to the vicinity of their homes for lunch. My purpose in entering the car was to take some express down to the express office. These boys came out and asked if they might ride with me. I told them I had to go down with the packages, that I would take them to their homes, and then deliver my packages afterwards. I had no objection taking the boys home. The taking of express packages was one of my ordinary duties. I usually go down J street and go right to Second street, and then over to the express office. I would not have gone down Sixteenth street to S and turned on S street west if I had not been taking these boys home, otherwise I would have gone down M street. I made the trip, so far as the Miller Automobile Company was concerned in this way, on my own initiative."

On examination by appellant's counsel the witness further testified:

"Q. Mr. Stephen, at the time that this collision occurred, you were on your way to take the boys to their homes, were you not? A. I was.

"Q. That is what you were using the car for at that time? A. Yes.

"Q. That is what you were driving over Sixteenth street to S street for? A. Yes.

"Q. And then out S street to where the accident occurred? A. Yes, sir.

"Q. That was no part of your duties as an employee of the company, was it? A. No, sir.

"Q. You were taking the young men down there purely for their convenience and accommodation, were you not? A. Yes, that is why I was taking them—

"Q. Mr. Stephen, would you have gone from Sixteenth to S street and turned on S street west, if you had not been taking those boys to their homes? A. No, sir.

"Q. That was the purpose for which you went down S street? A. Otherwise I would have gone down J.

"Q. That was the purpose for which you were using the car at the time this collision occurred, was it not—taking these boys down to their homes? A. Yes, sir.

"Q. The was no business or duties connected with the Miller Automobile Company that took you down S street with the car at that time, was there? A. No; there was not."

Only one of the boys who made the journey with Stephen on the trip in question was alive at the time of the trial, and he testified as to requesting the driver to go by way of their homes, and as to the automobile being driven southerly on Sixteenth street, and thence westerly on S street to the place of the collision. It will be observed from the foregoing testimony that the witness Stephen was permitted, not only to state the facts of his own journey, the taking of the automobile, the taking of the express packages, and the taking of the two boys and the course of his journey, but also to state his conclusions as well. Although some of the witness' conclusions are stressed in the argument, it is almost unnecessary to say that neither the court nor the jury are bound by the conclusions of a witness, but are there for the purpose of drawing their own conclusions from the facts. In the first place, it is evident from the facts that the driver of the appellant's automobile would probably have taken some other street on his westward journey to the American Express office, but the fact is also disclosed that he was taking the two express packages with him and was on his way to the American Express Company's office, even though he had departed from his usual course and was making a short detour to accommodate two other employees of the appellant. From the time the automobile, which the witness Stephen was driving, reached the intersection of Sixteenth and S streets, it was proceeding as directly toward the ultimate destination, to wit, the American Express office, contemplated by the driver, as though he had been driving westerly on any other one of the parallel streets in the city of Sacramento lying between B and S streets therein. It is evident that the driver of the appellant's automobile had not abandoned his purpose of taking the packages to the express office, but was simply accomplishing a double purpose—he was taking both the two packages and the two boys. There would be no return to the point of departure; there would simply be a continuation of his journey westerly on S street to the intersection of Second street, and thence northerly to the express office, or to some other intersecting street, leading to the express office which might chance to attract the fancy of the driver. There is nothing in the transcript which shows that the appellant had ever given the driver of the automobile in question any orders as to the streets over which he should travel in delivering the express packages, and, so far as the record shows, he was free to choose any one of them that he found convenient, or that read-

ily answered his purposes. The fact that Stephen testified that he would drop the boys at their homes and then afterwards deliver his express packages is also stressed in appellant's argument, but we do not find any merit therein. The word "afterwards" used by the witness does not mean that he would then re-enter the service of the appellant, because, if such were the case, it would be impossible to cover the hiatus or distance lying between the point of departure between L and M and Sixteenth street to Sixth street on S. The packages had to be conveyed, and the language of the witness means no more than this—that he would travel to the express office by way of S street to Second, then northerly on Second street to the express office, and on the way he would drop the two boys at Sixth and S streets. As the homes of the two boys would be reached before the express office, had their journey not been interrupted by the collision, the mere fact that the witness said he would deliver his packages after leaving the boys at their homes affords no basis for the legal conclusion that the driver of the automobile was not at the same time performing services for his employer, the appellant Miller Automobile Company. The facts are, disregarding the conclusion of the witness: The driver of the automobile was on his way to the express company with the two packages; was performing his usual duties, and took a different course to the express office to accommodate other employees of the company; and, while engaged in the performance of the services and the rendering of the accommodation, the collision occurred.

The trial court, by proper instructions, left to the jury the determination of the fact as to whether the driver of the appellant's automobile was or was not performing a service for the appellant within the scope of his employment at the time of the plaintiff's injury, and we think, under the facts disclosed and as shown by the discussion herein, the court did not err in so doing. We think the facts in this case bring it well within the principle applied to departures, incidental departures, and incidental services had or performed in connection with the main duties and obligations being performed by the employee, and did not constitute an abandonment for the time being of the employer's service. There is presented no element of a junketing trip, or pleasure trip; nothing further than going to the express office by a different route.

Relying upon the facts which have been hereinbefore set forth, the appellant calls attention particularly to the cases of Gousse v. Lowe, 41 Cal. App. 715, 183 P. 295, and Kish v. Cal. State Auto. Ass'n, 190 Cal. 246, 212 P. 27, which rest upon the principle expressed in these words:

"If a servant abandons or departs from the business of his master and engages in some matter suggested solely by his own pleasure or convenience, or pursues some object which relates to an end or purpose which may be said to be the servant's individual and exclusive business, and, while so engaged, commits a tort, the master is not answerable, although he was using his master's property, and although the injury could not have been caused without the facilities afforded to the servant by reason of his relations to his master."

We think the facts of the case at bar, however, show that it is clearly distinguishable from the two cases just cited and the principle upon which the decisions of those cases rests. In the case of Gousse v. Lowe the facts show that the servant had taken his master's automobile, and, instead of going to the place of his ordinary destination, had departed therefrom and driven two miles away upon a mission peculiarly and exclusively his own. He had gone that entire distance for the purpose of interviewing a tailor, where he was having some work done for himself, and on his way back the collision occurred. He had not only stepped aside temporarily, but was engaged absolutely and exclusively in performing a mission of his own, and was not rendering any service to his master whatsoever. A reference to the facts in the Kish Case will also show that the servants had entirely performed their day's work for their employer, and were simply engaged in a mission or an act done for their own personal convenience and accommodation. In the instant case the driver of the appellant's automobile was at all times, after leaving the point of departure on Sixteenth street, engaged in conveying the two packages to the American Express office. That he was also accommodating two other employees of the appellant is beyond question, but this does not take away the fact that he was also in the service of the company and was rendering a mission which it was his duty to perform. Our attention is also called to the cases of Provo v. Conrad, 130 Minn. 412, 153 N. W. 753; O'Brien v. Stern Bros., 223 N. Y. 290, 119 N. E. 550; Drobnicki v. Packard Motor Co., 212 Mich. 133, 180 N. W. 459; Healey v. Cockrill, 133 Ark. 327, 202 S. W. 229, L. R. A. 1918D, 115, and some others following the principles therein set forth, but we think these cases also clearly distinguishable from the one at bar. In the Provo v. Conrad Case the driver of the automobile had gone a number of blocks beyond where he was authorized to go, and was performing no mission for his employer. In the O'Brien v. Stern Bros. Case, supra, the chauffeur, as shown by the opinion in the case, had gone far beyond Pelham Manor, where he was to make delivery of a package, and on through several towns beyond. The facts also show that in the Drobnicki v. Packard Motor Co. Case the employee was strictly on a mission of his own. In the case of

Healey v. Cockrill the chauffeur, instead of performing the duty upon which he was sent, departed therefrom and drove a distance of six and one-half blocks for the purpose of getting a package of cigarettes, and it was while he was on this mission that the accident occurred, which was involved in the case. We do not deem it necessary to set forth the facts disclosed in the other cases cited by appellant, but they all show a complete departure and abandonment by the servant of the master's service and employment for the time being, and the engaging in business or pleasure exclusively his own. We think that the facts in this case bring it clearly within the principle enunciated in the case of Gibson v. Dupree, 26 Colo. App. 324, 144 P. 1133, where it is said:

"The law is well settled that one may be in the service of another and yet at times attend to business or pleasure for himself, and acts done while the servant is at liberty cannot render the master liable; but, if the servant, while about his master's business, makes a slight deviation for ends of his own the master remains liable, as, where the servant drives out of the most direct route for personal ends, or where a plot diverges from a direct course for ends not connected with the master's business."

In the opinion in this case the different cases are taken up and considered, and the distinction is drawn between a departure from or abandonment of the master's business and the mere performing of the master's business in a different manner from that ordinarily theretofore performed, showing that in the first instance the master would not be liable, while, under the second state of facts, the employer would be responsible. This case also follows the rule holding that, where the facts show a performance of some service for the master, the fact of whether the employee is acting within the scope of his employment, while also performing some act of accommodation, should be left to the jury, and also where the departure is merely incidental or only slight. See, also McKeever v. Ratcliffe, 218 Mass. 17, 105 N. E. 552, where similar questions were held properly submitted to the jury as a question of fact, when the departure was not such as to authorize the court in declaring the same as a matter of law. In a note to Fisher v. Fletcher, 22 A. L. R., beginning on page 1404, a large number of cases are collected bearing upon the question of deviation from the customary routes by chauffeurs and drivers of automobiles, from which it appears that, if the servant is also engaged in the performance of some mission for himself, a slight or temporary deviation from the ordinary route of travel will not relieve the master from liability for negligence on the part of the servant, and especially is this true where the servant has been left free to select his own highway, street, or route of travel.

We think the trial court in this case properly left to the jury the determination of the fact of whether the driver of appellant's automobile was not, at the time of the injury suffered by the plaintiff, also engaged within the scope of his services, and was in fact taking packages belonging to the Miller Automobile Company to the American Express office as well as accommodating the two boys; and the verdict of the jury, including necessarily within it the finding of such fact, we conclude that the judgment is supported by the evidence, and should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; THOMPSON, Judge pro tem.

---

73 Cal. App. 252

ALEXANDER v. MANTON JOINT UNION SCHOOL DIST. IN TEHAMA AND SHASTA COUNTIES. (Civ. 2901.)

(District Court of Appeal, Third District, California. June 17, 1925.)

1. **Schools and school districts ⟸141(5)—School trustees may treat attempted dismissal of teacher as nullity, hold hearing on due notice, and discharge teacher.**

After attempted dismissal of school teacher, where no charges had been preferred, no notice given, and no hearing had, school trustees may treat it as nullity, hold hearing on due notice, as required by Pol. Code, § 1609, and discharge teacher.

2. **Schools and school districts ⟸142—Teacher, on discharge, held entitled to sue to determine truth or falsity of charge preferred.**

Under Pol. Code, § 1698, section 1609, subd 5, as amended in 1921, school teacher, discharged by board of trustees, may sue in court to determine truth or falsity of charges preferred against him.

3. **Trial ⟸84(1)—Offer of proof of truth of charges, for which school teacher was dismissed, held sufficient, in absence of objection on that ground.**

In action by school teacher for dismissal by school trustees, offer by defendants to prove charges preferred against plaintiff by independent testimony and without reference to decision of school board was sufficient, in view of facts that no objection was made on ground that it was by improper method, and that it was rejected on ground that court had no right to hear testimony as to truthfulness of charge.

Appeal from Superior Court, Tehama County; K. S. Mahon, Judge.

Action by W. J. Alexander against the Manton Joint Union School District in Tehama and Shasta Counties, for breach of contract. Judgment for plaintiff, and defendant appeals. Reversed.

Fred C. Pugh, of Red Bluff, Curtiss Wetter, of Corning, for appellant.

M. J. Cheatham, of Red Bluff, for respondent.

FINCH, P. J. The plaintiff was given judgment and the defendant has appealed therefrom.

The complaint alleges that on or about the 12th day of May, 1923, the plaintiff and the board of trustees of the defendant district—

"entered into an agreement whereby plaintiff was employed as principal in the said Manton Joint Union School District at a salary of $2,000 per year payable as follows: $200 per month for 10 months, beginning such payments on October 3, 1923; * * * that pursuant to said agreement plaintiff performed the duties of principal of said Manton Joint Union School District continuously from the 10th day of September, 1923, to the 10th day of March, 1924, at which time the said board of trustees wrongfully and without any cause discharged plaintiff and refused to permit him to perform the duties of principal any longer; * * * that under said agreement said board of trustees have paid plaintiff the sum of $1,200 and no more, and by reason of the discharge of plaintiff as aforesaid, plaintiff has been damaged in the sum of $800."

The answer admits the employment and the performance by the plaintiff of services thereunder up to the 10th day of March, 1924, as alleged in the complaint; denies that the board of trustees "wrongfully * * * or without cause, or at all discharged plaintiff on the 10th day of March, 1924"; alleges that the board of trustees, "on the 24th day of March, 1924, dismissed plaintiff for unprofessional conduct, incompetency, evident unfitness for teaching, and persistent violation of and refusal to obey the school law of California and reasonable rules prescribed for the government of public schools in the county of Tehama"; and admits that "plaintiff is entitled to be paid his salary under the provisions of his contract of employment for the period from March 10th to March 24th."

As a further and separate defense, the answer alleges that "during the school year of 1923, and to and including the 10th day of March, 1924, plaintiff was guilty of * * * unprofessional conduct, incompetency, evident unfitness for teaching, persistent violation of and refusal to obey the school laws of California, and the reasonable rules prescribed for the government of public schools of the county of Tehama; that on the 12th day of March, 1924, charges were duly preferred in writing against plaintiff * * * for the causes in paragraph II hereof set forth, a copy of which charges is hereto annexed * * * and made a part hereof"; that a copy of such charges and a notice of the time and place of hearing to be had thereon were duly served upon the plaintiff; that said hearing was had March 24, 1924, and "witnesses were called and sworn and gave testimony in proof of said charges and * * * said board of trustees upon the affirmative vote of a majority thereof, all of whom had been present throughout the entire hearing sustained said charges and dismissed plaintiff as principal of said school."

The charges against plaintiff, referred to in and made a part of the answer, were dated March 12, 1924, and signed by three of the five trustees of the district and, among other things, contained the following:

"To W. J. Alexander, Principal of Manton Joint Union School District of Tehama County, California— * * * You will please take notice that the board of trustees * * * request and demand your resignation and dismissal as principal of said Manton Joint Union School District for the following causes and upon the following grounds committed and suffered to be done by you for the school year 1923–1924 in the manner following, to wit: * * * cursing and using profane and opprobrious language towards and addressed to a trustee of said district in the presence of said trustee and in the presence of the pupils of said district on the school grounds; * * * continuously disobeying the orders and requests of said board of trustees * * * to maintain order on the school grounds; * * * incompetence by reason of defective hearing; * * * refusing to discuss school problems with the superintendent of schools of Tehama county regarding the benefit and welfare of the school, and by waving an iron ramrod over her head."

February 25, 1924, plaintiff was served with a notice, signed by the three trustees who later signed the aforesaid charges, reading as follows:

"You are hereby notified that your services will not be required after March 10, 1924."

March 12, 1924, he was served with a second notice, signed by the same trustees, reading as follows:

"You are hereby again notified that our action on February 25, 1924, asking and demanding your dismissal, is final, and your services discontinued from that date. You will, therefore, be governed accordingly."

After giving the latter notice, the trustees employed another person as principal and put him in charge of the school.

The county superintendent testified that she was present at the hearing on March 24, 1924; that witnesses "were sworn and examined as to the charges"; that the trustees then "withdrew to another room and talked over the matter, and when they came back they announced that they found the charges to be sustained, and they were of the opinion that Mr. Alexander should not be continued in the school, and that he had been discharged two weeks before." One of the trustees, who appeared as a witness at the trial, was asked by counsel for defendant to state what findings the board made at the hearing. Counsel for plaintiff objected to

the question upon the ground, among others, that there is "no provision of the law for the trial of the question." The court said:

"It appears that some two weeks before this trial was had this teacher had been dismissed by the board and another teacher had been installed in his place, and that such teacher was teaching at the time the trial was had. * * * It would appear to me that it is immaterial to prove the trial was had afterwards."

Thereafter the following took place:

"Mr. Pugh: I offer to show that the discharge of the plaintiff by formal findings on the 24th day of March, 1924, at the conclusion of the hearing—that that was final.

"The Court: You make that as an offer?

"Mr. Pugh: Yes.

"The Court: Denied.

"Mr. Pugh: I now offer to prove by independent testimony and without reference to the decision of the school board on March 24th, that on the dates on which the two letters were written by the school board to plaintiff the causes of dismissal specified in paragraph 'j' of section 1609 of the Political Code existed, and that plaintiff, not being a permanent teacher, was not entitled to a trial upon written charges and upon notice.

"The Court: Denied.

"Mr. Cheatham: We ask that the jury be directed to bring in a verdict for the plaintiff.

"The Court: That will be the order."

The court thereupon instructed the jury "to find a verdict in favor of the plaintiff and against the defendant in the sum of $800."

Prior to the proceedings last narrated, the court had clearly stated its interpretation of the law applicable to the case. The county superintendent was asked whether she had "had any difficulty in getting Mr. Alexander to obey and enforce the rules promulgated by the county board of education." In sustaining an objection to the question the court said:

"That should have been determined * * * by a trial body of which the school superintendent is not a member."

Thereafter the following occurred:

"Mr. Cheatham: The original evidence should be introduced here.

"The Court: I don't think it should. The hearing should be before the board of trustees, and they are to determine the question as to whether or not those charges are sustained. * * *

"Mr. Cheatham: That would not bind the court—what the evidence was before that board.

"The Court: I think it does. They have the right to determine the question. * * * I think that is final, except an appeal to the * * * county school superintendent. * * * I don't think this court would have any right to hear the testimony going to the truthfulness or untruthfulness of the charge preferred against him. That is a matter for the trustees of the district."

From the whole record it clearly appears that the court decided the case upon the theory that the trustees had the right to dismiss plaintiff during the term of his employment for cause only, and after notice and a hearing as provided in section 1609 of the Political Code; that the court was without jurisdiction to determine the truth or falsity of the charges; and that, since the board had given plaintiff notice of dismissal without a trial and had placed another teacher in charge of the school, it had no authority to try him thereafter, because he was no longer a teacher in the school.

[1] It is unnecessary to decide the proposition first stated. If the trustees have authority to dismiss a teacher for cause without a trial, then in case of a wrongful dismissal he would undoubtedly have a cause of action on his contract, and in such action the court would have jurisdiction to determine, as in other alleged breaches of contract, whether there was just cause for his dismissal. If the trustees have not such authority, then the attempted dismissal of plaintiff was abortive, and the subsequent trial of the charges against him was a proper procedure for the termination of the contractual relations between the parties. If the trustees had attempted to dismiss plaintiff, after a trial upon charges preferred against him, but upon insufficient notice, or without any notice of the hearing, it would hardly be contended that they might not thereafter treat their attempted dismissal as a nullity and proceed anew to a hearing after a sufficient notice thereof. No reason appears why they could not pursue a similar course where no charges had been preferred, no notice given and no hearing had. In White v. Wohlenberg, 113 Iowa, 236, 84 N. W. 1026, it is said:

"Plaintiff had a contract to teach for the term of one year. After she had been teaching for a time charges were preferred against her, and, upon a hearing before the board, the charges were sustained, and plaintiff dismissed from her employment. From this decision of the board plaintiff appealed to the county superintendent, who reversed the action of the board, on the ground that plaintiff had been given no notice or opportunity to be heard. Plaintiff was not reinstated in her position, but new charges were at once filed against her by a member of the board, a time was fixed for their hearing, and due notice given her. * * * The decision of the county superintendent was not based on the merits of the case before him. He finds expressly that no notice was given plaintiff of the hearing. * * * This finding amounts to nothing more than a holding that the hearing before the board was a nullity. * * * The abortive attempt at a trial, when no jurisdiction was had of plaintiff, should not prevent a lawful hearing and legal judgment. Counsel say, if plaintiff had been reinstated in her position, this second proceeding might have been had, but that, inasmuch as the board did not recognize her as a teacher, it could not

try her. This reasoning seems to us faulty. The board did recognize her as a teacher, although she was not permitted to perform duties as such. It was because she was acknowledged as a teacher, to whom the district was bound by contract, that the board desired this latter hearing. Plaintiff's contract rights can be cut off only by her discharge for cause, after a full hearing. If the cause exists, it would seem strange to deny the board the right to show it, merely because of a former hearing that was wholly illegal and void. We do not see how the question at issue here is affected in any way by the fact that plaintiff was not again given her classes after the decision on appeal by the county superintendent. It was sought by these second charges to try her as a teacher to whom the district was still bound by contract. If this cannot be done, she will hold out her term, and recover her full compensation. We should, then, have the anomaly of a hearing, on which no legal judgment of conviction could be founded, operating as a full and complete acquittal."

The foregoing reasoning is sound and is determinative of the question under consideration.

[2] There are cases holding that the dismissal of a teacher for cause, after a trial by the board of trustees on charges preferred against him, is final and conclusive. There are others holding that where the teacher is given the right of appeal to the superintendent of schools in case of his dismissal, such remedy by appeal is exclusive. Section 1698 of the Political Code provides for such an appeal. Section 1609, subdivision 5, as amended in 1921 (Stats. 1921, p. 1664), however, provides:

"Nothing in this act shall be construed in such manner as to deprive any teacher of his rights and remedies in a court of competent jurisdiction on a question of fact and law."

Section 1609 prescribes the grounds and the proceedings for the dismissal of a teacher for cause. It would be difficult to give the provision quoted any meaning other than that, upon the discharge of a teacher for any alleged cause, he is entitled to maintain an action in court to determine the truth or falsity of the charges preferred against him. The reasons which may have actuated the Legislature in giving a teacher such right are well illustrated by the facts in this case. The trustees, as the representatives of one party to the contract, preferred the charges against plaintiff. One of the charges was abusive language towards a trustee who sat as a judge in the trial of plaintiff. Another charge constituted offensive and unmanly conduct towards the superintendent of schools, to whom the plaintiff had the right to appeal.

[3] Respondent contends that the appellant's offer to prove the truth of the charges preferred against plaintiff by "independent testimony and without reference to the decision of the school board" was a mere "offer to prove a conclusion of law without any offer to prove any fact from which such conclusion could be reached." No objection was made by plaintiff at the trial to the form of the offer, but it was denied by the court and, without waiting for defendant to close its evidence, on motion of the plaintiff, the court directed the jury to find for the plaintiff. In Biddick v. Kobler, 110 Cal. 191, 196, 42 P. 578, 579, it is said:

"A mere general 'offer' to prove a variety of things, without producing the witnesses or evidence whereby they are to be proved, or segregating the different items, is an improper method of presenting offered evidence, and should not be allowed unless by consent of parties. In the case at bar, however, the objection was not made upon the ground that the offer was an improper method, and therefore we will assume that this method was used by consent. And we think that the court below erred in sustaining the objection to appellant's said offer."

From the parts of the record quoted herein it clearly appears that counsel for plaintiff insisted at the trial, and he admits on this appeal, that evidence of the character designated by the defendant's general offer of proof was admissible, and that the court repeatedly declared to the contrary and stated:

"I don't think this court would have any right to hear the testimony going to the truthfulness or untruthfulness of the charge preferred against him."

The court also sustained plaintiff's objection to a question put to the county superintendent of schools relative to the truth of one of the charges against plaintiff. The effect of these declarations and this ruling was to limit the introduction of evidence to the other issues in the case. Under all the circumstances stated, it must be held that defendant's offer of proof was sufficient. Pastene v. Pardini, 135 Cal. 431, 67 P. 681.

The judgment is reversed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

73 Cal. App. 151

GAFFNY v. MICHAELS. (Civ. 3994.)

(District Court of Appeal, Second District, Division 2, California. June 6, 1925.)

Corporations ⟸121(4)—Variance between complaint and findings as to name of corporation, whose stock was sold, held immaterial.

In suit to recover amount of profit which defendant agreed to pay in addition to stipulated value of stock sold him, variance between complaint and findings as to name of corporation and amount due *held* immaterial; trial court being authorized to find according to the evidence, without requiring an amendment, in view of Code Civ. Proc. § 470.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by Maude C. Gaffny against A. Michaels. Judgment for plaintiff, and defendant appeals. Affirmed.

Fogel & Beman, of Los Angeles, for appellant.

Floyd S. Sisk, of Venice, Cal., for respondent.

CRAIG, J. It was alleged in the complaint filed by respondent, and admitted by the answer thereto, that on or about the 2d day of January, 1921, the appellant purchased from respondent and the latter's assignor certain capital stock of the Santa Monica Soft Water Company, a corporation, and that appellant then agreed to pay therefor, in addition to the stipulated sale value, such amount of profit as an audit of the company's accounts might show to have been earned between August 28, 1920, and December 31, 1920. The plaintiff alleged that an audit was made by competent accountants, and that the amount thereby determined to have been earned during said period of time was the sum of $1,413.60, for which the plaintiff prayed judgment. The defendant denied that it was determined by said or any account, or that it was the fact, that any profit was so earned, or that he ever became or then was indebted to the plaintiff on account of such purchase in any amount.

The case went to trial upon the issues thus presented by the pleadings, and at the conclusion thereof the trial court found that the allegations of the complaint were true, except as to the amount and the name of the corporation. Written findings were signed and filed, wherein it was recited that from an audit of the books by a chartered public accountant it appeared that the sum of $1,413.60 had been earned upon said stock within the time specified, but that from oral evidence adduced at the trial it was found that defendant was indebted to the plaintiff under the terms of their agreement in the sum of $797.28.

This appeal is taken from the judgment solely upon the ground that the findings and the judgment do not conform to the allegations contained in the complaint.

Appellant's brief raises no objection to the findings or judgment upon any attempted assertion that the evidence was insufficient to support them as to the amount of indebtedness, or the fact that it was due. The complaint alleged that the corporation whose stock was purchased by appellant was that of the Santa Monica Soft Water Company, a corporation, but the findings recite that "defendant purchased from plaintiff 2,400 shares of stock in the Santa Monica Soft Water Laundry, a corporation." Appellant contends that the judgment is based upon findings which nowhere mention or consider the company named in the complaint. Authorities are cited wherein it was held that a finding upon a fact not in issue can form no element in determining the appropriate judgment to be rendered; that a plaintiff must recover, if at all, upon the case as made by his complaint; that, where specific facts are put in issue, it is the duty of the trial court to find the facts specifically. Other authorities are presented, holding that a finding that plaintiff's services were worth 25 per cent. of an agreed selling price appeared to conflict with an allegation that they were worth 35 per cent. thereof, when the appeal was taken upon the judgment roll alone, and that a prayer in the complaint upon a contract for lawful money of the United States would not justify a finding or judgment for gold coin.

There is a wide distinction between the case at bar and those cited by appellant. In the instant case the relief sought was not specific performance of an agreement to purchase, or to deliver, the capital stock mentioned, nor was any particular stock or corporation directly involved in the controversy. This action was instituted for the recovery of a sum of money alleged to be due to the plaintiff through the sale of stock, as a result of an audit which the parties had previously agreed upon.

In alleging the necessary facts, it was incidentally stated in the complaint that the stock sold was that of the Santa Monica Soft Water *Company;* the findings, either inadvertently, or as the result of the evidence offered, which is not before us, recited that the transaction in question arose over the sale of stock of the Soft Water *Laundry.* The stock itself had long since been delivered and, so far as this case was concerned, the identity of the stock had never been questioned. It is not claimed that the name of the corporation was the subject of controversy; that the wrong business was audited; or that the agreement required the payment of a certain kind of money and that

the findings or judgment specified another kind. It is true that the findings and the complaint are not in accord as to the amount due, but this could not seriously be said to affect the legality of the findings or judgment. It is obvious, therefore, that any variance, if it be such, was immaterial.

In Varney v. Hutchinson Lumber & Mfg. Co., 64 W. Va. 417, 63 S. E. 203, it was held that a judgment against the Hutchinson Lumber & Manufacturing Company would not be set aside because the writ summoned the Hutchinson Lumbering & Manufacturing Corporation. Opportunity to amend and correct the name of the defendant was afforded the plaintiff, but this was not done, and the defendant contended upon appeal that the judgment was void. In holding to the contrary, the Supreme Court of West Virginia said:

"Although a corporation must sue and be sued by its corporate names, yet, if some words are added, omitted or changed in the spelling, this is not a fatal variance if there be enough to distinguish it from other corporations or to show that the corporation suing or being sued is the one intended."

In Claryville, G. L. & B. Turnp. Co. v. Commonwealth, 107 S. W. 327, 32 Ky. Law Rep. 861, 1157, it was held that an indictment and summons issued against a corporation under the name of Grant's Lick, Claryville & Butler Turnpike Company was sufficient to bring it before the court and to validate a judgment rendered against it by default, although its true name was the Claryville, Grant's Lick & Butler Turnpike Company, where the summons was served upon its president, and the real corporation was not misled or deceived by the error. There are many other holdings of a similar nature, but in the instant case it is not contended, nor could it be, that the corporation in question was at any time interested in the litigation, or that the defendant was misled, or his rights in any way affected by the deviation complained of. In the cases to which reference is made above the corporations whose names were confused in the pleadings or judgments were directly interested in the litigation, whereas in this instance such is not the same, and the difference between the name as alleged in the complaint, and that as found by the court is one which is quite immaterial. If a slight misnomer of a defendant whose rights are at stake does not affect a judgment, much less can it be said to have prejudiced the interests of a party where the name of the corporation was not at issue.

In Stevens v. Stebbins, 4 Ill. (3 Scam.) 25, it was held that—

"The courts at the present day are not confined to the rigid rule of idem sonans, but adopting a more liberal and reasonable one, inquire whether the variance be material or immaterial. If there be a material and substantial variance, it is fatal; otherwise it is not."

The same rule was applied in Belton v. Fisher, 44 Ill. 32.

In holding that the variance in question is immaterial, we have disposed of appellant's contention that the trial court failed to make a specific finding on the allegation that the corporation whose stock was purchased by appellant was that of a definite corporation. This is true, because, the variance being immaterial, the finding made is specific upon the allegation with which it deals. As we have pointed out, the variance in question was immaterial. The trial court found according to the evidence, without requiring an amendment. This action upon its part was fully authorized by section 470 of the Code of Civil Procedure.

Where a variance between an allegation and the proof is immaterial—that is, where it is not of such a character as to mislead the adverse party to his prejudice, in maintaining his action or defense upon its merits—the court may either direct an immediate amendment of the pleading to conform to the proof, or it may direct the fact to be found according to the evidence without requiring such amendment. Code Civ. Proc. § 470.

The judgment is affirmed.

FINLAYSON, P. J. I concur. The record before us consists only of the judgment roll. That record, in view of the permissible presumptions which may be indulged to support the judgment, fails to show that the trial court erroneously based its judgment upon a finding outside of the issues, even though the court did find that the stock was issued by the Santa Monica Soft Water *Laundry* instead of by the Santa Monica Soft Water *Company*, as alleged in the complaint. On appeal every intendment and presumption, not contradicted by or inconsistent with the record on appeal, will be indulged in favor of the judgment of the court quo. There is nothing in the judgment roll before us inconsistent with the presumption that respondent, when putting in his case, proved that the stock was that of the corporation referred to in the findings, the Santa Monica Soft Water Laundry, nor is the record inconsistent with the further presumption that appellant did not object to such evidence on the ground of variance. The failure of a party to object to evidence upon the ground of variance between it and the allegations of his adversary's pleading is a tacit admission that he is not misled by it to his prejudice in maintaining his action or defense on the merits. Indeed, his failure so to object affords the best possible evidence that the variance has not misled him to his prejudice. A variance which does not mislead a party to his prejudice in maintaining his action or defense on the merits is not deemed to be material (Code Civ. Proc., § 469); and, where the variance is not material, the court may

either direct the fact to be found according to the evidence, without amendment of the pleading, or it may order an immediate amendment (Code Civ. Proc., § 470). It must be presumed, therefore, in support of the judgment, that appellant made no objection in the trial court upon the ground of variance, and that therefore the court properly found the fact according to the evidence without requiring an amendment.

I concur: WORKS, J.

---

73 Cal. App. 147

LATHROP v. TITLE INS. & TRUST CO. (CROCKER, Intervener). (Civ. 5171.)

(District Court of Appeal, First District, Division 2, California. June 6, 1925.)

1. Bonds ⟸74—Pledgee not entitled to retain, as security, bonds issued in 1905, though payable to bearer.

Although amendment to Code, in relation to negotiable instruments, of August 8, 1915 (St. 1915, p. 99), makes bonds payable to bearer negotiable, character of bonds issued theretofore was not affected, and pledgee of bonds issued in 1905 was not entitled to hold bonds as security for debt negotiated in 1916, by one without proper authority, as against true owner.

2. Pledges ⟸21 — Pledgee of nonnegotiable bonds not entitled to retain bonds after debt was barred, where pledgor had no title.

The pledgee of nonnegotiable bonds receives only title of pledgor, and, where debt was barred by Code Civ. Proc. § 339; Civ. Code, § 2911, pledgee *held* not entitled to keep bonds until debt was paid, where pledgor had no authority, as against true owner of bonds.

3. Estoppel ⟸58, 110—Defense must be pleaded; injury must be shown from things relied on.

Defense of estoppel must be pleaded, and proof must show that injury caused resulted from things relied on to estop party.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by Orville A. Lathrop against the Title Insurance & Trust Company, wherein E. S. Crocker intervened. Judgment for defendant, and plaintiff appeals. Affirmed.

Porter C. Blackburn, of Los Angeles, for appellant.

Otis H. Castle, C. Elvon Musick, and H. C. Allen, Jr., all of Los Angeles, for respondent Title Ins. & Trust Co. and others.

Stuart M. Salisbury, Wm. B. Himrod, and Verne E. Robinson, all of Los Angeles, for respondent Crocker.

LANGDON, P. J. This appeal is by the plaintiff from a judgment against her in an action in which she sought to recover three bonds of the Home Telephone & Telegraph Company, of the face value of $1,000 each, which she had delivered to the defendant, and which it refused to return to her because of a claim of ownership made by E. S. Crocker, who intervened in the action, and in whose favor judgment was given.

The trial court found that intervener was the owner and entitled to the possession of said bonds; that the bonds had been pledged to the husband of plaintiff to secure a loan of $600 made to one Vaughn; that Vaughn had no right or authority to make such pledge. It appears that intervener had permitted the bonds to be used to secure a debt of Edna Brown to one Peck; that, when this indebtedness was satisfied, the bonds were received by Vaughn as attorney for Miss Brown and without her knowledge or consent, and, without the knowledge or consent of intervener, Vaughn pledged the same to secure a personal loan. The pledgee having died, the bonds were distributed as a part of his estate to his widow, the plaintiff in this action. She had given the trust company possession thereof, and intervener notified it of his ownership before it had accounted to plaintiff for the bonds, and thereupon the trust company protected itself by refusing to deliver the bonds without a judgment of court.

[1] There is no dispute about the foregoing facts. The findings are not attacked upon appeal. The first point raised is that plaintiff was entitled to hold the bonds as security for the debt because the bonds are made negotiable by statute, being payable to bearer. This contention is settled against the appellant by the recent case of Popp v. Exchange Bank, 189 Cal. 296, 208 P. 113. That case holds that the act of the Legislature of August 8, 1915 (St. 1915, p. 99), amending the Code in relation to negotiable instruments so as to make bonds such as those we are considering negotiable, did not have the effect of changing the character of such bonds issued before the amendment, although transferred thereafter. The bonds involved in the instant case were issued in 1905, and the loan was negotiated in 1916.

[2] Another phase of the case is presented by the findings of the trial court to the effect that no promissory note, writing or memorandum was given to evidence the debt for which the bonds were pledged, and that this debt was incurred in August, 1916, for a period of 90 days. The court concluded therefrom that the debt was barred under the provisions of section 339, Code of Civil Procedure. This holding is not attacked by appellant, but she contends that, even though the debt was barred and the lien extinguished under the provisions of section 2911, Civil Code, nevertheless she, being in possession of the pledged property, like a mortgagee in

possession of real property after the debt has been barred, was entitled to retain such property until the debt was paid.

Respondent concedes that equity requires the payment of a debt barred by the statute of limitations, when the debtor is asking to quiet his title against the mortgagee in possession, because of the moral obligation of the debtor, but contends that the reason for the rule fails where the person seeking to recover his property was never legally nor morally bound to the pledgee or mortgagee. As authority for this differentiation, respondent cites the case of Faxon v. All Persons, 166 Cal. 707, 137 P. 919, L. R. A. 1916B, 1209, wherein it is said:

"The respondent contends, and we think rightly, that the rule in question should not be extended to a case in which a liability to pay the debt does not, in morals and equity, rest upon the plaintiff or his property. Where the plaintiff is himself the debtor, the applicability of the rule is apparent. No different situation is presented where the plaintiff has bought the land before the right to foreclose the mortgage has become barred. In such case, he acquired the property subject to a valid existing lien, which was, presumably, taken into account in fixing the purchase price. Such property, when he acquired it, was bound by the debt, and it would be as inequitable to relieve him of the burden without payment as it would be to thus free the original debtor.

"In the present case, however, the plaintiff acquired the land by purchase for a consideration after the lapse of the time within which an action to foreclose the mortgage could have been brought. * * * The plaintiff was not personally liable for the debt, and was under no moral obligation to discharge it. When she bought the land, the records showed that the lien of the mortgage had become extinguished. Civ. Code, § 2911. It is difficult to see, therefore, how the land itself, so bought, was bound, legally or equitably, by the debt. There seems to be no good reason for refusing to quiet the title of an owner in the situation of the plaintiff here."

Similarly, in the instant case, intervener was never bound either legally or morally for the debt, and a purchaser of nonnegotiable bonds, although he buys in good faith and for value, acquires only the title of the seller. Popp v. Exchange Bank, supra. Therefore a pledgee of nonnegotiable bonds receives only what the pledgor had—in this case, no title at all. It must follow that there is no obligation upon the part of the intervener to pay the debt for which the bonds were pledged.

[3] The only other matter requiring discussion is the contention that the intervener was estopped from setting up the statute of limitations or from claiming that Vaughn had no authority to make the pledge. We think this contention is not borne out by the evidence, and, furthermore, the defense of estoppel was not pleaded as required, and there was no proof that any injury had been caused to plaintiff by any of the things relied upon by her to estop the intervener.

The judgment is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

---

73 Cal. App. 140

UMPHRAY v. HUFSCHMIDT. (Civ. 4846.)

(District Court of Appeal, First District, Division 1, California. June 6, 1925.)

1. Brokers ⊂⊃50—Owner's conduct held waiver of limitation of time fixed by broker's contract of agency to sell property.

Though broker's contract of agency to sell realty expired, owner's conduct thereafter in continuing negotiations with prospective purchasers procured by the broker, and depositing a deed in escrow, *held* a waiver of the limitation of time fixed by broker's contract of agency to sell the property.

2. Appeal and error ⊂⊃1011(1)—Ascertainment of truth of disputed conversation held matter for trial court.

Ascertainment of truth of disputed conversation between owner and broker as to latter's admission of termination of agency *held* matter for trial court.

3. Brokers ⊂⊃52—When written contract between vendor and purchaser is not essential to recovery of commissions stated.

Written contract between vendor and purchaser is not essential to recovery of a commission by broker, if latter has produced to vendor a purchaser who is ready, willing, and able to purchase upon vendor's terms, and who has agreed to those terms, and is willing and offers to enter into a binding written contract.

4. Brokers ⊂⊃63(1)—Broker held entitled to commission, even though owner never met prospective purchasers.

A broker *held* entitled to a commission whether or not the owner met prospective purchasers personally, where one of them was at office of escrow holder ready to close sale, but owner, after depositing all necessary documents with escrow holder, withdrew them and canceled sale.

5. Brokers ⊂⊃82(4)—Broker, basing complaint upon quantum meruit, held entitled to recovery of reasonable value of services, despite proof of written contract.

Broker, basing complaint upon quantum meruit, *held* entitled to recovery of reasonable value of services, despite proof adduced established written contract of agency to sell.

6. Brokers ⊂⊃86(1)—Written contract held evidence upon which finding of reasonable value of services could be made.

In action for commission, based upon quantum meruit, written contract of agency adduced *held* evidence upon which finding of reasonable value of services rendered could be made.

---

7. Brokers ⊂⊃74—Broker's right to recover commission not dependent upon ownership of land by party employing broker to sell such property.

Broker's right to recover commission *held* not dependent upon ownership of land to be sold by party employing broker to sell such property; the payment of commissions being purely a matter of contract.

8. Brokers ⊂⊃74—That defendant employing plaintiff to sell property was not owner thereof, of which fact plaintiff was aware, held not to relieve defendant from payment of agreed commission.

That defendant employing plaintiff to sell property was not owner thereof, of which fact plaintiff was aware, *held* not to relieve defendant from payment of agreed commission, where it appeared that he obtained and was given absolute control over a deed executed in blank by the real owners.

Appeal from Superior Court, Alameda County; H. D. Burroughs, Judge.

Action by Wm. E. Umphray against Henry Hufschmidt. Judgment for plaintiff, and defendant appeals. Affirmed.

Edward R. Eliassen, of Oakland, for appellant.

H. S. Craig, of Oakland, for respondent.

KNIGHT, J. An action to recover real estate broker's commissions, alleged to be of the reasonable value of $1,000, for which amount judgment was given in favor of plaintiff. Defendant appeals.

On April 21, 1922, Hufschmidt, the appellant, made a written contract with Umphray, the respondent, whereby, in consideration of a small cash payment and the prospective services of respondent as agent, he agreed to deed to respondent, or to any grantee the latter might name, at any time within 30 days, for the sum of $12,000, net, a tract of land situate on Holway street, Oakland, the purchase price to consist of the payment of the sum of $7,000 in cash and the delivery of a mortgage for the balance covering certain real property in San Leandro, Alameda county. Said contract further provided that as commissions for services rendered, respondent should be paid all money received from the sale of the property over and above the sum of $12,000. Appellant was at no time the owner of said property; title thereto being vested in the names of his daughter and other relatives, of which fact respondent was aware at the time the contract was entered into. Thereafter respondent procured a buyer named Page, who agreed to pay $13,000 for the property. Page was acting in the matter for himself and one Nason, with whom he was engaged in certain building enterprises under an arrangement existing between themselves whereby Nason furnished the capital, took title to real property in his name, and Page afterwards erected improvements thereon for an interest in the property. On May 22, 1922, Page deposited with a title insurance company, as part payment on the purchase price, certain securities, of which Nason was the owner, representing in the aggregate the sum of $1,769.74. Those securities were not acceptable to appellant but the parties continued on with their negotiations, and Page finally agreed to meet appellant's terms; that is, to deliver in payment of the purchase price a mortgage on said San Leandro property for the sum of $5,000, and to pay the balance in cash. Pursuant to this arrangement appellant, on May 29, 1922, obtained from the owners and deposited with said title insurance company an executed deed to said Holway street property, in which the name of the grantee was, at respondent's suggestion, left blank. The deposit of said deed was accompanied by written escrow instructions, signed by appellant, in which said title insurance company was authorized to deliver said deed to the purchaser upon receipt of a note for the sum of $5,212.50, secured by a deed of trust covering said San Leandro property, a 60-day note for $200 signed by Nason, an agreement that the buyer assume payment for street work adjoining said Holway property amounting to $3.120.63, and the payment of the sum of $3,466.87 in cash. Said escrow instructions fixed 10 days from the date thereof as the period of time within which to complete the sale, and further provided that, in the event that the conditions of said escrow were not complied with at the expiration of the date specified therein, said company should complete the same at the earliest possible date thereafter, unless written demand by appellant was made for the return of all instruments deposited, whereupon Page, a day or two thereafter, withdrew the securities previously deposited. Later, on or about June 1, 1922, and well within the 10 days specified in said escrow instructions, the purchasers called at the title insurance company's office prepared to consummate the purchase of said property in accordance with the terms of said escrow instructions, but were informed that about an hour or two prior to their arrival the prospective sale had been canceled by the other parties to the agreement by the withdrawal of the deed and the escrow instructions. About 4 months later Nason and Page, after further negotiations with the owners personally, purchased said property for the sum of $13,000; title thereto being conveyed to Nason by delivery to him of the same deed deposited with, and afterwards withdrawn from the possession of, said title insurance company. These subsequent negotiations were carried on by the parties themselves without the knowledge or aid of respondent. The sale was a cash transaction, except as to the mat-

ter of the payment for street work; payment therefor being assumed by the purchasers. When respondent learned of the sale of said property, he demanded a commission of $1,000, and upon refusal of appellant to pay the same commenced this suit with the result already stated.

[1, 2] The position taken by appellant upon the merits of the controversy, and in support of which he has cited a number of authorities, is as follows: That the contract upon which respondent's cause of action is founded expired by limitation of time on May 22, 1922, and that, inasmuch as no sale was made within that period, the contractual relationship of the parties at that time ended; that the circumstances of the deposit of the deed in escrow, accompanied by the escrow instructions, constituted an independent transaction, embodying a new offer which was disassociated with said contract of agency, and which offer appellant had power to withdraw at any time before the same was accepted; that, having in fact withdrawn said offer before it was accepted, no liability for commissions was incurred; that the sale of the property 4 months later was the result of separate negotiations opened by the purchasers with the owners of the property personally, and that the sale was made upon terms different from those previously agreed upon under the agency contract; that respondent did not participate in the ultimate sale of said property, and consequently was not entitled to a commission thereon.

There is sufficient evidence in the record to show, however, that the transaction involving the sale of the property was a continuing one from the time the agency contract was made until and including the time appellant made the escrow deposits; that, although the contract of agency according to its terms would have expired on May 22, 1922, appellant continued on with the negotiations through respondent, the result of which was that on May 29, 1922, he deposited in escrow the deed to the property, accompanied by written instructions directing the escrow holder to close the deal within 10 days thereafter upon the terms specified in said instructions, which terms were substantially the same as those set forth in the contract of agency. It further appears that, in continuation of those negotiations, and in direct response to, and within the limitation of the time fixed by, said escrow instructions, the buyers presented themselves to the escrow holder, ready, willing, and able to consummate the purchase of the property in accordance with the requirements of said escrow instructions; that the only reason why the sale was not completed at that time was that the documents had been withdrawn from escrow. Under those circumstances it must be held that appellant waived the limitation of time fixed by respondent's contract of agency for the sale of the property. True, evidence was offered by appellant to show that on the day of but prior to the withdrawal from escrow of said deed and written instructions respondent stated to one of the owners of the property that his contract for the sale of the property had expired; but this evidence was contradicted on behalf of respondent by a witness who was present at the time it is claimed the statement was made. The ascertainment of the truth of this disputed conversation was therefore a matter of determination for the trial court.

[3] We are also of the opinion that under the circumstances disclosed by the record respondent's claim to commissions cannot be avoided upon the ground that he neither obtained from the prospective purchasers a valid contract of purchase nor during the negotiations brought appellant and the purchasers together personally, for it is the established law of this state that a written contract between the seller and the purchaser is not essential to the recovery of the broker's commission, if he has produced to the seller a purchaser who is ready, willing, and able to purchase upon the terms proposed by the seller, and who has agreed to those terms, and is willing and offers to enter into a binding written contract. The broker has performed his duty, and has earned his commission regardless of whether a written contract is actually entered into or whether the sale is ever consummated by the delivery of the property and the payment of the purchase price. Twogood v. Monnette, 191 Cal. 103, 215 P. 542.

[4] The evidence shows, as before stated, that appellant, in writing, constituted and appointed said title company his agent to complete the sale, and deposited with said company all of the necessary documents for that purpose, which included an executed deed to the property and written authority to receive the purchase price and deliver the deed; that within the extension period fixed by said escrow instructions, to wit, on or about June 1st, the purchasers were present personally at the office of the title company, ready, able, and willing to meet the escrow terms and to pay the purchase price and accept the deed, but were prevented from doing so by the act of appellant and the sellers in canceling the sale. Under such circumstances, and in view of the rule stated in Twogood v. Monnette, supra, we believe that respondent was, at that time, entitled to his commissions. It matters little whether or not appellant ever met the purchasers personally during the negotiations, for the reason that he had vested said title company with full power to consummate the sale, and it was at the title company's office that the purchasers appeared ready to close the sale, and it is also immaterial whether or not Page or respondent were there at that time, although it would seem that they were, be-

cause each testified that he was. Nason was there, and he testified positively that at that time he was prepared to pay the cash and turn over the securities in payment of the purchase price. Nason cannot, therefore, be considered an undisclosed principal, as appellant contends; and, in any event, the evidence shows that Page and Nason were at all times jointly interested in the purchase of the property, and, although title was afterwards conveyed to Nason, the property was nevertheless acquired for the benefit of both Page and Nason.

[5-7] We are unable to sustain appellant's contention that there was a fatal variance between the allegations of the complaint and the proof, in that the complaint was based upon a quantum meruit, whereas the proof established a written contract, for the reason that, irrespective of whatever the rule may be in other jurisdictions, it has been held in this state that a recovery may be had for reasonable value in an action based on a common count, although the proof shows a written agreement; and in such an action the contract itself serves as competent evidence upon which a finding as to the reasonable value of the services may be made. Naylor v. Adams, 15 Cal. App. 548, 115 P. 335; San Joaquin L. & P. Co. v. Barlow, 43 Cal. App. 241, 184 P. 899. Nor do we think that respondent must be denied relief because appellant was not vested with ownership of the title to the property, of which fact respondent was aware at the time the contract was made, because the payment of commissions is purely a matter of contract, and it is immaterial, so far as concerns the right of the broker to recover, whether the party to be charged under the contract is or is not the owner of the land to be sold. Sanchez v. Yorba, 8 Cal. App. 490, 97 P. 205. Moreover, the evidence shows that, after the contract of agency was made, appellant obtained from the owners the execution and acknowledgment of a deed to the property with the grantee's name left blank, of which deed he was given absolute control; that he deposited said deed in escrow, and signed the escrow instructions authorizing and directing delivery to the purchaser on complying with the escrow instructions; that, after the deed was withdrawn from escrow, it was kept in appellant's possession in his safe deposit box for approximately 4 months, and eventually was delivered to the purchaser in consummation of the sale. Under those circumstances we think appellant may not escape the liability under his contract to pay commissions upon the ground that he was not the owner of the property.

Lastly, it is urged that commissions cannot be allowed for the reason that the escrow instructions required the payment of a purchase price aggregating only $12,000. But the testimony of both Page and Nason proves that they had agreed and were prepared to pay a purchase price of $13,000, which testimony was corroborated by the evidence of respondent. It is therefore obvious that the specific items of payment called for by said escrow instructions, and which aggregated only $12,000, related to the net amount the vendor was to receive for the property and not to the gross amount the purchasers had agreed to pay therefor.

We are of the opinion that the judgment should be affirmed, and it is so ordered.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 262

ARISS-KNAPP CO. v. SONOMA COUNTY. (Civ. 5189.)

(District Court of Appeal, First District, Division 2, California. June 18, 1925. Hearing denied by Supreme Court Aug. 13, 1925.)

1. Highways ⇐113(4)—Matters to be shown to warrant recovery for work in excess of estimate.

To warrant recovery of reasonable value of work performed in excess of amount covered by written contract to gravel highway, on theory that plaintiff mistook amount included because of error in estimate in notice to bidders, it must be shown that mistake was mutual; that minds of contracting parties met; that they agreed upon a certain thing which was to have been embodied in their contract; and that by mistake it was either fraudulently or inadvertently omitted, or inadequately expressed, and the reasons why plaintiff did not discover the mistake must be shown.

2. Highways ⇐113(4)—Contractor not entitled to amount in addition to contract price for graveling a highway because county engineer erred in estimate of gravel required.

Where contractor entered into written agreement for graveling highway a certain distance for a "lump sum," it could not recover additional sum because county engineer, in notice to bidders underestimated yardage; bidders being directed to specifications from which yardage could have been readily computed, and contract containing declaration that contractor had seen and examined specifications.

3. Customs and usages ⇐17—Custom of contractors to rely on estimates inadmissible, where contract to contrary.

Where notice calling for bids on highway graveling contract stated that estimates of yardage were approximate, and referred bidders to plans and specifications, and contract contained declaration that contractor had seen and examined the plans and specifications, evidence of custom of contractors to rely on estimates, and make no independent investigation, would have been inadmissible as modifying express terms of written contract containing no uncertainty, and amended complaint setting up such custom was demurrable.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the Ariss-Knapp Co. against the County of Sonoma. From a judgment for defendant, plaintiff appeals. Affirmed.

R. M. F. Soto, of San Francisco, for appellant.

G. W. Hoyle, Dist. Atty., of Santa Rosa, for respondent.

NOURSE, J. This is an action brought to recover the sum of $5,460 for work done in graveling a county road under a written contract executed with the county of Sonoma under the provisions of section 2643 of the Political Code. The action is termed a suit in equity, though, in fact, it is nothing more than an action at law to recover the reasonable value of work, which by reason of an alleged mistake was not included within the terms of the written contract. A demurrer to the complaint was sustained, amendments were filed, and a demurrer thereto sustained. Amendments were again filed and a demurrer thereto was sustained without leave to amend. Judgment followed in favor of the defendant, from which plaintiff appeals upon a record prepared under section 953a, Code of Civil Procedure.

The facts of the case as disclosed in the complaint are that in May, 1920, the board of supervisors of the county of Sonoma duly instituted proceedings for the graveling and improving of a certain road within the county, acting under the provisions of section 2643 of the Political Code, as amended in 1919 (Stats. 1919, p. 167), which section was repealed in 1921 (St. 1921, p. 1681, § 1). In the course of these proceedings notice inviting proposals for the work was duly given, and in response thereto the plaintiff's proposal was accepted, and on the 23d of June, 1920, a contract for the doing of the work was duly executed between the plaintiff and the county. In the notice inviting proposals the estimated yardage of surfacing gravel was given as 3,050 cubic yards and the estimated cost thereof was given as $8,387.50. In the same notice the length of the highway was given as 16,680 feet. In response to this invitation the plaintiff submitted a bid for the surface graveling of $9,150 and executed the contract upon the same terms; the exact language of the bid and contract reading as follows:

"For gravel road, in place complete as per attached plans and specifications, the lump sum of ninety-one hundred and fifty dollars ($9,150.00) for the entire length of road embraced in the said plans and specifications."

On December 31, 1920, all the work had been done under the contract except some of the graveling. At that time the plaintiff had laid 1,995 cubic yards of gravel. Between that date and May 21, 1921, the plaintiff laid 2,875 cubic yards of gravel, making an aggregate laid by plaintiff of 4,870 cubic yards instead of the estimated quantity of 3,050 cubic yards, an excess of 1,820 cubic yards. Up to the time of December 31, 1920, estimates had been made by the county engineer upon the basis of which payments were made to the plaintiff as the work progressed. It is claimed by plaintiff that these estimates were made upon the basis of $3 per cubic yard, calculated upon the engineer's estimate of 3,050 cubic yards. The dispute arose over the estimate made for the work done from December 31, 1920, until May 31, 1921, and the plaintiff made written protest and claimed before the board of supervisors and the county engineer that this work should have been estimated on the basis of $3 per cubic yard. After the work was completed and on the 8th day of June, 1921, the plaintiff for the first time raised the claim that more work had been done than that noted in the original estimate, and thereupon made demand for payment for this excess work on the basis of $3 per cubic yard.

[1] The whole case of the plaintiff thus becomes an action for the recovery of the reasonable value of work alleged to have been performed in excess of the amount covered by the written contract upon the theory that in the execution of the contract the plaintiff mistook the amount included because of the error of the county engineer in the estimate placed in his notice to bidders. It is essential to show in an action of this kind based upon an alleged mistake on the part of the respondent that the mistake was mutual; that the minds of the contracting parties met; that they agreed upon a certain thing which was to have been embodied in their contract; and that by a mistake it was either fraudulently or inadvertently omitted or inadequately expressed. Harding v. Robinson, 175 Cal. 534, 541, 166 P. 808. It is not sufficient merely to show that a mistake was made and that the party relied upon it to his injury, but he must show the reasons why he did not discover the mistake. If the means of investigation are at hand and knowledge of the mistake could be readily had, such knowledge will be imputed to him. This is particularly true if the relations of the parties are not fiduciary, and where there is no warranty, and where the means of knowledge of the truth of the facts are at hand and equally available to both parties.

[2] In the case before us the appellant relies solely upon the mistake in the estimate of the total yardage which was made in the notice to bidders. It is pointed out by the respondent that in this notice the county particularly stipulated that the estimates of quantity were merely approximate and the prospective bidder was not only directed to refer to the plans and specifications for the full details and descriptions of the work to be done, but was required to certify that he had carefully examined the plans and read the

specifications and that he had personally satisfied himself as to all the local conditions affecting the work. The respondent points out that reference to the plans and specifications would have readily disclosed the discrepancy in the original estimate of the county engineer, and also that the number of lineal feet mentioned in the notice to bidders was in itself sufficient notice to the prospective bidder as a simple multiplication of the length of the highway thus given, 16,680 feet by 16 feet, the width of the portion to be graveled, by one-half foot, the depth of the gravel, would have given a total of 133,440 cubic feet or 4,942 cubic yards. It is also pointed out that in the contract which was executed by the parties the appellant obligated itself to lay the gravel road "as per attached plans and specifications * * * for the entire length of road embraced in the said plans and specifications." It is to be noted that the appellant's bid and the contract called for the doing of this work for the lump sum of $9,150, no mention being made in either the bid or contract of the amount to be paid per yard; whereas, the other portions of the contract were on the basis of unit prices. We have then the allegation that the appellant, in making its bid for the work, relied upon the estimates made therefor, as stated in the notice, "and did not investigate to ascertain whether said estimates were or whether any one thereof was correct or not," because it believed that the county engineer was a reputable engineer, and because the county board of supervisors had approved the estimates.

In regard to this allegation, we are confronted with the written contract of the parties, executed before the work was commenced, in which the appellant covenanted to perform the work in accordance with the plans and specifications, which, in turn, it declared it had seen and examined. The contract is included in the complaint in hæc verba and presents a sharp conflict between the written obligations of the appellant made at the beginning of the transaction and the allegations prepared for the purpose of enforcing a claim for extra work. At the most the complaint demonstrates that the appellant failed to investigate where an investigation would have disclosed the mistake upon which it now relies. If its action is one in equity, as it claims it to be, then it is a case for the application of the well-known equitable rules that relief will not be afforded in equity on the ground of mistake where it is the result of pure carelessness and that there will be no relief to one who suffers by not using the ordinary means of information, whether his negligence be attributable to indifference or credulity. In making the allegation that no investigation was made for the purpose of determining the correctness of the estimates as to total yardage, when the very notice upon which the appellant relies stated definitely that the estimates of yardage therein contained were approximate only and that the prospective bidder was directed and required to examine and refer to the plans and specifications, the pleader has pleaded himself out of court, so far as any equitable remedy is concerned.

[3] In the amendment to the complaint the appellant set up the claim that it was relying upon a custom of contractors engaged in doing public work in the state of California to the effect that they relied upon the estimates made by the engineers appearing in their notice to the public and that such contractors would not make any independent or preliminary investigation to ascertain whether such estimates were correct. It is difficult to follow the rule that upon the consideration of a demurrer to a complaint we must assume all the allegations to the complaint to be true when such allegations are palpably absurd and contrary to all common knowledge and experience. But in this case the allegation is nothing more than an attempt to set up an issue of a prevailing custom as modifying the express terms of a written contract. To prove the issue, it would be necessary to rely upon parol evidence in a case where there is no uncertainty in the terms of the written contract and such evidence would be inadmissible. Withers v. Moore, 140 Cal. 591, 597, 74 P. 159. The amendment to the complaint merely injected an issue which could not be proved. It would not strengthen the case which the appellant attempted to plead.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

73 Cal. App. 321

RICHMAN v. BANK OF PERRIS et al.
(Civ. 5175.)

(District Court of Appeal, First District, Division 2, California. June 25, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Banks and banking ⟹43—Proceedings to compel bank to issue certificates of stock held not barred.

Proceedings by judgment creditor to compel bank to issue certificates of stock originally owned by judgment debtor, when certificates had been canceled and others issued to different persons pursuant to sale for delinquency under void assessment, *held* not included in or barred by Civ. Code, § 347, providing that no action must be sustained to recover stock sold for delinquent assessments on the ground of irregularity in the assessment, unless the sum for which the stock is sold be first tendered, or within Code Civ. Proc. § 341, subd. 2, providing that an action must be commenced within six months to recover stock for a delinquent assessment.

2. Banks and banking ⊂⊃43—Sale of bank stock to satisfy delinquency under illegal assessment held void.

Sale of bank stock to satisfy delinquency assessment voted at meeting called by two directors, without notice required by by-laws to third who did not attend, was, in view of Civ. Code, §§ 305, 308, void, though attempted purchase was made in good faith by persons who knew that bank was insolvent and for the purpose of reorganizing it.

3. Banks and banking ⊂⊃43—Statute requiring directors of bank to levy an assessment upon stock to repair any deficiency in the capital does not change requirement for valid directors' meeting nor authorize administration of corporate affairs in any manner not prescribed by corporate by-laws.

Bank Act, § 133, requiring directors of bank to levy assessment upon stock to repair any deficiency in the capital which may be found by bank superintendent, does not change requirement for valid directors' meeting nor authorize an administration of corporate affairs in any manner not prescribed in by-laws, and, where there is such deficiency in capital, and directors are in such a position that it is impossible to secure a legal meeting of stockholders, they should permit superintendent to raise required money, as authorized under section 136.

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Fred W. Richman to compel the Bank of Perris and others to issue certificates of corporate stock. From a judgment for defendants, plaintiff appeals. Reversed.

John E. Biby and Harry C. Biby, both of Los Angeles, for appellant.

John L. Richardson, T. E. Parke, and Anderson & Anderson, all of Los Angeles, for respondents.

LANGDON, P. J. This is an appeal by the plaintiff from a judgment against him in an action wherein the complaint presented the following facts:

The defendant bank is a corporation organized under the laws of the state of California. Its capital stock consists of 250 shares of the par value of $100 each. The number of directors of said corporation provided for in its articles of incorporation is three, and at all times mentioned in the complaint it has had a board of directors consisting of three members. On or about April 16, 1919, and prior to August 9, 1919, Joseph B. Moffere, Louis Vaiani, and Louis Casaretto were the duly elected, qualified, and acting directors of said bank. Moffere, on April 16, 1919, was the owner of 199 shares of the capital stock of the bank, represented by two certificates of stock issued in his own name, and also owned 10 shares of stock, which were represented by two other certificates for 5 shares each, issued in the names of Louis Casaretto and Louis Vaiani, so that these persons might act as directors of said bank. During April, 1919, defendants W. W. Stewart, W. G. Stewart, and Clifford R. Stewart learned that said bank was insolvent, and made efforts to reorganize said bank, and, in connection with this purpose, consulted with Charles F. Stern, superintendent of banks of the state of California, and said superintendent of banks requested the bank to repair its capital in the amount of $40,000. During all the times mentioned it was provided in the by-laws of the bank that special meetings of the board of directors might be called by the president on one day's notice to each director, either personally or by wire, and that special meetings might be called in like manner and on like notice on the written request of two directors.

On May 26, 1919, directors Vaiani and Casaretto signed the following instrument in writing:

"Los Angeles, May 26, 1919.

"Mr. James B. Moffere, President of the Bank of Perris, Huntley Apartments, Los Angeles, Cal.—Dear Sir: The undersigned, being a majority of the board of directors of the bank of Perris, hereby request a special meeting of said board, to be called and held in the Bank of Perris at one o'clock in the afternoon of Tuesday, the 27th day of May, 1919.

"Louis Vaiani.
"Louis Casaretto."

Said directors caused said instrument to be delivered to the Huntley Apartments, in Los Angeles, and the proprietor of said apartments signed the following instrument:

"Los Angeles, Cal., May 26, 1919.

"This is to cerify that Mr. James B. Moffere, formerly a tenant of the Huntley Apartments, 1207 West Third street, Los Angeles, was not here present (nor has he been for over thirty days, his present whereabouts being unknown here) to receive a letter personally delivered by messenger, said letter being a call to the meeting of the directors of the Bank of Perris, addressed to James B. Moffere, Huntley Apartments, and signed by Louis Vaiani and Louis Casaretto, as directors.

"Huntley Apartments,
"By E. Blalack."

The defendants W. W. Stewart, W. G. Stewart, and Clifford R. Stewart knew that said Moffere was a director of said bank, and that he could not be found for the purpose of securing his attendance at a meeting of the directors of said bank. Moffere, president of the bank, did not at any time make a call for the holding of a special meeting of the board of directors of the bank; but, on the 27th day of May, 1919, the said Vaiani and Casaretto, as directors of said bank, met at the banking room in said bank, and assumed to act as the board of directors of said bank and caused to be entered upon the minutes of the proceedings of the board of directors a resolution purporting to levy an assessment of $160 a share upon each share of the capital stock of the defendant, which then amounted to 259

shares, payable on June 26, 1919, to Louis Vaiani, the secretary and cashier of said bank, and in and by said resolution, and as a part thereof, the said two directors directed that any stock upon which said purported assessment should remain unpaid on the last-mentioned date would be delinquent and advertised for sale at public auction, and would be sold to pay the delinquent assessment, together with costs of advertising and expenses of sale, or would be sold at private sale and without such public notice. During the month of May, 1919, the defendants W. W. Stewart, M. P. Mapes, and J. F. Hooks offered in writing to pay the defendant bank $41,400 cash on account of the purported assessment above mentioned levied against the stock enumerated. Thereafter the following letter was sent to each and every stockholder of the bank:

"Perris, California, May 28, 1919.

"Dear Sir: Please be advised that we have this day been offered full payment of the amount assessed against your stock of this corporation, a notice of which assessment was mailed to you at your last known address, a copy of which offer is inclosed. If you refuse or neglect to pay such assessment on or before July 14, 1919, please be advised that such offer will be accepted by the board of directors of this corporation.

"Yours very truly,

"Bank of Perris,

"By Louis Vaiani, Sec."

However, the aforementioned offer to purchase said stock was not accepted at any time by the bank or by its board of directors, and it was agreed later that the persons making the offer would not purchase the stock of the bank, but that the stock would be purchased by the persons named in a resolution hereinafter referred to in the amounts and for the sums set opposite their respective names. In order to carry out said agreement on July 15, 1919, the said two directors of the bank, Vaiani and Casaretto, met at the office of the bank, and caused to be entered on the minutes of the proceedings of the directors a resolution which purported to cancel 249 shares of stock, including the 209 shares owned by Moffere, and said resolution further declared said stock to be null and void, and purported to authorize the vice president of the bank to issue new certificates in the amounts and to the persons named in said resolution.

It was alleged, upon information and belief, that, pursuant to the proceedings above recited, the bank, on July 15, 1919, purported to cancel the shares of stock mentioned in said resolution, including the 209 shares owned by Moffere, and issued new shares in lieu of the shares purported to have been canceled to various persons and in various amounts, and the defendants named in this action, except the bank, are the persons to whom said shares of stock were issued, and each of said persons, prior to the time he paid for the stock so issued to him, knew that the two directors of the defendant bank were attempting to sell said stock pursuant to assessment proceedings, and that each of said directors' meetings purported to have been held by them was held without notice to the third director, and that such meetings were not held on the date of the regular meeting of the board of directors, and each of said defendants knew that each of said meetings was held at a time and on a date other than the time provided by the by-laws for the regular meetings of said board, and each of said defendants knew that said meetings were not held pursuant to any call by the president of the bank nor pursuant to any call made in the manner provided by the by-laws of the bank. After the stock purported to have been canceled was issued to the various persons, the said defendants, with full knowledge of the facts set forth herein, acquired the remainder of the stock purported to have been canceled by said two directors of the bank, so that said defendants now claim to be the owners and holders of all the shares of stock of the bank.

Plaintiff alleges, upon information and belief, that the foregoing proceedings are the only proceedings held or performed or purported to be held or performed pursuant to which the said stock owned by said Moffere was canceled, or pursuant to which it was attempted to deprive said Moffere of his ownership thereof, and the foregoing proceedings are the basis of defendants' claim of their asserted right, title, or interest in any of the stock of said bank.

It is alleged, upon information and belief, that ever since such purported cancellation of said stock owned by Moffere and the issuance of shares in lieu thereof to various persons said bank has claimed that Moffere has not owned any of said stock subsequent to July 15, 1919, and that subsequent to that date he was not entitled to appear as a stockholder on its books, nor to exercise any of the rights of a stockholder therein, and that subsequent to the date last mentioned said bank has treated the persons to whom shares of stock were issued by it in lieu of the shares owned by Moffere, and their purported successors in interest, as the owners of all said stock owned by Moffere, and such persons claim to be the owners of all of the stock owned by Moffere. It is then alleged that the sale and reissuance of stock as hereinbefore set forth are void, and that none of the defendants claiming to own the same has any right, title, or interest in the same.

The plaintiff commenced an action against Moffere on August 14, 1922, and a writ of attachment was issued therein and levied upon the shares of stock of the bank alleged to be the property of Moffere and to have been illegally canceled. Thereafter plaintiff recovered judgment against Moffere in said action in the sum of $34,027.50, and an execution issued thereunder, and was levied upon

said stock alleged to have been owned by Moffere. Moffere's interest in said stock was sold under execution to plaintiff for the amount of his judgment. Plaintiff presented his certificate of sale to the bank, and demanded the issuance of a stock certificate to him for 194 shares, and the bank refused such demand. Plaintiff alleged, upon information and belief that said stock is of the value of $160 a share, and prayed that the purported sale and cancellation by the bank of the certificates representing the stock of Moffere be declared null and void, and that plaintiff be declared to be the legal owner of said stock.

Defendants demurred to the complaint upon the ground: (1) That it did not state sufficient facts to constitute a cause of action; (2) that said action is barred by the provisions of subdivision 2 of section 341, Code of Civil Procedure, and by the provisions of section 347, Civil Code. The demurrer was sustained and judgment given for the defendants.

[1] Upon the question of the statute of limitations appellants call to our attention the cases of Herbert Kraft Co. v. Bank of Orland, 133 Cal. 64, 65 P. 143, and Cheney v. Canfield, 158 Cal. 342, 111 P. 92, 32 L. R. A. (N. S.) 16. Cases from other jurisdictions are also cited, but, as the California cases relied upon seem to be decisive of this question in favor of the appellant, we shall not go further afield for authorities.

[2] There remains, then, to be decided the question of whether or not the complaint states a cause of action. The special meeting of the board of directors at which the purported assessment upon the stock was levied was not called by the president, as required by the by-laws of the corporation, and was held without notice to one of the directors, who did not attend. Section 305, Civil Code, provides:

"The corporate powers, business, and property of all corporations formed under this title, must be exercised, conducted, and controlled by a board of not less than three directors, to be elected from among the holders of stock. * * *"

Section 308, Civil Code, provides:

"A majority of the directors is a sufficient number to form a board for the transaction of business, and every decision of a majority of the directors forming such board, made when duly assembled, is valid as a corporate act."

In 6 California Jurisprudence, p. 1055, it is said:

"It is the general rule, therefore, that a special meeting held without notice is void, and the directors present at such meeting cannot perform any valid corporate act. The provision that a majority of the whole number of trustees shall form a board for the transaction of business and every decision of a majority of the persons duly assembled as a board shall be valid, does not change the rule."

See, also, Harding v. Vandewater, 40 Cal. 77; Thompson v. Williams, 76 Cal. 155, 18 P. 153, 9 Am. St. Rep. 187; Smith v. Dorn, 96 Cal. 82, 30 P. 1024; Beatty v. Rianda, 34 Cal. App. 180, 167 P. 185; Raisch v. M. K. T. Oil Co., 7 Cal. App. 667, 95 P. 662; Curtin v. Salmon River, etc., 130 Cal. 348, 62 P. 552, 80 Am. St. Rep. 132; Cheney v. Canfield, 158 Cal. 345, 111 P. 92, 32 L. R. A. (N. S.) 16. In the case last cited it was said:

"It is the settled law that an assessment can be legally levied upon the capital stock of a corporation by the board of directors only at a regular meeting of the board or at a special meeting thereof regularly called. [Citing cases.] As all proceedings whereby an assessment is levied upon the stock of a corporation, and under which a forfeiture of the stock of the stockholders may be had are in invitum, it is elementary law that they must be strictly followed. The levy of such an assessment can only be accomplished legally by a strict compliance with the statutory provisions relative thereto, or with the provisions of the charter of the corporation upon the subject. [Citing cases.]"

It must follow that, since the meeting of the directors was not regularly called, it was powerless to levy a legal assessment, and, the assessment being void, no rights flowed from proceedings thereunder.

[3] Respondent seeks to avoid the effect of the want of regularity in the directors' meeting by reliance upon section 133 of the Bank Act (Act 652, Gen. Laws of Calif., Deering [1923], p. 153). That section requires the directors of the bank to levy an assessment upon the stock to repair any deficiency in the capital which may be found by the bank superintendent. However, said act in no way changes the requirements for a valid directors' meeting, nor authorizes an administration of corporate affairs in any manner not prescribed in the corporate by-laws. It is certain that the directors might refuse to take the action called for by the bank superintendent, and this very contingency is provided for in the Bank Act itself (section 136), wherein the superintendent of banks is expressly authorized, in case of a refusal by the directors to levy such an assessment, to take possession of the bank and enforce the liability of stockholders and otherwise administer the affairs of the bank.

It seems obvious that, when the two directors of the bank found themselves in a position where they could not secure a legal meeting of the directors to levy the assessment, they should have permitted the superintendent of banks to exercise his authority and raise the money required by the means provided in the Bank Act.

We reach this conclusion with great reluctance, because of the consideration due those who, in good faith, paid this assessment and performed a public service in rehabilitating an insolvent bank. In deference to their good faith and endeavor to remedy a most

deplorable situation we have striven for ways and means of affirming the judgment of the trial court, but we have reached the conclusion that this is one of the "hard" cases which, proverbially, make "bad" law, and that any attempt upon the part of courts to relax the safeguards placed by corporate by-laws about the actions of directors would open a Pandora's box of business ills which would impair the usefulness of corporations. The law seems definite and clear and the practical policy behind it of the soundest.

The judgment must be reversed, with directions to the trial court to require the defendants to answer. It is so ordered.

We concur: NOURSE, J.; STURTEVANT, J.

---

73 Cal. App. 372

PEOPLE v. BOMAR. (Cr. 1179.)

(District Court of Appeal, Second District, Division 1, California. June 24, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Indictment and information ⟸39 — Functions of district attorney in filing information are ministerial.

Functions of district attorney in filing information are ministerial only, he having no power to file information for any offense other than for which defendant was by committing magistrate held for trial.

2. Criminal law ⟸241—Defective commitment may be returned by court order to committing magistrate for correction.

When commitment is defective in form or fails to state specific charge on which defendant was bound over, it may, by superior court order, be returned to committing magistrate for correction, and when corrected it has same force and effect as if originally issued in its corrected form.

3. Criminal law ⟸241—Order directing filing of commitment nunc pro tunc held proper.

Where amended commitment was left with clerk of court August 4, though not marked filed at that time, order of August 18, directing its filing as of date August 4, was proper.

4. Criminal law ⟸241—Magistrate's determination as to whether testimony shows commission of crime is judicial act, and amounts to judgment.

Determination by magistrate of question as to whether testimony before him shows that certain crime has been committed is judicial act, and in effect amounts to judgment of tribunal over which he presides.

5. Criminal law ⟸241 — If magistrate pronounces erroneous conclusion as to crime committed, it is judicial error beyond his power to correct.

If magistrate, in considering testimony as to whether certain crime has been committed, arrives at and pronounces erroneous conclusion as to crime committed thereby, it is on his part judicial error which is beyond his power to correct.

6. Criminal law ⟸241 — Magistrate judicially erring as to commission of crime cannot thereafter modify order except as to matter of form.

As law at conclusion of examination by magistrate requires that if it appears to him that offense has been committed, and there is sufficient cause to believe defendant guilty, he must make or indorse on complaint order signed by him to that effect, in making such order he exhausts all power invested in him by law, and attempt thereafter to modify this order, either under direction of superior court or on his own motion, except as to matter of form, is beyond his power and jurisdiction.

7. Criminal law ⟸241—Magistrate without authority to amend commitment holding defendant for offense different from that for which he was held in original commitment.

Magistrate has no authority to amend his commitment by holding defendant for trial for offense different from that for which he was ordered held in original commitment.

8. Criminal law ⟸223, 1186(4)—Failure to accord accused preliminary examination held miscarriage of justice, and prejudicial error.

Where accused was not accorded fair trial on information filed against him, because no preliminary examination before committing magistrate was held on charges of which he was found guilty, there was miscarriage of justice, and hence Const. art. 6, § 4½, is inapplicable.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

A. W. Bomar was convicted of obtaining money by false pretenses, and he appeals. Reversed.

Paul W. Schenck and Richard Kittrelle, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney, Deputy Atty. Gen., for the People.

CURTIS, J. A complaint was filed in the justice court of Los Angeles township containing four counts, each charging the defendant with the commission of the crime of grand larceny. A preliminary examination of said defendant was held upon said complaint, and the committing magistrate, on July 9, 1924, issued a commitment holding the defendant for trial in the superior court upon two charges of grand larceny set out in the first and second counts, respectively, of said complaint. On August 8th the district attorney filed an information against the defendant, which information contained four counts. The first two thereof charged the defendant with two separate crimes of grand larceny, and being the same two charges set forth in said commitment, and in each of the third and fourth counts of said information

the defendant was charged with the crime of obtaining money under false pretenses. The defendant moved the court to set aside the information on the ground that the defendant had not been legally committed. This motion was made on August 14th and continued to August 18th. On the calling of the motion on the 18th, the court, upon motion of the district attorney, ordered that the clerk file nunc pro tunc, as of August 4, 1924, an amended commitment. This amended commitment was issued by the committing magistrate before whom the preliminary examination of defendant had been held. It was dated August 4, 1924, on which date it had been received by the clerk of the court, but had not been marked filed, and it purported to commit the defendant for trial upon the two charges of grand larceny set out in the original commitment, and also two charges of obtaining money under false pretenses; said two last mentioned charges being the same two charges which were set forth in counts 3 and 4, respectively, of the information. The court then denied defendant's motion to strike out the information, or any part thereof. Upon the trial defendant was found guilty of the two charges of obtaining money under false pretenses. The two charges of grand larceny in the information had previously been dismissed by the court upon the motion of the district attorney. The sole point made by appellant at this time for the reversal of the judgment herein is that the court erred in its refusal to grant appellant's motion to strike out the information in so far as said motion applied to the two charges of obtaining money under false pretenses. On a former hearing the judgment was affirmed (46 Cal. App. Dec. 966), but later this court granted appellant's petition for a rehearing, and also, upon his suggestion of a diminution of the record, ordered that the original complaint and the commitments of date July 9th and August 4th, respectively, be made a part of the record on appeal. These papers were not before the court on the former hearing.

[1, 2] Was the defendant legally committed upon the two charges of obtaining money under false pretenses, being the charges of which he was found guilty by the jury? The functions of the district attorney in the filing of an information are ministerial only. He has no power to file an information for any offense other than that for which the defendant has been by the committing magistrate held for trial. People v. Nogiri, 142 Cal. 596, 76 P. 490. When the commitment is defective in form or fails to state the specific charge on which the defendant was bound over, it may be, by order of the superior court, returned to the committing magistrate for the purpose of correction, and, when corrected, the commitment has the same force and effect as if originally issued in its corrected form. People v. Norman, 62 Cal. App. 219, 216 P. 402; Ex parte Fowler, 5 Cal. App. 549, 90 P. 958.

[3] In the present action the superior court made no order returning the commitment to the magistrate for correction. The court did, however, upon motion of the district attorney, order the corrected or amended commitment filed as a record of the superior court. Under these circumstances this action of the court in ordering the corrected or amended commitment filed, we think, might serve as a legal substitute for an order of the court directing the return of the commitment for correction. The amended commitment had evidently been left with the clerk of the court on August 4th, although not marked filed at that time. The order of the court directing its filing as of date August 4th, was therefore proper. The commitment, however, as originally issued by the committing magistrate, held the defendant for trial for the crime of grand larceny. There was no defect in the form of this commitment, nor was there any failure to state the specific charge for which the defendant was bound over to the superior court for trial. The corrected or amended commitment made no material correction in the form of the original commitment binding the defendant over to the superior court for trial upon the charge of grand larceny, but it set forth, in addition to these two charges of grand larceny contained in the original commitment, two other and distinct charges, to wit, two charges of obtaining money under false pretenses, and purported to commit the defendant for trial in said superior court upon all four of said charges.

Has a magistrate any authority, after committing a person for trial on one offense, thereafter to change his order and commit said person for another and distinct offense, without any further hearing and upon the same testimony upon which the original commitment was based? The only decision of our courts to which our attention has been called in which this direct question has been considered is the case of Ex parte Fowler, supra, where the court, after holding that the committing magistrate had power to correct the commitment in matter of form, said:

"Of course we are not to be understood as suggesting that a magistrate, after once committing an accused for a certain offense, may thereafter change his order and commit him for another and distinct offense."

[4, 5] This statement of the court was probably not necessary for the decision of any question involved therein, and therefore may very properly be considered as dictum. Yet we are not prepared to say that the court did not make a correct statement of the law upon the question under discussion. The determination by a magistrate of the question as to whether the testimony before him shows that a certain crime has been

committed, is a judicial act (People v. Nogiri, supra), and in effect amounts to a judgment of the tribunal over which said magistrate presides. If the magistrate, in the consideration of such testimony, arrives at and pronounces an erroneous conclusion as to the crime committed thereby, it is on his part a judicial error which is beyond his power to correct. "Notwithstanding the power of the court to correct by amendment its inadvertent acts, where they are of such a nature as to be regarded as mere clerical misprisions, it is undoubtedly true that judicial error may not be thus corrected, but must be remedied in another way, as by motion for a new trial or on appeal. Proceedings for amendment of judgments * * * ought never to be the means of modifying or enlarging the judgment or the judgment record, so that it shall express something which the court did not pronounce, even though the proposed amendment embraces matter which clearly could, or even should have been pronounced." 14 Cal. Jur. p. 999. The authorities cited in the text in support of this proposition are directly applicable to judgments of courts of record, but we can see no reason why the same rule should not apply to a committing magistrate in the exercise of the power conferred upon him of holding preliminary examinations.

[6] At the conclusion of the examination, the law requires that if it appears to the magistrate that a public offense has been committed, and there is sufficient cause to believe the defendant guilty thereof, he must make or indorse on the complaint an order signed by him to that effect. In making this order, the magistrate has exhausted all the power in the premises with which he has been invested by law. Any attempt on his part thereafter to modify this order, either under the direction of the superior court or upon his own motion, except to correct the same in matter of form, is beyond his power and jurisdiction.

[7] We conclude, therefore, that the magistrate had no authority to amend his commitment by holding the defendant for trial for an offense different from that for which he was ordered held in the original commitment, and, therefore, that the defendant was not legally committed for the offense for which he was found guilty.

[8] Neither do we think that section 4½ of article 6 of the Constitution is applicable in the present case. Before any accused person can be called upon to defend himself on any charge prosecuted by information, he is entitled to a preliminary examination upon said charge, and the judgment of the magistrate before whom such examination is held as to whether the crime for which it is sought to prosecute him has been committed, and whether there is sufficient cause to believe him guilty thereof. These proceedings are essential to confer jurisdiction upon the court before whom he is placed on trial. To say that he was accorded a fair trial upon an information filed against him without a substantial compliance with these jurisdictional requirements, and therefore that there had been no miscarriage of justice, hardly meets the situation. Such an argument would apply with equal force to the validity of the conviction upon an information filed by the district attorney in a case where no preliminary examination at all had been held. Such practice would result, in legal effect, in wiping out all provisions of the Constitution and the Penal Code providing for preliminary examination, and in clothing the district attorney with unlimited authority to file information against whomsoever in his judgment he might consider guilty of crime. We do not believe that it was ever the intention to extend the scope of section 4½ of article 6 of the Constitution to any such limits.

The appellant never having been legally committed, the judgment and order appealed from are reversed, with directions to the trial court to grant appellant's motion to set aside the information.

We concur: CONREY, P. J.; HOUSER, J.

---

73 Cal. App. 361

LUCKEHE v. RECLAMATION DIST. NO. 2054. (Civ. 2905.)

(District Court of Appeal, Third District, California. June 23, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Drains ⟸13—Reclamation districts are quasi public in character.

Reclamation districts, created under Pol. Code, § 3440 et seq., are quasi public in character.

2. Drains ⟸13—Formation of reclamation district is a legislative act.

Formation of a reclamation district is a legislative act, carried out in exercise of police or taxing power of the state.

3. Drains ⟸14(3)—Proceedings for formation of reclamation district are conclusive as to all except jurisdictional matters.

Proceedings for formation of a reclamation district are special, and are final and conclusive as to all except jurisdictional matters, and conclusively determine that lands included in district are in fact swamp and overflow lands; that they will be benefited by reclamation; and that they have not been heretofore reclaimed.

4. Drains ⟸14(3)—Determination of board of supervisors to include plaintiff's land within proposed district held res judicata in action to annul assessment.

In action under Pol. Code, § 3462, to annul a drainage assessment, determination of board

of supervisors to include plaintiff's land within the district is res judicata, in view of section 3455, even though objections to formation of district on ground that plaintiff's land was not swamp or overflow land and should not be included in district were made before board of supervisors.

5. Drains ⟸14(4)—Legality and regularity of proceedings leading up to formation of reclamation district cannot be collaterally attacked.

Legality and regularity of proceedings leading up to formation of a reclamation district cannot be collaterally attacked.

6. Drains ⟸82(1)—Validity of drainage assessment can be contested only after objections have been presented and adversely ruled on by board of supervisors.

An action to contest validity of drainage assessment under Pol. Code, § 3462, can only be maintained after objections have been duly presented and adversely ruled upon by the board of supervisors, and no objections to the assessment are available, except such as have already been presented in writing to the board, unless they go to jurisdiction and render proceedings wholly void.

7. Pleading ⟸8(6)—Allegation of complaint in action to annul drainage assessment held to constitute a mere conclusion.

In action to annul drainage assessment, allegation that written objection to assessment was made before a hearing of the supervisors in the manner and within time required by law constituted mere statement of conclusion.

8. Drains ⟸82(1)—Plaintiff held not entitled to recover in action to annul drainage assessment, where no showing that objection had been made.

In action to annul drainage assessment, plaintiff *held* not entitled to recover, where there was no showing that written objection to the assessment was made before a hearing of the supervisors in the manner required by Pol. Code, § 3462.

9. Appeal and error ⟸1056(1)—Sustaining of objections to plaintiff's questions regarding benefits presumed to have been derived by formation and assessment of drainage district held harmless.

In action to annul a drainage assessment, sustaining of objections to plaintiff's questions regarding benefits presumed to have been derived by formation and assessment of the district *held* harmless, where there was no showing that objections to the assessment had been presented in writing to the board of supervisors, as required by Pol. Code, § 3462.

10. Drains ⟸82(1)—Evidence regarding benefit presumed to have been derived by formation and assessment of drainage district held incompetent.

In action to annul drainage assessment, evidence regarding benefits presumed to have been derived by formation and assessment of the district *held* incompetent, since question of such benefit was res judicata.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Charles J. Luckehe against Reclamation District No. 2054. From judgment of nonsuit, plaintiff appeals. Affirmed.

C. W. Johnson, Sr., of Gridley, and J. C. Saylor, of Fresno, for appellant.

A. H. Hewitt, of Yuba City, for respondent.

THOMPSON, Justice pro tem. This is an appeal from a judgment of nonsuit in an action to annul an assessment levied against plaintiff's property situated in reclamation district No. 2054, in Sutter and Butte counties, on the ground that said property was illegally included within said district, not being the character of swamp and overflow land subject to reclamation as provided by statute.

The action was brought under the provisions of section 3462 of the Political Code of the state of California. The complaint alleges the formation of the reclamation district pursuant to the provisions of part 3, title 8, chapter 1, article 2, of the Political Code; that the plaintiff is the owner of the land in question; that his land was included within the boundaries of the reclamation district by order of the board of supervisors of Sutter county, April 21, 1921; that prior thereto plaintiff had expended large sums of money and performed labor widening and deepening Snake river adjacent to his property, and connected ditches therewith, through his property, so as to thoroughly reclaim and drain the property; that at the time of the formation of reclamation district No. 2054 his property was not swamp or overflow land, and therefore not subject to reclamation; that in 1922 said board of supervisors wrongfully, inequitably, unjustly, and oppressively levied an assessment of $9,958 against plaintiff's property; that his land will receive no benefit from said plan of reclamation; that he "filed written objections to said assessment so made upon said lands before a hearing held by the board of supervisors thereon, on July 5th, 1922, in the manner and within the time required by law, and plaintiff offered evidence in support of his said objections at said hearing," but that said assessment was approved by the board; and plaintiff asks to have said assessment vacated and set aside.

The answer admits the formation of the reclamation district; the levying of the assessment; the ownership of the land; denies the widening or deepening of Snake river and the construction of ditches by plaintiff and the draining of his land thereby; denies that the assessment was unjust, wrongful, or oppressive; and alleges that plaintiff's land was swamp and overflow

land, properly included within the district, and that said assessment was apportioned on all lands within the district according to the benefits that would be derived. The allegations of the complaint respecting the objections filed with the board were not denied.

At the trial a civil engineer, two of the reclamation commissioners, and the plaintiff were examined. The chief effort on the part of the plaintiff was to prove that the enlarging of Snake river, and the digging of ditches across his land, prior to the formation of the reclamation district, had the effect of draining and reclaiming his land, and therefore removing it from the class of swamp and overflow land subject to reclamation under the statute. The levy of assessment was proven. There was no effort made at the trial to prove that any objections were made or filed with the board of supervisors upon the formation of the district or at the levying of the assessment. While it is alleged in the complaint, and not denied by the answer, that objections to the levying of the assessment were made and filed with the board in the time and manner provided by law, there was no allegation of the character or nature of these objections. At the trial there was no proof in support of the allegations in this regard, indefinite and uncertain as such allegations were.

In an effort to prove that the reclamation district project was not beneficial to plaintiff's land, he propounded the following questions, to which objections were sustained:

"Prior to 1906, Mr. Luckehe, was there any arrangement ever made with you and any others whereby you did acquire the right to drain into Snake river?" and "As far as the use of your land is concerned, have you been able to cultivate any more land since this reclamation work was completed, than you did before?" and "Were you able, last year to produce more crops on your land than you did before?" and "How much acreage did you have in cultivation in the year 1921?" "How much acreage did you have in cultivation, and susceptible of cultivation last year?"

At the close of plaintiff's case a motion for nonsuit was made under section 581, Code of Civil Procedure, and specifically that there was no evidence that objections had been made to the board of supervisors as provided by section 3462 of the Political Code; that it was not shown that the lands were assessed for a sum in excess of the benefits derived; and that it was not proven that the assessment was not apportioned according to the benefits accruing to each tract of land in the district. This motion was granted. From the judgment of dismissal this appeal was taken.

Section 3455 of the Political Code provides that, where the reclamation district is within the Sacramento or San Joaquin districts, the trustees must report their plan of formation of the district to the board of supervisors; three copies of the original plan of work shall be filed with the county clerk; notices of the time and place of hearing objections to said plan shall be published; at the hearing evidence may be adduced in support of such objections. It is then provided (subsection 5):

"When the said reclamation board shall have taken action approving, modifying, or rejecting any such original, supplemental or new plan of reclamation after a hearing as herein provided, such action shall be final, and thereafter the sufficiency of said plans shall not be subject to attack either before the reclamation board or in any court. * * *"

It is neither alleged nor proven that any objection was ever made before the board of supervisors to the proceedings leading up to the formation of district No. 2054, nor to the including of plaintiff's land in said district.

[1-3] Reclamation districts created under the provisions of the Political Code are quasi public in character. 9 Cal. Jur. 856; Reclamation District No. 542 v. Turner, 104 Cal. 334, 37 P. 1038. The formation of a reclamation district is a legislative act carried out in the exercise of the police or taxing power of the state. Inglin v. Hoppin, 156 Cal. 483, 105 P. 582; Williams v. Board of Supervisors, 65 Cal. 160, 3 P. 667. The proceedings for the formation of a reclamation district are special proceedings, and are final and conclusive as to all except jurisdictional matters. In 9 California Jurisprudence, at page 865, the author says:

"Among the facts thus conclusively determined are the following, that the lands included in the district are in fact swamp and overflow lands, that they will be benefited by reclamation, and that they have not been heretofore reclaimed."

[4, 5] Even though objections to the formation of the district on the ground that plaintiff's land was not in fact swamp or overflow land, and that it should not therefore be included in the proposed district, had been made before the board of supervisors as provided by law, in this attack upon the proceedings the determination of the Board of Supervisors would be res judicata. Lower Kings River Reclamation District No. 531 v. Phillips, 108 Cal. 306, 39 P. 630, 41 P. 335. The legality and regularity of the proceedings leading up to the formation of a reclamation district cannot be collaterally attacked. 9 Cal. Jur. 868.

[6] An action to contest the validity of an assessment under section 3462 of the Political Code can only be maintained after objections have been duly presented and adversely ruled upon by the board of supervisors. In such an action no objections to the

assessment are available, except such as have already been presented in writing to the board of supervisors, unless they go to the jurisdiction, and render the proceeding wholly void. 9 Cal. Jur. 908; Meyer v. Reclamation District No. 17, 172 Cal. 104, 155 P. 635. Section 3462 of the Political Code provides, with relation to assessments:

"At any time before the date of such hearing, any person * * * may file written objections to such assessment, stating the grounds of such objections, which said statements shall be verified. * * * At said hearing the board of supervisors shall hear such evidence as may be offered. * * * And such decision of said board of supervisors shall be final. * * * No objection to such assessment shall be [thereafter] considered by the board of supervisors, or allowed in any other action or proceeding, unless such objection shall have been made in writing * * * as above specified."

[7, 8] The allegation of the complaint to the effect that "written objection to said assessment" was made before a hearing of the supervisors "in the manner and within the time required by law" is the mere statement of a conclusion. The "grounds of such objections" are not mentioned, if indeed they were specified in the written objections filed. Moreover, there was no effort to supply any proof of these allegations at the trial of this case. Under the foregoing authorities, this failure is fatal to plaintiff's right of recovery in this action.

[9, 10] It necessarily follows that the objections sustained to plaintiff's questions regarding the benefits presumed to have been derived by the formation and assessment of the district, are harmless. Moreover, under the authority of People v. Hagar, 66 Cal. 59, 4 P. 951, the question of such benefit was res judicata, and the evidence sought to be elicited was incompetent. The court there said:

"The board of supervisors, in hearing the petition for the formation of the district, and in making the order, had jurisdiction to determine what lands were to be benefited by the proposed system of reclamation, and to include such lands within the district, and their determination cannot now be inquired into; * * * the commissioners had authority to assess upon each and every acre within the district to be reclaimed or benefited a tax proportionate to the whole expense, and to the benefits which would result from the works. Such jurisdiction and authority being given by the statute, we do not think it was competent for the court below to have determined that either of the parcels enumerated in the offer was not benefited, or that such benefit was not of the value of the assessment."

The judgment of nonsuit was properly granted.

The judgment is therefore affirmed.

We concur: FINCH, P. J.: PLUMMER, J.

73 Cal. App. 236

WATERHOUSE-WILCOX CO. v. BETZ & MABREY et al. (Civ. 2834.)

(District Court of Appeal, Third District, California. June 17, 1925.)

1. Dismissal and nonsuit ⟸24—Plaintiff may dismiss action by nonsuit as against part of defendants and proceed against remainder.

In replevin, plaintiff may dismiss action against one or more of defendants by nonsuit and proceed against remainder, especially where defendants against whom he proceeds ask for no relief against codefendants, and do not object to granting nonsuit.

2. Replevin ⟸11(2)—Where taking is tortious, and answer denies plaintiff's ownership, and alleges possession was lawful, no demand for return of goods is necessary.

Where taking of property is tortious, and defendants in answer deny plaintiff's ownership, and allege that their possession is lawful, demand for return of property, as provided by Code Civ. Proc. §§ 509–521, is unnecessary.

3. Replevin ⟸72—Evidence held to show that plaintiff was owner and entitled to possession of property.

In replevin to recover elevator doors taken wrongfully from place where they had been delivered through mistake by carrier, evidence *held* to show that plaintiff was owner and entitled to possession.

4. Replevin ⟸68—Permitting amendment of complaint so as to allege directly that defendants converted and disposed of property to their own use held proper.

In replevin, permitting original complaint, alleging taking goods and retaining possession, to be amended several months later to allege directly that defendants converted and disposed of property to their own use, was not error.

5. Replevin ⟸10—Plaintiff held not prevented from maintaining replevin because property was in possession of sheriff at commencement of action.

In replevin for conversion of elevator doors, which through mistake on part of carrier had been misdelivered and wrongfully taken, and after being delivered to defendants were taken from defendants, who replevied them, in which action they were in control of sheriff, who placed them in possession of a keeper, in view of fact that doors were taken from keeper prior to trial of action, plaintiff was not precluded from maintenance of replevin on ground that property was in possession of sheriff at commencement of action.

6. Replevin ⟸10—Negotiation relating to installment of property in building not accepted by defendants held not consent to installation by plaintiff preventing maintenance of replevin.

Where owners of elevator doors, which were misdelivered, agreed that, if defendants, into whose possession they had come, would pay for them, they would install them in building, to which defendants replied that they had not bought doors of him, and would be unable

to do so until released from present contract and certain money was returned to them, plaintiff did not consent to installation of doors in building so as to be prevented from recovering them in replevin.

7. Replevin ⟸79—Allowing interest on value of property converted and plaintiff's expenditures incurred in pursuit thereof held proper.

Under Civ. Code, § 3336, allowing interest on value of property converted and plaintiff's expenditures incurred in pursuit thereof was not error.

Appeal from Superior Court, Sacramento County; J. B. Landis, Judge.

Replevin by the Waterhouse-Wilcox Company against Betz & Mabrey, a copartnership composed of F. H. Betz and C. S. Mabrey and others. With consent of plaintiff, nonsuit was granted as to all except the named defendants. Judgment for plaintiff, and the named defendants appeal. Affirmed.

Elliott & Atkinson, of Sacramento, for appellants.

George L. Popert and H. W. Zagoren, both of Sacramento, for respondent.

FINCH, P. J. The defendants Betz and Mabrey, copartners, have appealed from the judgment herein in favor of plaintiff for the value of 16 elevator doors.

The original complaint, which was filed November 18, 1922, alleged that on the 9th day of November, 1922, the plaintiff was the owner and in possession of the doors and certain appliances, which were of the value of $2,500; that on that day the defendants, "without the consent of plaintiff, wrongfully took such goods and chattels from the possession of plaintiff"; that subsequently and prior to the commencement of the action the plaintiff demanded possession thereof, but that defendants refused to deliver possession thereof, and "still unlawfully withhold and detain said goods and chattels from the possession of plaintiff, to its damage in the sum of $2,500." The prayer was "for the recovery of the possession of said goods and chattels, or for the sum of $2,500, the value thereof, in case the delivery cannot be had, together with $500 damages and costs of suit."

It appears that the plaintiff claimed the immediate delivery of such property, as provided in part 2, title 7, chapter 2, of the Code of Civil Procedure, relating to the claim and delivery of personal property. A deputy sheriff testified that he served the "replevin papers" on the defendants; that he took possession of five of the doors, which were "in the new building being built by the John Breuner Company"; and that thereafter Betz and Mabrey filed a redelivery bond, and the five doors were then delivered to them.

April 11, 1923, the plaintiff filed an amended complaint, which was substantially the same as the original complaint, except that it was therein alleged:

"That the defendants, on or about the 9th day of November, 1922, * * * without the consent of plaintiff, wrongfully took and carried away the said goods and chattels from plaintiff, and converted and disposed of the same to their own use. * * * That plaintiff has spent time and money in the pursuit of said property, and has incurred an expense and has expended $500 in an attempt to recover said personal property."

The answer of Betz and Mabrey was filed July 13, 1923. It is therein denied that plaintiff was at any time the owner or in possession of the property described in the complaint; that the defendants, "without the consent of plaintiff, wrongfully, or otherwise, took such goods and chattels from the possession of plaintiff, and converted them to their own use"; that "plaintiff demanded of these defendants possession of said goods and chattels, but to deliver possession thereof the said defendants, and each of them, have refused"; or that "defendants still unlawfully withhold * * * or detain said goods and chattels." The answer alleges that at all times mentioned in the complaint defendants Betz and Mabrey "were then and there building and erecting a five-story building * * * under a contract with defendant John Breuner Company; that in the course of construction of said building * * * said defendants long prior to the commencement of this action entered into a contract with defendant Norman W. Tatterson, as agent for and representing the Peelle Company, of New York, manufacturers of elevator doors, for the manufacture and erection within said building of eight double Peelle elevator doors; that under the terms of said contract * * * said doors were manufactured by said Peelle Company, and were delivered in said building by said Tatterson, and erected and placed therein in accordance with said agreement, and fully paid for as therein provided; that after the delivery of said doors to these defendants, as above set forth, eleven pieces thereof, constituting five and one-half doors, were forcibly taken from said Breuner building, and it became necessary for these defendants to, and they did, begin an action in replevin to recover said doors, so taken, and said action is still pending in this court; that said eleven doors were, by due and legal process, taken into the custody and control of the sheriff of Sacramento county under a writ duly issued out of this court, in said action, and the said doors were at the commencement of this action in the custody and under the control of said sheriff of the county of Sacramento."

With plaintiff's consent, a nonsuit was granted as to all defendants except Betz and Mabrey. The court found that all the allegations of the complaint are true; that on or about the 18th day of November, 1922, defendants Betz and Mabrey "unlawfully withheld and detained all of said personal property, with the exception of the electrical interlocks, above mentioned, from the possession of this plaintiff"; that prior to the commencement of this action plaintiff demanded the return of such property, but said defendants refused to return the same; that "the said personal property has been installed, as a permanent fixture to real property, and delivery thereof cannot be made by the defendants above named to this plaintiff"; that the reasonable market value of the property on November 18, 1922, was $2,018; that the plaintiff expended $50 in locating said property. Judgment was entered accordingly with interest on the value of the property from November 18, 1922.

Appellants urge five grounds for a reversal of the judgment, as follows: First, that it was error to grant a nonsuit as to Tatterson and the John Breuner Company; second, that the evidence is insufficient to show a demand for the return of the property; third, that eleven of the doors were in the possession of the sheriff at the commencement of the action, and "hence were not subject to recovery by plaintiff in this action"; fourth, "that the evidence does not justify the court's finding as to the value of the doors"; fifth, "that after the commencement of this action the doors were installed in the Breuner building with plaintiff's consent and by its order, and hence plaintiff was estopped by its own conduct from recovering said doors in this action, or from any recovery from defendants Betz & Mabrey."

[1] If it be conceded that plaintiff had a cause of action against all the defendants jointly, it does not follow that all of them were necessary parties. "In the prosecution of actions for causes ex delicto all persons concerned in the commission of the tort may be joined as defendants, or either or any of them may be sued severally." Gosliner v. Briones, 187 Cal. 557, 563, 204 P. 19, 22. Appellants asked for no relief against their co-defendants, and made no objection to the granting of the nonsuit. Plaintiff had the right to dismiss the action as against one or more of the defendants and proceed against the remainder. This it did, in effect, by consenting to the nonsuit.

[2] The plaintiff made no formal demand for the return of the property, but in his discussions with appellants its president asserted plaintiff's ownership and right to possession in such manner as to constitute a demand. Appellants' taking was tortious, and in their answer they denied plaintiff's ownership, and alleged that their possession was lawful, thus showing that a demand would have been clearly useless. Under such circumstances no demand is necessary. 5 Cal. Jur. 169.

[3-5] It is not contended, and under the evidence it could not be maintained, that the plaintiff was not the owner and entitled to the possession of the property. It had purchased the same from Peelle Company, and had paid for it. Plaintiff had consigned the property to Waterhouse-Wilcox Company, Sacramento. Through a mistake on the part of the carrier the property was delivered to a company in Sacramento which is not a party to this action. Plaintiff notified Tatterson that the doors would be delivered to him upon his making payment of the contract price therefor. He demanded delivery without first making such payment. Tatterson finally took the doors wrongfully from the place where they had been delivered through the aforesaid mistake and delivered them to appellants at the Breuner building. At the time of and prior to such delivery appellants knew of plaintiff's claim of ownership of the property. Upon dicovering its mistake in the delivery of the property the carrier succeeded in regaining possession of eleven of the doors. The appellants then brought an action against the carrier alone for the recovery of the eleven doors, and, in that action, the sheriff took the eleven doors into his possession on the 16th of November, 1922, and stored them in the Breuner building, placing John Breuner Company in charge of them as keeper. The carrier made no defense in that action. The president of the plaintiff company testified that the property was "in Mr. Breuner's building, or the Breuner job, at the time we started our replevin proceedings. * * * The doors themselves were in the Breuner warehouse. Now who had possession of them, I don't know, whether they were in the sheriff, in Betz & Mabrey, or anybody else. I know where they were located." Several months later the complaint was so amended as to allege directly that the defendants "converted and disposed of" the property "to their own use." In Henderson v. Hart, 122 Cal. 332, 54 P. 1110, it was held proper to permit an amendment to the complaint in an action of replevin to be made after the close of the evidence, so as to change the action into one of conversion. The court said:

"It was not an abuse of discretion in the court to allow plaintiff to amend her pleading so that it might support a recovery for the conversion of the property when it was shown that she could not have judgment for its possession because defendant had disposed of the same before the action was begun. Riciotto v. Clement, 94 Cal. 105 [29 P. 414]. If it appeared that plaintiff knew, when she brought her action, that defendant no longer had possession of the property, the conclusion might be different; but it was not shown that she had such knowledge."

Since the president of the plaintiff found the property in a building which appellants were constructing, his testimony to the effect that he did not know it was in possession of the sheriff is not unreasonable. The original complaint was substantially in the form of that considered in Faulkner v. First National Bank, 130 Cal. 258, 262, 62 P. 463. At page 267 (62 P. 466) it is said:

"The averments in the complaint of the demand by respondent of the appellant that it deliver to her the property, and appellant's refusal to do so, are sufficient averments of conversion; and the action may therefore be considered in the nature of trover."

See, also, Commercial Credit Co. v. Peak (Cal. Sup.) 231 P. 340; New Liverpool, etc., Co. v. Western, etc., Co., 151 Cal. 479, 91 P. 152; Benzler v. Van Fleet, 28 Cal. App. 389, 152 P. 736. The undersheriff who, in the action of Betz & Mabrey against the aforesaid carrier, placed the eleven doors in the possession of John Breuner Company as keeper, testified that he had never terminated the authority of such keeper or released the property to any one else, yet the doors were installed in the building prior to the trial of the action. When they were taken from the possession of the keeper does not appear. Appellants' third contention is without support.

The president of the plaintiff testified in detail as to the market value of the property. This testimony stands uncontradicted, and it fully supports the finding as to the value of the property.

[6] It remains to be determined whether the doors were installed "with plaintiff's consent" or "by its order." It is to be observed that appellants did not plead the estoppel here claimed, although their answer was filed long after they had acquired knowledge of the facts upon which such claim is based. The evidence, however, does not support the contention that plaintiff so consented or gave such order. The president of plaintiff testified that a meeting of the various parties and their attorneys was held on the 21st of November, 1922, apparently in an effort to compromise the dispute between them; that "at that time the agreement was made which I assumed was the binding one upon which I had sold those goods to Betz & Mabrey. As a result of that assumed sale, I relinquished—I withdrew my objection to having the doors installed, as shown by the letter." November 22d plaintiff wrote Betz and Mabrey as follows:

"I am inclosing copy of our letter of this day to C. E. Hague & Co., from which you will note that I informed Mr. Hague by phone early this morning that he was at liberty as far as we are concerned to proceed with any arrangements he had made to install the materials in question. I also requested Mr. Hague to notify you of this release by phone at our expense, and I presume that he has done so."

The copy of the letter referred to contains the following:

"While in Sacramento yesterday I sold the above-mentioned goods to Betz & Mabrey. We therefore hereby withdraw our recent written notification not to install these goods for anybody until you received our release from such instructions. In other words, this sale has entirely removed our objections, and you are therefore at liberty as far as we are concerned to proceed with the installation under any arrangements you have made with orders for such work."

November 24th appellants wrote plaintiff as follows:

"We are just in receipt of your letter of Nov. 22d, also a copy of letter which you wrote to C. E. Hague & Co. Referring to the second paragraph of your letter to C. E. Hague & Co., you state that you sold the doors to Betz & Mabrey. This matter was thoroughly discussed with you at the time you were in Mr. Devlin's office and we have no recollection of buying the doors from you, in fact we told you at the time that we would be unable to do so until we were released from our present contract and the money we had advanced was returned to us."

It thus appears that appellants knew that the plaintiff's apparent consent was based upon the assumption that it had sold the property to appellants. Appellants' denial of the sale by plaintiff to them left the parties in the same position they were in prior to the attempted compromise. Under such circumstances appellants' contention that plaintiff consented to the installation of the doors and that it estopped by its conduct cannot be upheld.

[7] The court did not err in allowing interest on the value of the property converted and plaintiff's expenditures incurred in pursuit thereof. Civ. Code, § 3336.

The judgment is affirmed.

We concur: PLUMMER, J.; THOMPSON, Justice pro tem.

73 Cal. App. 244

RANEY v. MERRITT et al. (Civ. 5110.)

(District Court of Appeal, First District, Division 1, California. June 17, 1925. Hearing Denied by Supreme Court Aug. 13, 1925.)

1. Public lands ⟸39(8)—Conveyance by town authorities of part of lot previously conveyed gave grantee no additional land.

Under Act Cong. March 1, 1867, providing for grant of land in town of Petaluma to corporate authorities thereof with authority to convey land in actual occupancy of parties, where city trustees conveyed lot to person in actual occupancy of whole thereof on March 1, 1867, subsequent conveyance of 10 feet thereof, which official map erroneously included in street, to one of such occupant's successors in interest gave grantee no additional land, but merely confirmed original deed, and quieted the title as against the city, if it had any effect.

2. Boundaries ⟸46(3)—When line agreed on as true boundary line becomes conclusive stated.

Mere acquiescence in the existence of a fence and the occupancy of land up to it does not amount to an agreement that it is on the accepted boundary line, but, where a dispute exists as to the true line, and the parties are uncertain as to its exact location, and they agree upon it, mark it upon the ground, or build up to it, and acquiesce in the location for a period equal to the statute of limitations, such line becomes in law the true line, regardless of accuracy of agreed location as it may subsequently appear.

3. Boundaries ⟸46(2)—Agreement fixing boundary line theretofore uncertain binds all parties consenting to it.

Agreement fixing boundary line theretofore uncertain binds all parties consenting to it.

4. Boundaries ⟸37(3)—Inference from conduct and long acquiescence supports finding parties acquiesced in certain line as true boundary line.

A finding that adjoining property owners have acquiesced in a certain agreed line as the location of the true boundary line is fully supported in the absence of direct evidence upon the subject, when it may be inferred from their conduct and long acquiescence in such line as the true boundary line.

5. Boundaries ⟸37(3)—Evidence held to show uncertainty as to true boundary line and that parties fixed certain line as true line, in which their successors in interest acquiesced.

Evidence *held* to show error in Stratton map, made pursuant to Act Cong. July 1, 1864, for the town of Petaluma, incorporated by special act of Legislature (St. 1858, p. 140), occasioned uncertainty as to a boundary line of properties, and that predecessors in interest of the parties fixed a certain line, and that their successors in interest at all times acquiesced therein.

6. Adverse possession ⟸90—Taxes assessed against lands is payment on lands as determined by agreed line.

Taxes assessed against lands as to which certain line is agreed as being true boundary line is payment on lands as determined by such agreed line as respects adverse possession.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Suit by Grace M. Raney against John T. Merritt and others. Judgment for defendants, and plaintiff appeals. Affirmed.

F. A. Meyer, Frank J. Burke, and Fred S. Howell, all of Petaluma, for appellant.

Geary & Geary, of Santa Rosa, for respondents.

TYLER, P. J. Action to enjoin defendants from interfering with the use of certain real property alleged by plaintiff to be owned by her. The property in dispute is situated in the city of Petaluma, and forms a part of what is known and designated as block 517. The complaint alleges plaintiff to be the owner of two separate parcels of land located within said block. The first is described as beginning at the southeast corner of said lot 517 at the corner of Oak and Main streets, and running thence northerly along the line of Main street 82½ feet; thence running westerly at right angles to Main street 130 feet; thence southerly at right angles 82½ feet to Oak street; thence at right angles along Oak street in an easterly direction 130 feet to the place of beginning.

The second parcel is described as being a strip of land 10 feet in width and 130 feet in length on Oak street in front of and adjoining that portion of said lot No. 517, according to Stratton's official map of the city of Petaluma extending in an easterly and westerly direction and in a northerly and southerly direction on Main street a distance of 10 feet.

At the outset it may be well to state that the southeast corner of lot No. 517 is the northwest corner of Main and Oak streets, and that the width of Oak street, as laid out and delineated on Stratton's Official Map of the City of Petaluma, is 70 feet, when in truth and fact that street is but 60 feet in width. Plaintiff contended at the trial that her first tract begins at and the point of commencement is at the southeast corner of lot No. 517 and not at the northwest corner of Main and Oak streets (which would be 10 feet farther south) as contended for by defendant, and that she, plaintiff, should have the southerly 82½ feet off of said lot No. 517, and in addition thereto the northerly 10 feet off of Oak street, making a total of 92½ feet on Main street.

Defendants contended that plaintiff was

only entitled to 82½ feet frontage on Main street lying immediately north of and along and adjacent to said Oak street, as said street is upon the ground, for the reason that the point of commencement set out in the deeds in the various chains of title of plaintiff and defendants was intended to and contemplated by reason of their acts and those of their predecessors to commence at the northwest corner of Oak and Main streets (as it is on the ground).

The question which was presented for determination by the trial court, therefore, was whether plaintiff was entitled to 82½ feet or 92½ feet fronting on Main street lying immediately north of Oak street as it now exists. The discrepancy in the official map has given rise to the controversy.

In support of their asserted title defendants claimed that a board fence, located 82½ feet north of the northern boundary line of Oak street, as it exists upon the ground, became by acquiescence an established and agreed line between the parties. They also relied upon adverse possession. The findings of the trial court were in conformity with their claim.

Appellant here contends that nowhere does it appear in the evidence that the parties ever made such an agreement, or that any line was ever established. They also claim that the evidence does not support the finding as to adverse possession.

For a clear understanding of the different conveyances involved it may be well to state the history of land titles in the city of Petaluma. They are set forth in Gervasoni v. City of Petaluma, 189 Cal. 306, 208 P. 120.

In the year 1858 the town of Petaluma was incorporated by a special act of the Legislature, which defined the exterior limits of said town, but did not embrace any details as to its interior lots, blocks, or streets. Stats. 1858, p. 140. In 1864 an act of Congress was adopted (13 Stats. at Large, 343) providing for a survey of the town, which act embodied a method for acquiring title to the lands held by bona fide occupants at the time of the adoption of said act. The survey provided for in the act was made, and a map drafted and adopted known as the "Stratton map." This map contained a detailed description of the lots and width and location of the streets, and was approved by the trustees of the town.

On March 1, 1867 (14 Stat. 418), an act of Congress was passed providing that all the right and title to the land situated within the corporate limits of certain towns, including Petaluma, as defined in the act of the Legislature of the state of California, be granted to the corporate authorities of said towns and their successors in trust for and with authority to convey so much of said lands as was in the bona fide occupancy of parties. In the following year the state Legislature adopted an act authorizing the trustees of the town or city of Petaluma to execute the trust provided for in the act of Congress mentioned by the execution and delivery of deeds to the persons entitled thereto under the Congressional act.

The Stratton map, above referred to, indicates that the portion of Oak street here involved is a street 70 feet in width, when, as before stated, in truth and in fact, it was and is a street of but 60 feet in width.

In conformity with the acts above mentioned the board of trustees of the city of Petaluma conveyed to one Brady, lot No. 517 of said city, describing it by number, and reciting that it fronted 253.4 feet on Main street, and contained 13,880 square feet. Through mesne conveyances one John D. Scott acquired this lot, and on January 17, 1885, he conveyed a portion thereof to B. F. Cox, D. F. Connolly, William Ayers, and Thomas Kyle.

The portion so conveyed was described as being a part of lot No. 517, according to Stratton's official map. The description by metes and bounds recites its beginning to be "at the southeast corner of said lot numbered 517 at the corner of Oak and Main street, running thence northerly along the line of Main street 82½ feet; thence westerly at right angles to Main street 130 feet; thence running southerly at right angles 82½ feet to Oak street; thence at right angles along Oak street in an easterly direction 130 feet to the place of beginning."

Thereafter, on August 22, 1887, Scott (the common grantor and predecessor in interest of both plaintiff and defendants) conveyed to John Merritt (father of defendants and their immediate predecessor in title) all of lot No. 517, saving and excepting from the conveyance the 82½ feet fronting on Main street by 130 feet fronting on Oak street, heretofore conveyed to Cox et al.

On May 2, 1906, the trustees of the city of Petaluma, acting under the authority vested in them under the acts hereinabove mentioned, conveyed to one Albert R. Charles, one of the predecessors in interest of plaintiff, title to the northerly 10 feet fronting on Main street by 130 feet in depth, off of the northerly side of Oak street, as being a bona fide occupier through his grantors on the 1st day of March, 1867. Plaintiff's asserted chain of title therefore to the two claimed parcels of land is the deed from Scott to Cox et al., through which he deraigned title to the first parcel and the deed from the trustees of the city of Petaluma to Albert Charles granting the 10-foot strip.

Defendants, on the other hand, deraign their title by decree of distribution through the deed of Scott to John Merritt by which all of lot 517 was conveyed to him, saving the 82½ feet conveyed by Scott et al.; John Merritt having died, and his estate being succeeded to by defendants under such decree.

[1] It is clearly manifest to us that plaintiff never acquired through her predecessors in interest any additional frontage on Main street by reason of the deed in 1906 executed by the city trustees to Charles. The trustees had already executed a deed to the entire tract to Brady, who was entitled thereto as being in possession of all of lot 517, and no other person than Brady could have procured this deed, as he was the bona fide occupant of the entire lot on March 1, 1867. The action of the trustees, therefore, if it had any effect, was to merely confirm the original deed, and thus, in effect, quiet the title of the successors in interest of Brady as against any claim of the city of Petaluma in and to the northerly 10 feet of Oak street as erroneously depicted on the Stratton map with respect to the width of that street.

In support of the findings respondents claim that, by the error in the Stratton map with respect to the width of Oak street, Scott, while the owner of the balance of the lot, and Cox et al., grantees of Scott, agreed that the northerly line of the lands conveyed by Scott to Cox et al. should commence at a point on the west side of Main street, 82½ feet north of the northerly property line of Oak street, and thereafter Scott and Cox et al., and their respective successors in interest, acquiesced in said line, and built to it, and no further.

There is evidence to show that prior to the execution of the deed from Scott to Cox et al., on January 17, 1885, these grantees were engaged in the express business in the city of Petaluma, and were at the date of the deed just mentioned leasing from Scott the identical property which they subsequently acquired. Upon this property while so leased was situated along the north property line of Oak street for a considerable distance of the 130 feet, marking the north line of the land, a fence, which had been constructed by Scott. Shortly after their purchase Cox et al. built barns and sheds to the line of the old fence and to the line of the property they had leased, which was a line running west 130 feet from a point on the west side of Main street 82½ feet north of the north property line of Oak street. Kyle, one of the grantees, testified that, when the sheds and barns were built to that line, Scott, himself, and his associates, believed it to be the northerly line as conveyed to them, and that they designated it as such.

It also appeared that all parties interested therein acquiesced in and maintained the line so established by Scott and Cox et al., and that during all of the times since 1885 and down to the year 1919, when appellant acquired the property, John Merritt, through whom defendants claim, and his successors in interest enjoyed all of lot 517 without interruption of claim of right therein to a point 82½ feet north of the north property line of Oak street. Other evidence is to the same effect, and we deem it sufficient to support the findings of the trial court.

[2] While the mere acquiescence in the existence of a fence and the occupancy of the land up to it does not amount to an agreement that it is on an accepted boundary line (Huddart v. McGirk, 186 Cal. 386, 199 P. 494; Staniford v. Trombly, 181 Cal. 372, 186 P. 599), still, where, as here, a dispute exists as to the true line, and the parties are uncertain as to its exact location, and they agree upon it, mark it upon the ground, or build up to it, and acquiesce in the location for a period equal to the statute of limitations, such line becomes in law the true line called for by the respective descriptions, and this is so, regardless of the accuracy of the agreed location as it may subsequently appear. Silva v. Azevedo, 178 Cal. 495, 173 P. 929; Board of Trustees v. Miller, 54 Cal. App. 102, 201 P. 952.

[3] The doctrine of an agreed boundary line and its binding effect upon conterminous owners rests fundamentally upon the fact that there is, or is believed by all parties to be, an uncertainty as to the true line. When that uncertainty exists, or is believed by them to exist, they may among themselves by agreement fix the boundary line, and that agreement will bind all the consenting parties. Clapp v. Churchill, 164 Cal. 741, 130 P. 1061.

[4] Whether adjoining property owners believe that an uncertainty as to the location of the boundary line dividing their properties exists at the time they agree upon a location is a question to be proven by direct evidence or deduced from circumstances in evidence (Hill v. Schumacher, 45 Cal. App. 362, 187 P. 437), and a finding that the parties have so acquiesced is fully supported, in the absence of direct evidence upon the subject, when it may be inferred from conduct, and especially, as here, from long acquiescence. Board of Trustees v. Miller, 54 Cal. App. 102, 201 P. 952.

[5] Upon the question, therefore, we conclude that there was an uncertainty occasioned by the error in the Stratton map, and that Scott and Cox et al., predecessors of the parties in interest, had fixed the true line as commencing on the west side of Main street at a point 82½ feet north of the north property line of Oak street, and that their successors in interest had at all times acquiesced in the line so fixed until the claim made by plaintiff.

[6] Equally without merit is the contention that adverse possession to the 10-foot strip was not proven, for the reason that taxes had not been paid thereon by defendants for the necessary period.

In this connection the evidence shows that both parties have paid all taxes assessed upon their holdings as conveyed to them by their respective conveyances. The findings of the trial court as to the agreed boundary

line had the effect of extending and diminishing the limits of the deeds to include and exclude the parcel of land in dispute. Under such circumstances the payment of taxes assessed in this manner is a payment on the land in the possession of the parties. Price v. De Reyes, 161 Cal. 489, 119 P. 893.

In conclusion it may be stated that to us it seems beyond all question that the predecessors of the parties in interest plainly intended and contemplated that the property to which plaintiff has succeeded should commence at the northwest corner of Oak and Main streets as it appeared upon the ground, and that plaintiff never acquired any additional or greater frontage than the deed of his predecessors in interest called for.

Judgment affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

73 Cal. App. 334

PEOPLE v. JACOBS. (Cr. 1178.)

(District Court of Appeal, Second District, Division 2, California. June 23, 1925. Rehearing Denied July 22, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Receiving stolen goods ⟸8(3) — Evidence held to justify jury's inference that accused came into possession of stolen car on night of theft, or soon thereafter.

Evidence *held* to justify jury's inference that accused came into possession of stolen car on night of the theft, or soon thereafter.

2. Receiving stolen goods ⟸8(3)—When possession of stolen articles, together with suspicious circumstances, justifies conviction, stated.

Possession of stolen articles, together with suspicious circumstances, justifies conviction upon charge of receiving stolen property, provided that there is evidence that the property charged to have been feloniously received was stolen by some person other than the individual charged with illicitly receiving it.

3. Receiving stolen goods ⟸8(3) — Evidence held to support finding automobile was stolen by some person other than accused.

Evidence *held* to support finding that automobile received by accused was stolen by some person other than accused.

4. Receiving stolen goods ⟸8(4) — Evidence held to support implied finding that accused received car with knowledge it was stolen.

Evidence *held* to support finding implied in verdict that accused received car with knowledge that it was stolen.

5. Receiving stolen goods ⟸8(3) — Evidence held to warrant inference that accused received stolen car for his own gain, and to prevent owner from repossessing it.

Evidence *held* to warrant inference that accused received stolen car for his own gain, and thus to prevent owner from repossessing it.

6. Criminal law ⟸696(3)—Motion to strike, stating no grounds, and supported only by objection to incomplete preliminary question, properly overruled.

Motion to strike evidence of defendant's pleas of guilty to other offenses *held* properly overruled, where it stated no grounds, and the only objection on the grounds of incompetency, immateriality, and irrelevancy, was made before completion of preliminary question, as the court's remarks, when objection was made that "the question is not finished yet, but you can make it, and I will overrule it," was not as claimed notice that objections would be useless, and the objection did not dispense with statement of grounds in the motion.

7. Criminal law ⟸696(5)—Motion to strike evidence is unavailing, unless addressed to evidence received over objection.

Motion to strike evidence is availing only when addressed to evidence received over an objection, unless there was no opportunity to make the objection.

8. Criminal law ⟸695(4) — Specification of ground of objection to admission of evidence is unnecessary, if evidence is inadmissible for any purpose.

Specification of ground of objection to admission of evidence is unnecessary, if evidence is inadmissible for any purpose.

9. Witnesses ⟸350—Accused having been impeached by admitting plea of guilty, it was proper for prosecuting officer to show name of offense.

Accused having testified on direct examination to plea of guilty, and on cross-examination that crime was a felony, he was impeached, and it was proper for prosecuting officer to go further by showing on cross-examination the name of the felony, especially in view of Code Civ. Proc. § 2051.

10. Witnesses ⟸350—Prosecutor held entitled to show interposition by accused of plea of guilty to charge of grand larceny, and not to different charge testified to by accused.

Prosecution *held* entitled to show on cross-examination that accused's plea of guilty was interposed to charge of grand larceny, and not to charge of receiving stolen property as testified to by accused.

11. Witnesses ⟸350—Reading of information in prior criminal prosecution held permissible to refresh accused's erroneous memory.

Reading, on cross-examination, of information in prior criminal prosecution, *held* permissible to refresh accused's erroneous memory as to crime to which he pleaded guilty, and crime with which he was charged.

12. Criminal law ⟸695(2)—Objection to evidence, stating no grounds, held not good.

It having been proper to use information in a prior prosecution on cross-examination to refresh accused's memory, a general objection to its admission, stating no grounds, was not good.

13. Witnesses ⊂⊃350 — Questions propounded to accused pertaining to former prosecutions held not misconduct, but proper cross-examination.

Questions propounded to accused pertaining to former prosecutions, to refute accused's testimony that charge against him in a former prosecution was that of receiving stolen goods, and not robbery, and that he had pleaded guilty of former charge, and not to charge of grand larceny, *held* not misconduct, but proper cross-examination.

14. Criminal law ⊂⊃1169(11) — Question whether accused knew persons with whom he was jointly charged with having committed crime in prior prosecution held not harmful.

Question whether accused knew two other persons with whom he was jointly charged with having committed crime in prior prosecution *held* not harmful, where fact that he pleaded guilty had already been shown, especially in the absence of a showing that such other persons were disreputable.

15. Criminal law ⊂⊃1144(12) — Not assumed that question on cross-examination did not relate to matter referred to on direct examination.

Where accused for claimed purpose of showing persecution by police testified to various arrests on suspicion, it cannot be assumed that question on cross-examination, whether on the day of one of such arrests he stole an automobile with two other boys, did not relate to the matter out of which the arrest on that day sprang.

16. Criminal law ⊂⊃1036(2) — Question propounded to accused held improper, but, having been withdrawn on objection, not reversible error.

A question propounded to accused on cross-examination, whether he had been in the courts every year since 1917, *held* improper, but, having been withdrawn, on objection, not reversible error, in absence of a request to admonish jury to disregard such question.

17. Criminal law ⊂⊃782(5)—Refusal of instruction as to considering all evidence held not error.

Refusal of instruction that jury's deliberation must be based upon, and they must take into consideration all the evidence admitted, and that they were to determine whether the written or documentary evidence together with the rest of the testimony tended to prove the allegations of the information, *held* not error, as instruction contained nothing but what every person qualified for jury duty knows.

18. Criminal law ⊂⊃829(12)—Essence of requested instruction held covered by instruction given.

Essence of instruction as to considering all the evidence, etc., *held* covered by instruction given.

19. Criminal law ⊂⊃783(1)—Instruction held properly refused as misleading as to question of consideration of plea of guilty, as impeachment of accused.

Requested instruction that jury must not consider accused's plea of guilty to a felony charge in deliberating upon the issue of guilt or innocence *held* properly refused as being misleading, in view of rule that plea of guilty is proper to be considered as an impeachment of accused as a witness.

On Appellant's Petition for Rehearing.

20. Criminal law ⊂⊃562—Not the law that acquittal must result under each of two inconsistent charges merely because evidence, in theory, would equally justify verdict of guilty under either.

It is not the law that where the evidence in a criminal case positively demands a conviction under one or the other of two inconsistent charges, such as a charge of grand larceny and of having received stolen property, an acquittal must result under each merely because the evidence, in theory, would equally justify a verdict of guilt under either.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

Frank Jacobs was convicted of receiving stolen property, and he appeals. Affirmed.

Wm. J. Clark, of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., and H. H. Linney and John W. Maltman, Deputy Attys. Gen., for the People.

WORKS, J. Defendant was tried under an information in two counts. Under the first of these the charge was grand larceny. Under the second the charge was receiving stolen property. The property concerned in both charges was a Ford automobile—a coupé. The evidence at the trial showed without dispute that the car was stolen one evening between 8:30 o'clock and 9:15 o'clock from a place on a public street where it had been parked by the owner. It was also shown without dispute that the vehicle was placed in a certain private garage on the same evening and that it remained there continuously for a period of about 6 weeks, at the end of which time it was removed by police officers. Other facts will be stated as we proceed with a discussion of the various points involved in the cause. Defendant was acquitted on the charge of grand larceny, but was convicted on the charge of receiving stolen property. He appeals from the judgment of conviction and from an order of the trial court denying his motion for a new trial.

[1] One of the contentions of appellant is that the evidence was insufficient to show that he ever received the stolen property. The garage in which the car was found was upon the property of a Mrs. Johnson. This individual testified that appellant came to her residence, which was located on the same property, at about 7:30 o'clock on the evening on which the car was stolen; that he was accompanied by another man who

was unknown to Mrs. Johnson, and whose identity was never ascertained by her; that the two came to the place in a Ford touring car; and that appellant inquired whether she had a garage for rent. Upon being informed that she had, appellant said, according to Mrs. Johnson, that—

"They were looking for one, and they would be back later to let me know if they would take it."

The witness further testified that on the same evening, between 9 and 9:30 o'clock, she heard a car driven into the garage. On the next morning she saw there the Ford coupé, which afterward turned out to be the stolen property. On that same day, Mrs. Johnson further testified, appellant came to her place, and she said also that he thereafter came to the premises about once each week during the time the car was in the garage. On these various occasions she testified she talked with him only about the weather, except that at one time, which she did not identify particularly, he said that there was something wrong with the car and that it needed repairing. She further testified that on these various visits to her place appellant usually came "with some one else," and also:

"What did he do when he came there, if anything? A. Well, he talked to my husband, I think, two or three times; he went in the garage; and the other times he stayed out in the machine [in which she testified he came]. * * *

"Q. What do you mean by saying that he went into the garage? * * * A. He unlocked the door and went in [using a key which was in his possession].

"Q. Unlocked the door and went in. Did he stay any length of time? A. No.

"Q. Other times he would drive in there with the car, and not go to the garage at all, you say? A. Yes."

The garage had been rented by the month. The rent for the first month was handed to a daughter of Mrs. Johnson, at the front door of the family residence, on the night and at the time when the stolen car was driven into the garage. The girl testified that the money was paid to her by a man whom she did not know, and not by appellant. About 2 weeks after the rent for the second month fell due, appellant made one of his visits to the Johnson place, according to the testimony of Mrs. Johnson, and said to her "that he was sorry he was late in paying his rent." He then handed her his check for the amount. Prior to this occasion the stolen car had been located by the police and an officer was lying in wait upon the Johnson premises at the time of the delivery of the check. He then made his appearance and took appellant into custody. The officer testified that he said to appellant, immediately preceding the arrest, "We have got you on the ground at last," and that before anything further was said appellant responded, "That ain't my car." In order to show that no unfavorable presumption is to be indulged against the prosecution for its failure to produce Mrs. Johnson's husband as a witness, it is to be observed that he died before the action came to trial. We think the jury was justified in drawing from the testimony above recited the inference that appellant came into possession of the stolen car on the night of the theft or soon thereafter.

The further point is made by appellant that there is in the record no evidence that he acquired possession of the Ford coupé with knowledge of the fact that it was stolen. It having been established by uncontradicted evidence that the car was stolen, respondent sees evidence of guilty knowledge upon the part of appellant in the evidence above recited as to his possession of the property. It is said that, in the absence of a satisfactory explanation by appellant, his possession of the stolen car was sufficient to support a conviction on the charge of receiving stolen property. The question is evidently one of first impression in this state, for we are referred to no California cases on either side of it, and have found none. There is, however, abundant authority upon the point, and upon related questions, elsewhere. We shall cite many of these cases, but we desire it to be understood that in doing so we are continually having in mind what is termed in the cases the recent possession of stolen property; that is, the possession of it immediately or soon after it was stolen, and not a possession acquired after a considerable length of time following the theft. It has been decided in a few cases that the possession of stolen articles, while warranting an inference of guilt of larceny, will allow no such inference where the charge is that of receiving stolen goods. Among these cases are Sartorious v. State, 24 Miss. 602, and State v. Adams, 133 N. C. 667, 45 S. E. 553, although it is remarked in the opinion in the first of the two that—

"There might be cases where recent possession of stolen goods, united with other circumstances, would warrant the presumption of a felonious reception, and not of a larceny of the goods."

In another case the dogmatic assertion is made that the "recent possession of stolen property is not evidence" of knowledge that it was stolen. People v. Lardner, 296 Ill. 190, 129 N. E. 697. Doubtless, however, it was not intended by the adjudication to announce such an extreme rule, for authorities are cited in support of the statement which decide only that possession alone is not evidence of guilty knowledge of the theft. There are many cases which state this latter rule. Among them are Durant v. People, 13 Mich. 351; People v. Weissenberger, 73 App.

Div. 428, 77 N. Y. S. 71; State v. Richmond, 186 Mo. 71, 84 S. W. 880; State v. Malvarosa, 30 Del. (7 Boyce) 451, 108 A. 95; Grant v. State, 87 Tex. Cr. R. 19, 218 S. W. 1062; State v. Lippman (Mo. Sup.) 222 S. W. 436; Rosen v. United States (C. C. A.) 271 F. 651; Sellers v. U. S. (C. C. A.) 299 F. 258, and Stuart v. State, 97 Tex. Cr. R. 652, 263 S. W. 928. Several of these cases, however, and some others, state as a fixed rule the proposition so grudgingly mentioned in Sartorious v. State, supra; that is, that the possession of stolen property, when attended by other suspicious circumstances, will justify a conviction upon a charge of receiving stolen property. These decisions are Goldstein v. People, 82 N. Y. 231; Jenkins v. State, 62 Wis. 49, 21 N. W. 232; State v. Freedman, 3 Pennewill (Del.) 403, 53 A. 356; State v. Malvarosa, supra; Grant v. State, supra; Rosen v. United States, supra; Sellers v. United States, supra, and Stapleton v. Commonwealth (Va.) 124 S. E. 237. A number of adjudications adhere to the rule contended for by respondent, that, as in the case of charges of larceny, the possession of stolen articles, when not satisfactorily explained by the possessor, is sufficient to justify a conviction under a charge of receiving stolen goods. These are People v. Weldon, 111 N. Y. 569, 19 N. E. 279; State v. Guild, 149 Mo. 370, 50 S. W. 909, 73 Am. St. Rep. 395; State v. Miller, 159 Mo. 113, 60 S. W. 67, and Boyd v. State, 150 Ala. 101, 43 So. 204.

[2] If we take as a guide the cognate rule in this state concerning charges of larceny, we should possibly be justified in adopting as principles of our criminal jurisprudence each of the two rules last stated in the preceding paragraph; that is, that either, first, the possession of stolen property, when attended by other suspicious circumstances; or, second, the possession of such property, when not satisfactorily explained, will support a conviction on a charge of receiving stolen property. If we take the rule in California in cases of larceny as a guide, there is apparently no difference between the first and second principles just stated as applying to charges of receiving stolen property, for it has been determined, in larceny cases, that, where there is no explanation of his possession by a possessor, the possession alone will not justify a conviction, but that there must be other incriminating circumstances. People v. Reed, 58 Cal. App. 7, 207 P. 1025. It is to be noted also that where the possessor attempts to explain, but the explanation is unsatisfactory, that is in itself a suspicious circumstance. Without, however, adopting both the rules stated above as first and second, and assuming, but not deciding, that there is a difference between them, we are satisfied that it is a correct principle that the possession of stolen articles, together with suspicious circumstances, will justify the action of a jury in convicting upon a charge of receiving stolen property. From this rule there is but little dissent, and we are in accord with the reasoning of the opinions which in such great number adhere to it.

In making an application in the present case of the principle which we have just stated, and to which we have expressed our determination to assent, there is a circumstance which requires a special consideration. Running through the decided cases on the subject, there is constant mention of the fact that the rule is not to be applied in a given case, unless there is evidence that the property charged to have been feloniously received was stolen by some person other than the individual charged with illicitly receiving it. This is, of course, a proper limitation upon the rule, for, if the person charged with receiving unlawfully is really the thief, the charge of receiving must fall. The two crimes are inconsistent when sought to be fastened upon the same individual, if the charges arise out of the theft of particular property and the felonious receiving of the same property following that theft. Under such a condition, possession of the stolen property, with attending suspicious circumstances, is evidence of larceny, and not evidence upon the charge of receiving stolen goods. This principle inheres in many of the cases cited above to the various propositions stated, and it is evident that it is a just one.

[3] We are to inquire, then, what evidence there was in the present case to show that the car was not stolen by appellant. He himself accounted for his whereabouts on the evening of the theft in such a manner as to demonstrate, if the jury believed him, that he was not the thief. He, in effect, therefore denied that he was the thief. The alibi thus laid by his testimony was directly and positively supported by the oath of four other witnesses. Appellant also gave testimony which cast grave suspicion on one Shattuck as the thief, if, in fact, it were not sufficient to support a verdict against that individual if given upon a trial had under information charging him with the theft. Moreover, Shattuck, who, according to the testimony, was known to several of the witnesses other than appellant, was seen by none of them, nor by appellant, after the day of appellant's arrest, although seen often before. There was also testimony that Shattuck had been sought as a witness at the trial of appellant, but that he could not be found. Again, it is to be remembered that Mrs. Johnson's daughter testified that some person other than appellant placed the coupé in the garage on the night of the theft. We think this evidence was ample to support a finding by the jury that the coupé was stolen by some person other than appellant. In fact, as already observed, the jury acquitted appellant upon

the charge of larceny which was contained in the information.

[4] It is plain, from the evidence which we have stated during our discussion of the point that it was not shown that appellant ever received the stolen car, that his acquisition of the possession of it was "recent," within the meaning of that term as it is employed in the cases above cited. In determining whether there was evidence that he received the vehicle with knowledge that it had been stolen, it remains only to detail the suspicious "circumstances" disclosed by the evidence and which were proper to be considered by the jury in connection with the fact of appellant's possession. A part of the evidence touching this subject has been stated already. It was testified, in any view of the evidence, that appellant made his tentative arrangement for the use of the garage within 1¾ hours before the theft of the car and that it was placed in the garage within an hour after the theft. The evidence shows, without dispute, that the coupé was a new one, having been bought by its owner but 10 days before the theft, and having been driven but 223 miles. The owner testified that when it was stolen it was in good condition. The police officer testified that he drove the car from the garage on its own power and that there were then in it 4 or 5 gallons of gasoline. Despite these facts, it appeared without contradiction that the car was secreted in the garage, not once being taken outside the doors, for 6 weeks. The evidence showed, also without dispute, that when the police found the vehicle the license plates and the certificate of registration had been removed from their places on it and that the latter was found under one of the seats. The license plates were never found. The police officer testified that when appellant was arrested he denied ownership of the car before being told that the vehicle bore any relation to his arrest. We think this evidence supported the finding implied in the verdict that appellant received the car with knowledge that it was stolen.

[5] It is contended that the evidence was insufficient to show that appellant received the stolen car either for his own gain or to prevent the owner from again possessing it. This point is concluded by the state of the evidence shown in the discussion of the two questions of which we have above made disposition. There being evidence that appellant received the car with knowledge that it was stolen property and that he secreted it for 6 weeks, the jury was justified in drawing the inference that he received it for his own gain—for the purpose of making it or its proceeds his own if he could—and thus, also, for the purpose of preventing the owner from again possessing it.

[6, 7] The defense of appellant in the trial court was conducted—not, however, by the same counsel who represents him on the appeal—with an amazing degree of timidity, indecision, and lack of skill. We make mention of that state of affairs now, as it appears to some extent in connection with a point about to be considered, but we shall have occasion later to dwell on it more at large. As a prelude to the question now to be discussed, we quote a portion of the record, a police officer being on the witness stand, purposely omitting the name of the counsel for defendant:

"Q. Calling your attention to the People's Exhibit No. 1, being the superior court files No. 15102, charging William—

"Counsel for defendant: Just a moment; I object to that as incompetent, irrelevant, and immaterial.

"The Court: Well, I don't know; the question is not finished yet, so I cannot possibly determine. Finish the question.

"Mr. Costello: Q. —charging William Rose, Frank Jacobs, and Harold Kirtner with the offense of robbery, dated February 11, 1920?

"Counsel for defendant: At that point, I want to raise the objection, if your honor please.

"The Court: Raise it; the question is not finished, but you can make it, and I will overrule it. Go ahead and make your objection; the question is not finished. Proceed, Mr. Costello.

"Q. —charging the defendant with the offense of robbery; I will ask you now if you were the arresting officer in that case, or the investigating officer? A. Both.

"Q. * * * —is this the same Frank Jacobs that was charged with that offense at that time? A. Yes, sir.

"Q. And were you present * * * when this defendant was called for trial? A. Yes, sir.

"Q. And were you present when he entered his plea to the charge in this information, charging him with robbery? A. Yes, sir.

"Q. And were you present when he entered a plea of grand larceny [sic] to this charge, an offense included in that robbery— * * * A. Yes, sir.

"Q. And this is the same Frank Jacobs that entered his plea to the offense of grand larceny, on June 14, 1920? A. Yes, sir.

"Mr. Costello: You may cross-examine.

"Counsel for defendant: I move, may your honor please, that the entire testimony of this witness be stricken, and the jury admonished to pay no attention to same.

"The Court: Motion denied."

What is above set forth was the entire testimony of the witness, except for a preliminary question or two asking for his occupation, and excepting a cross-examination which followed the denial of the motion to strike. It is now insisted that the trial court erred in permitting the testimony to stand after the objection which was interposed and after the motion to strike was made. Appellant's present counsel frankly concedes, as of course he must, that the record on which he seeks to present his contention is not ideal. He voluntarily points out that the objection came too soon; that no objections

were made to questions interposed after what were really but preliminary questions had been answered; and that the motion to strike specified no grounds. He seeks to avoid in various ways the dilemma in which he finds himself. He first says that the court treated the objection which was made in such a manner that notice was conveyed that all "objections to such questions would be overruled," and that it would have been useless and therefore it was unnecessary to interpose them. We cannot accede to this view. There was no such notice conveyed by the court's attitude. The only objection which was made was futile for two reasons: It was interposed to an incomplete question and as far as the question had proceeded it was apparently but a preliminary question. In fact, when it was completed it was actually but a preliminary question. In form, also, the only notice conveyed by the court's attitude toward the objection was that it must be overruled because the question was not complete. He said, "The question is not finished yet, so I cannot possibly determine." This was a very proper attitude and the objection should have been overruled for the reason stated, although the court did not overrule it. Appellant insists that, while the motion to strike stated no grounds, the court was sufficiently apprised, by the objection which had been interposed, of the grounds intended. This cannot be so. No objection having been made to any substantive question, the court could not have guessed what point was in the mind of counsel when he objected to a mere preliminary question. In truth, the court could not have imagined, and appellant's counsel probably did not know, what questions of substance would follow the preliminary question which the prosecution was finally allowed to complete. Further, the court was justified in assuming for the time being, when no objections were made to substantive questions, that the objector, having learned the nature of those questions, and making no objection to them, had none to make. Surely there was nothing in the record to apprise the court of the point sought to be presented by the motion to strike the testimony, and such a motion is never good unless it is addressed to evidence which has gone in under objection, unless opportunity to make the objection is absent. People v. Bradley, 23 Cal. App. 44, 136 P. 955. The point which is now pressed is without merit.

[8] The district attorney offered in evidence the information found in the files on the superior court in the action mentioned above, No. 15102, which charged appellant, together with two others, with the crime of robbery. To this offer an objection was made thus:

"I object to its being introduced in evidence in respect to this case."

The objection was overruled and the information was received in evidence. It is contended that the ruling was error. It will be observed that no ground was specified in the objection, but none was necessary if the evidence was inadmissible for any purpose. In one case the record showed only, after stating a question which was put to a witness, that "counsel here objected to the question." The Supreme Court said:

"The defendants claim that the evidence was not admissible for any purpose, and that a statement of the grounds upon which it was objected to would have been superfluous and, was not therefore required. This view is based upon what appears to us to be the proper rule in such cases, and we see no good result to be accomplished by holding parties to a more strict and rigid practice in these matters." Nightingale v. Scannell, 18 Cal. 315.

In a later adjudication an order granting a motion for a nonsuit was upheld upon a ground not mentioned in the motion; this upon the theory that the defect in plaintiff's proof was one which could not have been cured and that therefore it was not necessary to give him the opportunity to supplement his evidence through the making of a specific objection notifying him of the nature of the defect. Daley v. Russ, 86 Cal. 114, 24 P. 867. It is to be observed that the opinion in the case last cited did not proceed upon the theory that the order involved was one granting and not one denying a motion for nonsuit. The case was decided solely upon the question arising from the form of the motion. We make specific mention of the two cases noted for the reason that apparently in all adjudications later than Daley v. Russ which cite Nightingale v. Scannell the general objection of immateriality, irrelevancy, and incompetency was made. The latest of these cases appears to be Scott v. Times-Mirror Co., 181 Cal. 345, 184 P. 672, 12 A. L. R. 1007. Under all the decisions, in the matter now under discussion, there seems to be no difference between "I object to the question," and "I object to the question on the ground that it is immaterial, irrelevant, and incompetent." The entire reasoning of Nightingale v. Scannell supports that view, and the continual citation of the opinion in that case in the later adjudications would seem to carry the doctrine to the present moment.

It becomes necessary then to determine whether the information in cause numbered 15102 was admissible for any purpose. The information was filed when appellant was a minor, and was therefore subject to the provisions of the Juvenile Court Act. Replying to questions propounded to him by his counsel on his direct examination, appellant testified that in the action in which the information was filed he was charged with receiving stolen property; that he was not found guilty, but that "the attorneys fixed

it" and he pleaded guilty; and that he was sentenced to 11 months' imprisonment at the reform school at Ione, he being that near the age of 21. On cross-examination appellant testified that he had been convicted of a felony, referring to his plea of guilty just mentioned, and that the felony was receiving stolen property; that he was not charged with robbery; and that he did not plead guilty of grand larceny as a lesser offense included within the charge of robbery. It was at this juncture that the information was offered, showing that the charge against appellant was robbery.

[9-12] When appellant testified on his direct examination that he had pleaded guilty to a charge of receiving stolen property, and on his cross-examination that the crime to which he had so pleaded was a felony, he stood impeached as a witness, for under the law concerning impeachment the showing of a plea of guilty is beyond doubt equivalent to proof of a conviction. This impeachment having been fixed partially on the direct examination—and the district attorney might have ascertained the whole situation on cross-examination if it had not been brought out on the direct (Code Civ. Proc. § 2051; People v. Chin Mook Sow, 51 Cal. 597; People v. Arlington, 123 Cal. 356, 55 P. 1003)—it was proper for the prosecuting officer to go further. He was entitled to show on the cross-examination the name of the felony of which appellant had been convicted (People v. Fouts, 61 Cal. App. 242, 214 P. 657). Appellant having testified that the conviction was upon a charge of receiving stolen property, it seems plain that on the cross-examination the prosecutor was entitled to show that the conviction—appellant's plea of guilty—was of the crime of grand larceny. The testimony of appellant was not only that he had pleaded guilty of the crime of receiving stolen goods, but was also to the effect that it was with the commission of that crime that he had been charged. It seems to us that, for the purpose of refreshing appellant's recollection, the prosecutor very properly read to him the information in an endeavor to draw from him the fact that he had pleaded guilty of the crime of grand larceny, a crime lesser than and included within the charge made by the information, a charge of robbery. It having been proper to use the information for that purpose—and that was really the manner in which it was "offered"—the very general objection interposed by appellant's counsel at the trial was not good.

[13-16] A reversal is contended for upon the ground of the alleged misconduct of the district attorney during the progress of the trial. In considering the point, it becomes necessary again to refer to the manner in which appellant's defense was mismanaged, as an introduction to the matters concerning which the charge of misconduct is made. The plea of guilty which had carried appellant to Ione for a detention of 11 months' duration was entered in June, 1920, a fact which, as we have observed, was brought out by his counsel on direct examination. This circumstance was not as bad as some of the other items in the mismanagement of the defense, as it might perhaps be justified upon the theory that the same showing would have been made by the prosecution on the cross-examination in any event, and that no harm could therefore come from it. However, in addition to this item, appellant's counsel at the trial brought out from him on direct examination these facts: On July 5, 1917, appellant was arrested on a charge of "suspicion of grand larceny" and was later "released." On September 19, 1917, he was arrested on a charge of grand larceny, with the same result. August 8, 1919, he was arrested again on a charge of grand larceny, but was "turned loose" when his mother produced a bill of sale for the automobile which he was charged with stealing. On February 3, 1920, he was arrested "on suspicion of robbery," but was again "turned loose." On February 26, 1920, he was again arrested "under suspicion of robbery," and was again released. On November 2, the year apparently having been 1920, he was arrested on a charge of robbery, and was again "turned loose." Appellant says in his brief on this appeal that these facts were drawn out for the purpose of convincing the jury that, consistently and continually, he had been persecuted by the police, and that the present action was but a continuation of the oppressive treatment to which he had been subjected. That the effect on the jury was quite the contrary may readily be imagined. On the cross-examination of appellant the district attorney asked him the following questions, which we number for convenience:

(1) "The case being 15102. * * * Shelby Jacobs, Frank Jacobs, Domenick Antone, C. Shipley, and E. L. Lapway were sworn and testified on behalf of the defendant, do you remember that?"

(2) "Now, at the time that those proceedings in the superior court, you were charged with the offense of robbery, and pleaded guilty to grand larceny, along with another young man by the name of Rose and another young fellow by the name of Klackner, isn't that true?"

(3) "Well, you were in on the charge of robbery, with these two defendants?"

(4) "At the time that you pleaded guilty in the superior court, weren't you charged with the offense of robbery, and through Mr. Dominguez you accepted a plea of grand larceny, and the offense, including that, of robbery [sic]?"

(5) "Did you go, in company with two other boys, and steal an automobile on July 5, 1917, which was standing in front of the Los Angeles high school, and take it to Venice and abandon it?"

(6) "Now, since July, 1917, you have been in the courts every year since 1917, haven't you?"

(7) [After reading the information in cause No. 15102] "I am just asking you the simple question, were you not charged with robbery with those two other boys, and that you afterwards pleaded guilty to grand larceny, and went to Ione?"

(8) "You did know those two boys?"

(9) "And you were charged in this information with robbery of the man that is alleged in there."

It is contended that the district attorney was guilty of misconduct in propounding these questions. The claim is met, as to questions numbered 1, 2, 3, 4, 7, 8, and 9, by what we have said in disposing of the contention that the trial court erred in permitting the district attorney, in the presence of the jury, to read to appellant the information in cause No. 15102, with the possible exception of question 8. All the interrogations mentioned, if we except No. 8, were surely parts of a proper cross-examination. The putting of so many queries along the same line was justified by the fact that appellant persisted to the end in asserting in his answers that the charge against him in the action mentioned was receiving stolen goods and not robbery, and that he had pleaded guilty to the former charge and not to a charge of grand larceny. If we concede that question 8 was not proper cross-examination, it at once appears that the question was not harmful. It having transpired that appellant had pleaded guilty to some charge under the information making complaint jointly against him and the two others mentioned in the pleading, we cannot perceive that he could have been contaminated, or his defense in this action injured, by the mere question whether he knew the others. This is especially true for the reason that there is nothing in the record, aside from the fact that they were charged with crime jointly with him, to show that they were disreputable characters. Question 5 doubtless related to one of the charges against appellant, concerning which he had testified on his direct examination. At any rate it touched upon an alleged occurrence on a date upon which appellant testified that he had been arrested upon a charge of "suspicion of grand larceny," and we cannot assume that the question was unconnected with the matter out of which sprang the arrest. Question 6 should not have been asked, but, upon objection being made, it was immediately withdrawn by the district attorney. Defendant's counsel did not, however, ask that the jury be admonished to disregard the fact that the question had been propounded. If he had made the request, the injurious effect of the question could have been removed by the admonition. As bearing generally upon the charge that the district attorney was guilty of misconduct in asking the nine questions, it is to be observed that defendant's counsel sat supinely by and made no objection whatever to any of them except question 6. Not only so, but he asked no admonition concerning any of them. Under all the circumstances incident to the claim of misconduct, we are convinced that it cannot be upheld.

[17, 18] The trial judge refused to instruct the jury:

"That your deliberation must be based upon, and you must take into consideration in arriving at a verdict, all the evidence submitted to you by the prosecution and by the defendant, including documentary evidence that has been introduced as such, and you are to determine whether or not the written or documentary evidence, together with the rest of the testimony tends to prove the allegations of the information."

It is contended that the refusal was error. The giving of the instruction would have done no harm, but we think it was unnecessary. It contained nothing but what every person qualified for jury duty knows. Moreover, the judge told the jury, in an instruction which he gave, that in discharging its duty the sole guide was to be "the evidence introduced in this trial and the law as given you by the court." This language covered the essence of the instruction which was rejected.

[19] The trial judge refused to give the following instruction:

"* * * There has been some evidence introduced in the trial of this cause tending to show that the defendant has been arrested on numerous occasions on suspicion of having committed various offenses, and on one occasion that he pleaded guilty as a juvenile to a felony charge. In this connection you are instructed that in your deliberations on the guilt or innocence of the charges for which he is now on trial, you are to totally disregard such testimony and to confine yourself to just such evidence as has been introduced on behalf of the people and the defendant relative to the crime alleged in the information filed against him."

This proposed instruction was properly refused for the reason that it is misleading in part, if it does not actually contain a misstatement of the law. It was sought by the proposed instruction to have the court tell the jury that its members were not to consider appellant's plea of guilty to the felony charge in deliberating upon the issue of his guilt or innocence. It is practically certain that this language would have been understood by the jury to mean that the plea of guilty was not to be considered for any purpose. In this respect then it was misleading. As to the possibility that the proposed instruction contained an erroneous statement of the law, this is to be said: The plea of guilty was proper to be considered as an impeachment of appellant as a witness. Was not this matter of his impeachment a factor in the determination of the ultimate question as to whether he was guilty or in-

nocent? At any rate, the instruction was properly refused on the ground that it was misleading in the respect mentioned.

Judgment and order affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

On Appellant's Petition for Rehearing.

WORKS, J. Appellant petitions for a rehearing of this cause. The principal ground upon which the request is based is this: It is said that the evidence which we have recited as supporting the verdict of guilty on the second count would as well have sustained a conviction on the first count, and that therefore there could properly have been a conviction on neither count. This sounds startling, but it is indubitably the ground which is taken in the petition. Not only so, but authorities are cited which it is insisted uphold the contention. In order that there may be no misapprehension as to the exact point made by appellant, we append two sentences from the petition, occurring immediately preceding the citation of authority, with his italics:

"The true rule is that, where circumstantial evidence is relied upon for a conviction *of any crime*, the evidence must, not only be consistent with the guilt of the defendant *of that specific offense*, but absolutely inconsistent with any other rational hypothesis. Where the evidence is equally consistent with the defendant's having committed either one of two crimes the proof does not measure up to the standard which the law has fixed."

In support of his contention, appellant first cites People v. Fagan, 98 Cal. 230, 33 P. 60. That case in no way sustains his argument. The defendant there was charged with grand larceny alone and the court held that the evidence was insufficient to support the verdict of guilty which was rendered against him. In connection with the determination of that point, the only point discussed by the court, it was remarked that perhaps the evidence would have sustained a charge of receiving stolen goods. The only other California cases which are cited are People v. Dick, 32 Cal. 213; People v. Ward, 105 Cal. 652, 39 P. 33; People v. Smith, 106 Cal. 73, 39 P. 40; and People v. Eagan, 116 Cal. 287, 48 P. 120. We are unable to perceive that any of these decisions supports the contention which appellant makes. Leaving now the decisions in this state, we shall refer to but one authority relied upon, as an examination of its text will enable us to ascertain the true rule upon the question now under scrutiny. Appellant quotes a part of the text under rule 4, in chapter 6, of Wills on Circumstantial Evidence. The rule itself is thus stated, italics ours:

"In order to justify the inference of guilt, the inculpatory facts must be incompatible with the *innocence* of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt."

In a portion of the text set forth under the statement of the rule, and within a quotation therefrom upon which appellant relies, occurs the following, italics again ours:

"It is not enough * * * that a particular hypothesis will explain all the phenomena. Nothing must be inferred merely because, if true, it would account for the facts; and, if the circumstances are equally capable of solution upon any other reasonable hypothesis, it is manifest that their true moral cause is not exclusively ascertained, but remains in uncertainty, and they must therefore be discarded as conclusive presumptions of guilt. Every other reasonable supposition by which the facts may be explained consistently with the hypothesis of *innocence* must therefore be vigorously examined and successively eliminated; and only when no other supposition will reasonably account for all the conditions of the case can the conclusion of guilt be legitimately adopted."

We have italicized the word "innocence" in these two quotations for the purpose of laying a foundation upon which to expose the difference between appellant's position and the rule so succinctly stated and illustrated by Justice Wills. Before we proceed thus to lay bare the fallacy in appellant's argument, let us state his attitude in the extreme to which it is logically to be carried. Appellant says this: If an individual is charged with two inconsistent crimes and the evidence at his trial is undisputed, and would demand a verdict of guilty of either offense if he were on trial for the commission of either alone, he could not, upon a trial under the dual charge, be convicted of either, because of the rational hypothesis that he may be guilty of the other; that is, although he is a manifest lawbreaker, the jury may not make choice as to his guilt—that is, again, although the mystery as to which crime he has actually committed is not susceptible of positive and absolute solution under the evidence he must go scot free. These sentences, placed beside the language of the text-book, will indicate the difference between the argument of appellant and the rule of Justice Wills. The text-writer deals with the hypothesis of innocence of a particular crime, as opposed to the hypothesis of guilt in the matter of the same crime. Appellant deals with the hypothesis of guilt, upon a charge of the commission of one crime, as opposed to a like hypothesis, upon a charge of the commission of a second and different crime. Although manifestly guilty of a crime, under evidence which would without cavil, and equally, support a verdict of guilt upon each of two charges like those here made, appellant contends that a verdict of innocence under each charge is the only possible result. This result seems not to be possible, and it is certainly not directly determined to be possible by any authority presented to us. Nor do we think appellant has brought himself within the principle of any authority cited by

him. We have ourselves not located authority bearing specifically upon the question.

[20] In what we have said in the preceding paragraph, we have not forgotten that the jury in a criminal case may not convict, unless its members be convinced beyond a reasonable doubt that the defendant is guilty of the specific offense charged. The extreme of appellant's position, however, as above stated, allows no reasonable doubt to the jury when considering each charge which is made, entirely apart from the other. When charge 1 is viewed alone, the evidence positively demands a conviction. When charge 2 is viewed alone, the same result is unavoidable. Does this aspect of the question satisfy the law as to reasonable doubt, or does it not? We believe it does. It is difficult to perceive, where the evidence in a criminal case positively demands a conviction under one or the other of two inconsistent charges, that an acquittal must result under each merely because the evidence, in theory, would equally justify a verdict of guilt under either. This would appear to be a perversion of the law as to reasonable doubt.

If it be conceded for the sake of argument that the authorities cited by appellant, as bearing upon the question just discussed, are in point and do support the theory advanced by him, it would seem that their application must be limited to cases in which the evidence would equally support a conviction on either of the two charges made. In fact, the entire argument of the question by appellant seems to proceed upon that theory. Here, however, the jury was justified, so far as we may ascertain from the record, in taking the view that the evidence was not of equal weight as applied to the two charges. Appellant gave testimony which, if believed, showed that he did not actually participate in driving the car away from the place at which it was parked on the street. In this alibi he was directly supported by the testimony of four other witnesses. The jury may well have credited this apparently formidable array of evidence. If the trial body did accord credit to the testimony laying the alibi, there was left on the charge of larceny only the question whether appellant aided and abetted the actual commission of the theft and was thereby a principal. It is upon a comparison of this possibility with the possibility of guilt upon the charge of receiving stolen goods that the jury might justly have resolved the evidence toward a conviction upon the latter charge. If appellant and a confederate—he who actually drove the car away from its parking place in the street—were together guilty of the theft, the jury might reasonably have inferred that both would have shown a solicitude as to the safety of the car while it was stored in the garage. No such anxiety was shown, however, by any other person than appellant, and the attention he paid to the vehicle during the 6 weeks of its occupancy of the garage was according to some of the testimony, quite marked. It is true that some of the evidence was to the effect that another person sometimes came to Mrs. Johnson's place with him, but it was not shown who this person was, nor, in fact, whether it was always the same person, nor that he paid any attention to the car when he came. In truth, there was nothing in the record to indicate that the person who upon each occasion accompanied appellant on his trips to the place was more than a casual and volunteer visitor. There was some testimony that one Shattuck was the person who stole the car, but there was no evidence that he ever appeared at the Johnson place after the car was stored there, or that he displayed the least solicitude concerning its safety. The jury might justly have reasoned that he would have been anxious as to the car, along with appellant, if they were both guilty of the theft. The jury might justly therefore have concluded that appellant was not an aider and abetter; that he was guilty of receiving stolen goods; and that he was not guilty of grand larceny. See People v. Crane, 34 Cal. App. 599, 168 P. 377.

In his petition for rehearing, appellant persistently rings the changes upon the fact that, in reciting in our original opinion the evidence upholding the verdict of guilt upon the charge of receiving stolen property, we referred to testimony that appellant arranged for the use of the Johnson garage before the car was stolen. This inadvertence, if we admit without deciding that it was one, does not affect the result arrived at in the opinion, nor does it affect anything we have said in the present opinion upon the petition for rehearing.

Other points are made by petitioner, but they do not require a specific consideration.

Rehearing denied.

We concur: FINLAYSON, P. J.; CRAIG, J.

73 Cal. App. 285

STATE COMPENSATION INS. FUND et al. v. SCAMELL et al. (Civ. 5120.)

(District Court of Appeal, First District, Division 1, California. June 22, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Municipal corporations ⊜705(10)—Constant lookout for automobiles behind unnecessary.

One using a street traveled by automobiles, in absence of warning, is not required to constantly keep sharp lookout behind for approaching machines.

2. Municipal corporations ⊜706(7)—Street sweeper not contributorily negligent as matter of law in failing to keep lookout for automobiles.

Street sweeper, engaged in his duties, and struck without having heard any warning of approach of automobile, *held* not contributorily negligent as matter of law in failing to keep constant lookout for approaching cars.

3. Municipal corporations ⊜706(7)—Care required of street sweeper question of fact.

Due care required of a street sweeper, engaged in performance of his duties, cannot be determined by rules applicable to pedestrians generally, but is a question of fact to be determined from all facts and circumstances surrounding the case.

4. Statutes ⊜121(1)—Motor Vehicle Act, creating liability on parent signing child's application for drivers' license, not unconstitutional.

Motor Vehicle Act, § 24, imposing liability upon a parent who has signed application of child for automobile operators' license, for injuries caused by that child, *held* not unconstitutional.

Appeal from Superior Court, Sonoma County; Ross Campbell, Judge.

Action by the State Compensation Insurance Fund and another against J. W. Scamell and another. Judgment for plaintiffs, and defendants appeal. Affirmed.

W. F. Cowan, of Santa Rosa, Leo A. Sullivan, of Oakland (A. W. Hollingsworth, of Santa Rosa, of counsel), for appellants.

F. J. Creede, of San Francisco, for respondent State Compensation Ins. Fund.

R. M. Barrett and C. W. Anderson, both of Santa Rosa, for respondent McNulty.

TYLER, P. J. Action to recover the sum of $10,000 as damages for personal injuries alleged to have been suffered by plaintiff on account of having been run down by an automobile driven by the defendant William Wilson Scamell, a minor son of J. W. Scamell. Plaintiff McNulty was employed as a street sweeper by the city of Santa Rosa at the time of the accident in question, and the state compensation insurance fund, having paid compensation as the insurance carrier of the city, it is here joined as plaintiff.

Defendant J. W. Scamell was made a party defendant by reason of a statutory liability incurred by signing the application of his minor son, William Wilson Scamell, for an operator's license, under the terms of the Motor Vehicle Act (St. 1919, p. 223).

The complaint alleged negligence on the part of the defendant William Wilson Scamell as the proximate cause of the injury. Defendants, answering, denied generally the allegations of the complaint, and in addition set up the affirmative defense of contributory negligence. The cause was first tried before a jury, and resulted in a disagreement. Thereafter it again came on for trial before the court sitting without a jury, and by stipulation it was submitted upon the testimony had upon the first trial, together with certain additional testimony. The court entered findings and judgment in favor of plaintiffs, awarding damages in the sum of $2,000, from which judgment defendants have appealed.

They contend that the findings are not supported by the evidence, and that the judgment is not supported by the findings, and in connection with the latter claim the constitutionality of section 24 of the Motor Vehicle Act, imposing a liability upon a parent for the tortious act of his minor child, is attacked.

From the evidence it appears that on July 29, 1921, at about the hour of 11:30 p. m., plaintiff McNulty, while performing duties growing out of and incidental to his employment as a street sweeper, was walking on Fourth street in the city of Petaluma in an easterly direction, shoving a cart used in connection with his work in front of him. Fourth street runs in an easterly and westerly direction. The portion of the street where the accident occurred is approximately 48 feet between the curbs. An electric car line follows the center of the street, and is of standard gauge; the rails being 4⅞ feet apart. The distance, therefore, from the curb line to the nearest rail on each side of the track is about 22 feet. The street is lighted by street lamps suspended in pairs from the trolley poles on either side of the street. In the block where the accident occurred were four poles on each side of the thoroughfare, from each of which was suspended what was described by a witness to be two 100 candle power electric lights. On the evening in question they were lit, and illuminated the street to such an extent that objects were visible for a considerable distance.

At the time and place mentioned defendant William Wilson Scamell was operating and driving an automobile, the property of defendant J. W. Scamell, along the line of Fourth street in an easterly direction and on the southerly side of the street. Accompanying him was one Stewart, a boy friend. Just prior to the accident they had picked up two

strange girls, one of whom occupied the front seat with young Scamell, the other the rear one with Stewart. The party then proceeded up Fourth street at a speed variously estimated at from 15 to 20 miles an hour. On approaching the intersection of Davis with Fourth street, Scamell, according to his testimony, blew his horn, although he saw no one in the path of the machine. Another car was approaching on the northerly side of Fourth street some 30 or 40 feet distant, which Scamell testified he did not see. At this time McNulty was performing his duties in company with one Seegelken. They had commenced work at the westerly end of Fourth street, and Seegelken was sweeping north of the car tracks while McNulty was sweeping south. As McNulty worked he kept his street sweeper's cart about 6½ feet from the gutter, following a painted line which ran parallel to the curb, marking a space within which automobiles might park. At this moment he was struck from the rear by defendant's automobile and rendered unconscious. Just before the impact he had pushed his cart right into the gutter. The injuries which plaintiff suffered consisted of the crushing of his left hand, the tearing of the flesh of his left arm, the throwing of his left knee out of joint, and the cutting of the left ear, which was partially torn from his head. He also suffered severe abrasions of the scalp, the bruising of both legs, and injuries to his neck, spine, shoulder, and arms. Some of the injuries are permanent in their nature. Prior to being run down McNulty had heard no sound from a horn, nor had he seen anything that might indicate to him that a car was approaching. After striking plaintiff, Scamell, so he testified, thought he had run over a tin can. He "stepped on the gas," and drove down Washington street one block, and the two girls left the car. He was followed by a witness to the accident, and, when attempting to turn his automobile around on the street last mentioned, was arrested and placed in custody. At the jail the statements of Scamell and his companion were taken by the district attorney, and defendant Scamell admitted that he knew he had hit something, but got all excited, and "stepped on the gas."

The driver of the car who had been approaching defendant's machine just prior to the accident observed McNulty at work on the south side of the car track at a distance of some 200 feet away. As he proceeded onward his attention was attracted to the collision by the sound of a crash, whereupon he looked around and saw the Scamell car 25 or 30 feet away, and he also saw McNulty's body being hurled through the air toward the curb, and the cart used by him in connection with his work being thrown toward the car tracks.

Another witness testified that he had heard the crash while he was some 400 feet away and around a corner.

The trial court found that the collision and the resulting injuries to plaintiff was caused solely and entirely by reason of the carelessness, want of care, and lack of due caution on the part of defendant William Wilson Scamell. It further found that the accident was not caused through any negligence or fault on the part of the plaintiff McNulty.

In support of their contention that these findings are not supported by the evidence, the appellants claim the evidence shows as a matter of law that the contributory negligence of the plaintiff was the proximate cause of the injury.

Respondents on the other hand claim that the evidence shows that defendant did not sound his horn or in any manner indicate his presence as he approached McNulty; that he was driving far over on the right-hand side of the street; and that the obvious reason why he did not see plaintiff in the glare of his headlights and by the lights of the street immediately overhead was that he was not looking in the direction in which he was traveling, and that there was a clear space to his left between himself and the center line of the street within which the Scamell car could have passed in safety.

[1, 2] At the trial plaintiff testified that at times during the course of his employment he looked for the approach of automobiles, but that he could not do so on all occasions and properly perform his duties, and that he had not done so at the time he received his injuries. Appellant claims that this omission on plaintiff's part constituted contributory negligence as a matter of law, which prevents a recovery. Plaintiff testified, however, that he had heard no horn sounded or other warning given of the approach of the car, and at the time he was struck he was bending over, putting a pile of dirt in a sack. It also appeared that plaintiff was working near the curb of the street and adjacent to the space reserved to the parking of cars, and that there was ample room for defendant's car to pass without colliding with plaintiff had he been exercising the care required of him. One using a street traveled by automobile, in the absence of warning, is not required to constantly keep a sharp lookout from behind to see whether a machine is approaching (Sheldon v. James, 175 Cal. 474, 166 P. 8, 2 A. L. R. 1493; Devecchio v. Ricketts [Cal. App.] 266 P. 11; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. [N. S.] 976, Ann. Cas. 1916E, 656, 696), and his failure so to do does not constitute negligence as a matter of law (3 Cal. Jur. 884; Raymond v. Hill, 168 Cal. 473, 143 P. 743; Berry on Automobiles [3d Ed.] § 297).

Much less so is a laborer whose duties require him to be in the street in the performance of his occupation. Pedestrians are not continuously in the street, and their attention is devoted to a safe passage, while the attention of a street laborer must be to a

considerable extent devoted to his task. There can be and there is no duty imposed on a workman to be constantly on the lookout for motor vehicles; on the contrary, it is the duty of drivers of vehicles to observe the street laborers and to avoid contact with them. It is not negligence as a matter of law for a workman to keep his mind on his work or to fail to look and listen for approaching vehicles. He may properly assume that the automobilist will not be guilty of negligence in running him down without warning (King v. Green, 7 Cal. App. 473, 94 P. 777), and especially is this true where he remains within a space established for the parking of cars (Medlin v. Spazier, 23 Cal. App. 242, 137 P. 1078).

One so employed may also assume that a driver will give a signal or warning so that an accident may be avoided. Regan v. Los Angeles Ice Storage Co., 46 Cal. App. 513, 189 P. 474.

A man who is engaged in work upon the streets cannot, if he performs his duty, spend a large part, if not all, of his time looking for the approach of vehicles. In most streets, if he did so, he would accomplish little or nothing.

[3] We do not wish to be understood as holding that one so engaged is not bound to use ordinary care, but his rights cannot be determined by the same rules applicable to pedestrians generally. His care or want of care is a fact to be determined from a different standpoint. Clark v. Bennett, 123 Cal. 275, 55 P. 908; King v. Green, 7 Cal. App. 473, 94 P. 777.

The question of negligence under such circumstances is one for the jury or trial court. Berry on Automobiles (3d Ed.) 465; Blackwell v. Renwick, 21 Cal. App. 131, 131 P. 94. In King v. Green, just cited, it appeared that the plaintiff was engaged in oiling street car tracks; that he was facing in the direction from which a car or vehicle obeying the law of the road would approach; that he was walking backward while at work; that he heard no warning; that defendant's automobile approached from behind and injured him, and it was held that the jury was justified in finding for the plaintiff.

So, also, in Cecola v. Cigar Co., 253 Pa. 639, 98 A. 775, the evidence showed that plaintiff was struck by defendant's automobile while he was engaged in picking up a paving brick. There was also evidence to show that the driver of the automobile had given no warning of his approach, and it was there held that the question of plaintiff's negligence was one for the jury, and a judgment in plaintiff's favor was affirmed.

Again, in Latham v. Harvey, 203 Mo. App. 363, 218 S. W. 401, it appeared in evidence that plaintiff, a street sweeper, was on the street performing his duties with his back turned to the west and in full view of the driver of an approaching automobile coming from that direction, but defendant, nevertheless, ran the laborer down, and injured him, and it was held that the case was a proper one to be submitted to the jury. See, also, Burger v. Taxicab Motor Co., 66 Wash. 676, 120 P. 519; Cloonan v. Brooklyn Heights Ry. Co., 87 Misc. Rep. 177, 149 N. Y. S. 481; Berry on Automobiles (3d Ed.) 468.

The mere fact, therefore, that plaintiff did not look behind him for the approach of automobiles at the moment he was struck, but was engaged in his employment, does not constitute contributory negligence as a matter of law, but the question as to whether he has exercised the care enjoined upon him is a question of fact to be determined from all the facts and circumstances surrounding the accident.

As above indicated, it here appears that plaintiff, at the time of the injury complained of, was where he had a legal right to be. He was attending to his work, and was under no legal compulsion to keep constantly looking behind to ascertain if he was likely to be run down. No warning or signal was given, or at least he heard none, nor did certain other witnesses, of the approach of the car. The testimony also shows that he was working near the curb adjacent to the space reserved for the parking of cars, and there was more than ample room for the driver to have passed him without danger of collision. These were facts for the trial court to consider in determining the question of negligence, and its finding cannot here be disturbed.

[4] Appellants' attack upon the constitutionality of that portion of the Motor Vehicle Act creating liability upon a parent for the reason that it is not covered by the title of the act is disposed of contrary to appellants' contention in Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42.

For the reasons given the judgment is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

73 Cal. App. 459

RUDY et al. v. SLOTWINSKY. (Civ. 5114.)

(District Court of Appeal, First District, Division 1, California. June 30, 1925. Hearing Denied by Supreme Court Aug. 27, 1925.)

1. Judgment ⊂⊃444—Judgment, obtained by false allegations, not set aside.

Equity will not relieve against a judgment obtained by false allegations.

2. Pleading ⊂⊃221 — Notice of right to plead over, after demurrer overruled, held sufficient.

Service of notice of overruling a demurrer and granting leave to answer, on one whose office adjoined that of plaintiff's attorneys and who, though not authorized to accept service, had done so many times, *held* sufficient to satisfy Code Civ. Proc. § 1011.

3. Judgment ⊂⊃443(2)—Remarks of counsel, that action would be dropped, held not to constitute fraud.

Statement by counsel to opposing counsel, indicating that case would be abandoned, *held* not sufficient to warrant counsel in ignoring further proceedings, so as to constitute a fraud on party against whom judgment was obtained.

4. Judgment ⊂⊃138(2)—Judgment by default, through neglect of party, not set aside, though unwarranted relief was granted.

Judgment by default obtained against a party by his own neglect will not be set aside, though adversary obtained relief to which he may not have been entitled.

5. Judgment ⊂⊃445—No relief against judgment based on matters tried or put in issue.

Equitable relief will not be granted against a judgment, founded on matters tried or put in issue, however unjust the judgment may be, such matters being res judicata.

6. Judgment ⊂⊃407(1)—Statutory method of setting aside judgment not exclusive, where facts justify aid of equity.

Relief provided for in section 473, Code Civ. Proc. for setting aside of a judgment is not exclusive, but where facts justify it, relief may be had in equity, if party exercises due diligence.

7. Judgment ⊂⊃456(1)—Failure to exercise due diligence held to bar suit to set aside judgment.

A delay of over two years after default and one year after judgment, before party, against whom judgment was taken, took any action, *held* not to constitute due diligence necessary to invoke aid of equity in setting aside judgment.

Appeal from Superior Court, City and County of San Francisco; J. J. Trabucco, Judge.

Action by R. L. Rudy and another against M. F. A. Slotwinsky to enjoin enforcement of a judgment. From a judgment for plaintiffs, defendant appeals. Reversed.

Hearing denied by Supreme Court; Knight, Justice pro tem., not participating.

Carl W. Mueller, of San Francisco, for appellant.

H. M. Anthony, of San Francisco, and J. W. Clarke, of Oakland, for respondents.

TYLER, P. J. This is an appeal from a judgment in favor of plaintiffs granting a permanent injunction against defendant from proceeding to enforce a certain judgment and setting aside and canceling the same.

The complaint alleges that defendant herein on April 17, 1920, commenced an action against the above-named plaintiffs, R. L. Rudy and E. D. Hopper and one Garbini, as directors and incorporators of Chateau Bellevue Vineyard Company, a defunct corporation, and that on May 21, 1920, Rudy and Hopper demurred to the complaint, which demurrer was sustained; that an amended complaint was filed on the 20th day of August, 1920, to which Rudy and Hopper again demurred and this demurrer was, on September 10, 1920, overruled with 10 days' leave to answer.

Proceeding, the complaint then alleges that on September 14, 1920, plaintiff Slotwinsky in that action, by and through his attorney, attempted to serve notice of the overruling of the demurrer upon Clark & Clark, attorneys for said defendants Rudy and Hopper.

In this connection it is alleged, in substance, that the notice of the overruling of the demurrer was served on one Ellison, who occupied an adjoining office to Clark & Clark, but who was in no manner connected with the business of said attorneys and not authorized to receipt for or give admission of service of any legal papers or documents, but notwithstanding this fact said Ellison signed an admission of service of the notice of the overruling of the demurrer as follows: "J. W. Clark, per E. Ellison." That Ellison, so it is alleged, at no time informed Clark & Clark of the fact that he had signed an admission of such service.

It is then alleged that at the time of the filing of the demurrer by Hopper and Rudy, the attorney for plaintiff, Slotwinsky, had remarked to J. W. Clark, one of the attorneys for the defendants, that he supposed he would have to collect from the estate of one F. D. Burr, deceased, he being the party with whom Slotwinsky had had the transaction which was the subject-matter of the litigation. That due to this remark Clark & Clark concluded that the action would be discontinued as to their clients, and, not having heard any more concerning the demurrer which they had interposed, they considered the case closed. Nothing further was heard of the matter, so it is alleged, by either Hopper or Rudy or their attorneys Clark & Clark until about 2½ years thereafter and on the

6th day of March, 1923, when a letter was addressed by one Carl W. Mueller, acting attorney for Slotwinsky (his original attorney having been killed September 28, 1921), to Hopper informing him that his real estate was about to be sold under writ of execution upon a judgment secured in the action referred to.

The complaint in the original action is then set forth in full. It appears therefrom that it was one based upon a claim of liability against the directors of Chateau Bellevue Vineyard Company, under section 309 of the Civil Code, it being alleged in said action that the directors of that corporation had incurred an indebtedness in the sum of $1,200 at a time when the total amount of the subscribed capital stock of the corporation did not exceed the sum of $60, thus making them individually liable for debts created beyond the subscribed capital stock. Proceeding, the complaint in the instant case charges that the complaint in the original action, in which the judgment was procured and here sought to be set aside, was predicated on the false and fraudulent misstatement of the total amount of the subscribed capital stock of the corporation, as the statement that the same did not "exceed the sum of sixty dollars" was falsely and fraudulently made with the object and intent of unjustly obtaining a judgment against defendants in said action.

Further allegations are to the effect that on the 28th day of April, 1922, judgment was rendered by default against Rudy and Hopper for the sum of $1,200, interest and costs of suit, which judgment was entered on April 29, 1922.

Plaintiffs then allege that had they knowledge of the entry of their default, or had they knowledge of the trial, they would have taken steps in said case to have protected their rights; that they would have proved to the court upon the hearing of the case, that it was not true no more than $60 of the capital stock of the corporation had been subscribed and thus have avoided liability.

The complaint concludes with a prayer for a cancellation of the judgment. To this complaint, defendant filed a demurrer alleging that it did not state facts constituting a cause of action, nor a cause for equitable relief, nor did it state facts sufficient to justify the issuance of a restraining order or injunction. The demurrer was overruled.

Defendant answering alleged in effect that the notice of the overruling of the demurrer was legally served. It also denied that any statements had been made to the attorneys in the original action which would justify them in concluding that the action would not be further prosecuted, and it also denied that the statement contained in the original complaint concerning the amount of the subscribed capital stock of the corporation was false. As an additional defense, it set forth certain facts charging that defendants, as directors of the corporation named, had fraudulently obtained a certain tract of land of the value of $1,200 in exchange for a note executed by the corporation, which was worthless.

Laches on the part of defendants was also pleaded. The trial court found, among other facts, that the attorneys for defendants in the original action had relied upon statements made by the attorney for the plaintiff that the case would not be further prosecuted, and also that the attorneys for the defendant had never been properly notified of the overruling of their demurrer. It also found that the complaint in the action in which the judgment was obtained had been predicated upon a false statement concerning the total amount of the subscribed capital stock of the corporation, and that plaintiff herein had unjustly recovered the judgment sought to be set aside, and the relief prayed for was granted. In support of the judgment, respondents claim that the facts as found by the court constitute extrinsic fraud justifying the setting aside of the judgment.

[1] We cannot subscribe to this contention. The mere fact that defendant herein may have obtained the judgment here sought to be set aside upon allegations that may have been untrue, did not authorize the setting aside of the judgment. Equity will not relieve by injunction against a fraudulent judgment, unless the fraud in obtaining it is extrinsic to the merits. It will grant no relief, even in cases where a judgment is obtained through perjured testimony. Steen v. March, 132 Cal. 616, 64 P. 994; Eisenmayer v. Thompson, 186 Cal. 538, 199 P. 798; Pico v. Cohn, 91 Cal. 135, 25 P. 970, 27 P. 537, 13 L. R. A. 336, 25 Am. St. Rep. 159; Borland v. Thornton, 12 Cal. 440.

This rule, however, seems to be conceded by respondents' counsel, as they state that the evidence upon the subject is important only as showing that their clients possessed equities upon the merits in the original action, which it was necessary for them to do in making an application to set aside the default judgment.

The extrinsic fraud relied upon therefore consists in the alleged remarks of the attorney for defendant in the original action indicating that the case would be abandoned, and in the taking of the default without giving a legal notice of the overruling of the demurrer, where time had been given to answer, and in proceeding to trial and having a judgment entered when the attorney was kept in ignorance of the proceedings.

[2, 3] Assuming that these facts, if true, would constitute extrinsic fraud, we do not think the evidence upon the subject justifies the conclusion that defendants were prevent-

ed from fully presenting their claims in the original suit by reason thereof. The original judgment recites that notice of the overruling of the demurrer was given. Ellison, who signed the admission of service on the notice, testified in the instant case that the admission was in his handwriting. He further testified that he had offices together with Clark, and that it was necessary to go through his office to enter Clark's office; that his name was on the door with the name of Clark & Clark, and that he was in the habit of and had signed hundreds of different papers for Clark. Clark himself testified that he had at times done so. Assuming that Ellison never gave the copy of the notice to Clark, nevertheless the service under these circumstances was sufficient to satisfy the requirements of section 1011, Code of Civil Procedure. Nor was there any evidence to support the finding that the attorneys for defendants in the original action (plaintiffs herein) were prejudiced or kept away from the trial by anything the former attorney had said, giving such remarks their full force and effect. All that is proved to have been said is that plaintiffs' attorney, during a discussion in relation to Burr's property, stated to Clark that "he was not concerned much with the other defendants, because he did not think he had a case against them of any particular merits." This statement did not justify Clark in concluding that the case would be discontinued against his clients, nor warrant him in completely ignoring any further progress of the proceedings.

[4, 5] Where a judgment by default is obtained against a party through his own neglect, it constitutes no ground for equitable intervention that his adversary obtained relief to which he may not have been entitled. Equity will not entertain a bill for relief against a judgment founded on any matters which were tried and determined in the action at law, or which were there so put in issue that they might have been adjudicated, however unjust the judgment may appear to be. Such matters have become res judicata. This rule assumes that there has been a trial in which the respective parties have had an opportunity fully to present their claims. 34 Corpus Juris, 466.

[6, 7] There must be some end to litigation. Here plaintiffs had appeared in the action through their attorneys. The exercise of the slightest diligence on their part would have acquainted them with the fact that a judgment had been rendered against them. It was a matter of public record. They could have proceeded under section 473, Code of Civil Procedure, where relief might have been granted them. They did not do so, but waited over two years and three months after their default had been entered on November 29, 1920, and about a year after the judgment had been rendered on April 28, 1922, before taking any steps whatsoever. While it is true that one seeking to set aside a judgment is not limited to the relief provided for by section 473, Code of Civil Procedure, but may, where the facts justify it, invoke the aid of a court of equity, he must, in doing so, exercise due diligence. The instant case in our opinion, however, does not present such a situation. Here, as stated, the default was a matter of public record, open to inspection at all times to the plaintiffs and their attorneys. This fact should have put them upon inquiry which would have led to the discovery of the alleged fraud in the procurement of the judgment. The contention that they had a right to rely upon a service of a notice of the overruling of the demurrer can avail them nothing, when it is considered that the judgment sought to be set aside recites that such a notice was served and the evidence in the instant case shows that it was in fact made. Nor did the remarks of plaintiffs' former counsel justify them in practically abandoning their case. The mere expression of an opinion, as to the merits of a case by an attorney, could not possibly warrant opposing counsel in believing that no further action would be taken, and it does not constitute fraud practiced upon a party seeking relief against a judgment which prevented him from presenting his case to the court. Solemn judgments cannot be set aside upon such a showing.

The judgment is reversed.

We concur: KNIGHT, J.; CASHIN, J.

73 Cal. App. 383

RENOWDEN v. PACIFIC ELECTRIC RY. CO. (Civ. 4505.)

(District Court of Appeal, Second District, Division 1, California. June 25, 1925. Hearing Denied by Supreme Court Aug. 24, 1925.)

1. Negligence ⟸141(11) — Injured automobile passenger held entitled to instruction on defenses of joint enterprise and of agency between driver and passenger.

In action for injuries to passenger in an automobile hit by train, where there was no proof that he was engaged in joint enterprise with driver, nor that he had made driver his agent, plaintiff was entitled to instruction that, where evidence does not support allegations of joint enterprise or of agency, jury must disregard such defenses, particularly where instructions had been given which might lead jury to believe that such defenses were part of case submitted for decision.

2. Negligence ⟸141(11)—Injured automobile passenger held entitled to instruction negligence of driver could not be imputed to him.

In action for injuries to passenger in an automobile struck by train, where court in-

structed that if driver was guilty of contributory negligence plaintiff could not recover, plaintiff was entitled to instruction that driver's negligence could not be imputed to plaintiff, and refusal to so instruct constituted reversible error.

Appeal from Superior Court, Los Angeles County; Wm. D. Dehy, Judge.

Action by Thomas Renowden against the Pacific Electric Railway Company. From a judgment for defendant, plaintiff appeals. Reversed.

John C. Miles and B. J. Wellman, both of Los Angeles, for appellant.

Frank Karr, R. C. Gortner, and W. R. Millar, all of Los Angeles, for respondent.

CONREY, P. J. Action to recover damages for personal injuries which the plaintiff claims to have received as the result of negligence of the defendant in the operation of a train of freight cars at a street crossing. The case was tried before a jury, which returned a verdict in favor of the defendant. The plaintiff appeals from the judgment. The principal errors assigned relate in part to the refusal of instructions requested by the plaintiff, and in part to instructions given by the court to the jury.

It is alleged in the complaint that on the 18th day of January, 1922, the defendant was engaged in the switching of freight cars in a southerly direction upon its tracks, across a public street; that at that time the plaintiff was riding in the automobile of one Ross L. Putnam in an easterly direction along said street; that the plaintiff was so riding solely as the guest of Putnam without exercising any control over the driving of the automobile by Putnam. The complaint charges that the defendant negligently failed to maintain any gates, wigwag, or flagman at said crossing; that while said automobile was crossing said railroad track the defendant carelessly and negligently backed a train of freight cars in a southerly direction at a high and dangerous rate of speed, to wit, 20 miles an hour, without sounding any whistle or other warning of its approach, and without having any flagman upon the rear end of the train; that by reason thereof the train was driven against said automobile, thereby causing the plaintiff to suffer the injuries described in his complaint.

The answer denied the alleged negligent conduct of defendant, and alleged negligence upon the part of the plaintiff. The answer further alleged that, at the time and place of said accident, the plaintiff was engaged in a joint and common enterprise and undertaking with each and every other occupant of said automobile, including the driver thereof, and that riding and traveling in said automobile was a part thereof; that neither of the occupants of the automobile, nor the driver, nor the plaintiff, exercised ordinary care, caution, or prudence in the premises, and that the collision, injury, and damage, if any, sustained by the plaintiff were directly and proximately contributed to by the fault, carelessness, and negligence of the plaintiff and of each and every occupant of said automobile in and about said joint and common enterprise and undertaking, and by the failure of them and each of them to exercise ordinary care, caution or prudence in the premises. The answer further alleged that the plaintiff at and immediately prior to the said accident carelessly and negligently rode and traveled in said automobile while the same was, to his knowledge, being carelessly and negligently managed and operated by the driver thereof; that said plaintiff then and there constituted and made the driver of said automobile his agent for the purpose of driving same and of conveying said plaintiff therein; and that said automobile was then and there, to the knowledge of plaintiff and by his agent in the premises, so negligently and carelessly operated as to bring same into collision with said train of defendant, thereby directly and proximately contributing to the said accident and the injury and damage, if any, by plaintiff sustained.

Under points 1 and 2, appellant claims that the court erred in refusing to instruct the jury that the negligence, if any, of the driver of the automobile could not be imputed to the plaintiff, and in refusing certain instructions requested by the plaintiff on the question of agency and of what constituted a joint enterprise.

[1] It is stated by counsel for appellant, and appears to be conceded, that there was an entire absence of proof either that the plaintiff while riding in said automobile was engaged in a joint enterprise with the driver, or with any of the occupants of the car, or that the plaintiff constituted the driver Putnam his agent in the driving of the car. On this condition of the evidence, the plaintiff was entitled to have the jury instructed that in the absence of any evidence tending to support the allegations of the answer relating to the alleged agency or the alleged joint enterprise, the jury must disregard those defenses.

This error might not be prejudicial, if there had been no instructions given which would probably lead the jury to assume that these alleged defenses were a part of the case submitted for decision. But there was a series of instructions given at the request of the defendant, which, however correct they may be in themselves as statements of law (and as to this we express no opinion), might easily have been applied by the jury in such manner as to hold the plaintiff responsible for negligence of the driver of the automobile, in the absence of any instruction that negligence of the driver could not be imput-

ed to the plaintiff. This is well illustrated by certain instructions to which we will give the numbers found in appellant's brief. In the transcript the instructions have no numbers. We further assume that these numbered instructions were given at the request of the defendant. In the transcript each of them is marked (D). The use of the letters (P) and (D) as found in the transcript constitutes, with one exception, the only indication of the party by whom instructions were requested. It is not denied by respondent that those letters were used for that purpose.

Instruction 19: "It was the duty of the driver of the automobile in which the plaintiff was riding to approach said defendant's tracks, on which the car was running, in such manner that he could control the movements of the automobile in case the crossing of the tracks should appear dangerous, and to look with ordinary care at the last moment before going upon the tracks to ascertain if there was any danger approaching. It was his duty to look with ordinary care at the last moment before going upon the tracks, or so close thereto as to be in danger of being struck down by a passing car, and if, just before driving upon the tracks upon which he was struck, or so close to it as to be in danger of being struck, he could have seen and known of the approach of the train by looking and listening with ordinary care, and could have known thereby that it was dangerous to attempt to drive upon or across said tracks, then the driver would be guilty of negligence, and if such negligence was alone the direct or proximate cause of the accident, then plaintiff cannot recover, and your verdict must be for the said defendant."

Instruction 21: "Even though you might believe from the evidence that no whistle or bell was sounded on said defendant's train, it was still the duty of the driver of the automobile before going on the tracks to look for the purpose of ascertaining if a train was approaching. He had no right not to look because he may not have heard any bell or whistle from said train, or because none may have been rung or blown. It was his duty, in the exercise of ordinary care, which the law requires at a railroad crossing, to look for the purpose of seeing that which may have been visible to one looking with ordinary care, and if you find from the evidence that the driver failed to exercise ordinary care in these particulars, and that such failure on his part was the sole proximate cause of the accident, then the plaintiff cannot recover, and your verdict must be for said defendant."

Instruction 31: "I instruct you that defendant had a lawful right to operate a freight train backward over the crossing in question, and that it is as much the duty of persons traveling on the highway to look and listen for such a train, so operated, as for any other train which may be operated on railroad tracks."

[2] Upon reading the foregoing instructions, and taking into consideration that the court struck out from instruction No. 28, requested by the plaintiff, a direct statement "that the driver's negligence cannot be imputed to the plaintiff," we think that there was prejudicial error in the refusal of the court to give at least some of the instructions requested by the plaintiff on the subject of imputed negligence and the subjects of joint or common enterprise and agency. This refusal is further illustrated by instruction (G) requested by the plaintiff and refused by the court:

"To constitute a joint or common enterprise within the meaning of the law, each must have some voice and authority in the management and control of the same. If Thomas Renowden and those riding in the auto had no voice or authority over how Putnam should drive, it was not a joint or common enterprise, and the negligence of any of the party cannot be imputed to either or any of the rest."

We deem it unnecessary to consider closely the other numerous assignments of error, nearly all of which relate to instructions given or instructions refused. It may be that, aside from the matters which we have discussed, there would be no sufficient reasons for reversal of the judgment. But there was evidence quite sufficient to have warranted a finding that the defendant was negligent in the management of its train. This being so, it is reasonable to infer that the verdict may have rested upon an implied finding that the accident was caused by the concurrent negligence of defendant and the driver Putnam, and that the jury understood that for that reason alone the plaintiff was barred from any right to recover damages.

The judgment is reversed.

We concur: HOUSER J.; CURTIS, J.

---

73 Cal. App. 268

GREGORY v. HECKE, Director of Department of Agriculture. (Civ. 2814.)

(District Court of Appeal, Third District, California. June 19, 1925. Hearing Denied by Supreme Court Aug. 17, 1925.)

1. Poisons ⟸2—Court will consider language, mischief to be avoided, and remedy intended in construing Economic Poison Act.

In construing the Economic Poison Act of 1921, court will consider clear import of language used, together with mischief sought to be avoided, and remedy intended to be afforded by the statute.

2. Poisons ⟸2—Economic Poison Act manifests legislative intent to regulate sale of poison, and to protect horticultural interests.

Economic Poison Act of 1921 manifests a legislative intention not only to regulate manufacture and sale of economic poison, but to protect the large and valuable state orchard and horticultural interests against fraud, imposition, and misrepresentation as to the efficiency of antidotes for germ and fungoid diseases.

3. Evidence ⟸13 — Judicial notice taken of germs infesting orchards, and that sprays and germicides are effective in eradicating them.

Court will take judicial notice that innumerable germs and pests infest orchards, vineyards, and gardens of the state, and that certain sprays and germicides are most effective in eradicating such pests, thereby increasing productiveness of trees and vines, to profit of farmer and welfare of the public.

4. Evidence ⟸5(2)—Judicial notice taken of evils demanding legislation.

Judicial notice will be taken of evils demanding legislation, mischief intended to be remedied, and importance of public interests affected thereby.

5. Constitutional law ⟸81 — Public welfare may be preserved under police powers.

Public health, morals, and general welfare may be preserved under the police powers vested in the state.

6. Constitutional law ⟸81—Property may not be used to detriment of equal rights of others.

While legislation under police powers must not be unreasonable or oppressive, all property within jurisdiction of state is subject to reasonable regulation, so that it may not be used to detriment of equal rights of others.

7. Poisons ⟸4—Disposal of germicide held to constitute a violation of Economic Poison Act of 1921.

Advertising, labeling, and selling a germicide as "most efficacious remedy known, an absolute remedy for, and the greatest remedy known, for mildew, fungus, etc," when in truth such compound was not efficacious for any of such purposes, and was of little or no use therefor, constituted a violation of the Economic Poison Act of 1921.

8. Equity ⟸65(1)—Will not intervene to sanction fraud or gross imposition on the public.

Even though an act may be unconstitutional, equity will not intervene to sanction fraud or gross imposition on the public.

9. Constitutional law ⟸48—Statute not declared unconstitutional unless clearly so.

Court should not declare a statute unconstitutional unless it is clearly and palpably so, and is incapable of reconciliation.

10. Statutes ⟸71—"Uniform operation" provision of Constitution construed.

Const. art. 1, § 11, providing that all laws of a general nature shall have a "uniform operation," does not mean that the law shall operate alike on all persons, but that it shall affect all persons uniformly who stand in the same category, or all those who stand in the same relation with respect to particular privileges and immunities conferred by the act.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Uniform Operation of Laws.]

11. Statutes ⟸77(1)—Economic Poison Act held not to constitute special legislation and to be based on a valid classification.

Economic Poison Act of 1921, regulating manufacture and sale of economic poisons, and purporting to operate uniformly on all persons who manufacture, sell, or use economic poisons, *held* to be based on a natural and valid classification, and not to be unconstitutional as special legislation.

12. Statutes ⟸77(1)—Factors to be considered in determining legality of classification for legislative regulation stated.

In determining legality of classification for legislative regulation, there should be considered the general subject to be regulated, its character, extent, and purpose, together with those who would be naturally affected thereby.

13. Constitutional law ⟸80(2)—Poisons ⟸2—Economic Poison Act held not unconstitutional by conferring on director of agriculture duty of regulating manufacture and sale.

Economic Poison Act of 1921, regulating sale and manufacture of economic poison, *held* not a delegation of judicial power, violative of Const. art. 3, or article 6, § 1, by conferring on director of agriculture duty of regulating manufacture, sale, and use of economic poisons, together with means of enforcing act by licensing or revoking licenses of dealers.

14. Poisons ⟸2—Power conferred on director of agriculture to regulate economic poisons held not arbitrary and final.

Power conferred on director of agriculture, by Economic Poison Act of 1921, to regulate manufacture, sale, and use of economic poisons, together with means of enforcing act by licensing or revoking licenses of dealers, *held* not arbitrary and final, since he can act only pursuant to law after notice, and he acts in quasi judicial capacity, and his decisions are subject to review on certiorari.

15. Constitutional law ⟸296(1) — Economic Poison Act held not unconstitutional as taking of private property without due process of law.

Economic Poison Act of 1921, regulating manufacture, sale and use of economic poison, *held* not violative of Const. art. 1, § 14, or Const. U. S. Amend. 14, prohibiting taking of private property without due process of law.

16. Constitutional law ⟸251—"Due process of law" defined.

"Due process of law" does not necessarily mean that a person is entitled to a trial in a court before he may be deprived of what may be equivalent to property rights, but does mean that an orderly proceeding, adapted to the nature of the case, shall be accorded to the owner of property, in which he may be heard, and where he may defend, enforce, and protect his personal rights.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Due Process of Law.]

17. Constitutional law ⟸296(1)—Regulations for preservation of public safety do not deprive owner of property without "due process of law."

General right to engage in a trade, profession, or business is subject to the power inherent in the state to make necessary rules and

regulations respecting use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety, and such regulations do not deprive owners of property without due process of law.

18. Constitutional law ⟸92—No vested right acquired to continue in licensed business.

No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police powers.

19. Jury ⟸19(1)—Economic Poison Act held not violative of constitutional provision guaranteeing trial by jury.

Economic Poison Act of 1921, regulating sale and manufacture and use of economic poisons, *held* not violative of Const. art. 1, § 7, guaranteeing a trial by jury.

20. Jury ⟸10—Trial by jury assured in only such cases as existed at common law.

Trial by jury is assured in only such cases as existed at common law.

21. Jury ⟸19(1)—Trial may not be demanded in special proceedings, unless right given by statute.

A jury trial may not be demanded in special proceedings, unless the right is given by statute.

22. Poisons ⟸2—Economic Poison Act held not unconstitutional because providing for revocation of licenses.

Economic Poison Act of 1921, regulating sale, manufacture, and use of economic poisons, *held* not unconstitutional because providing for revocation of licenses and permits.

23. Constitutional law ⟸43(1)—Manufacturer held estopped to question validity of Economic Poison Act.

Economic poison manufacturer *held* estopped to question validity of Economic Poison Act of 1921, regulating sale, manufacture, and use of economic poison, where for several years he had registered his economic poison product, and had been licensed to manufacture and sell the same, and was enjoying protection of the statute at the time of challenging its constitutionality.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Petition by A. R. Gregory for a writ of prohibition, directed against G. H. Hecke, as Director of the Department of Agriculture of the State of California. Judgment for plaintiff, and defendant appeals. Reversed.

U. S. Webb, Atty. Gen., and R. T. McKisick, Deputy Atty. Gen., for appellant.

B. M. Aikins, of San Francisco, for respondents.

THOMPSON, Justice pro tem. This is an appeal from a judgment by default entered against defendant for failure to answer the petition for a writ of prohibition, after a general demurrer thereto had been overruled.

The writ prohibits appellant from proceeding, pursuant to the provisions of the California Economic Poison Act of 1921 (St. 1921, p. 1259), to hear or revoke respondent's license to manufacture and sell a compound known as "Qua-Sul," a germicide intended for the purpose of eradicating mildew, aphis, codlin-moth, germs, and fungoid diseases of plants and trees.

The petition alleges that for a number of years the petitioner has been engaged in the manufacture and sale of this "Qua-Sul;" that it is intended for use as a germicide for treatment of diseases of trees and plants, and for the destroying of the larvæ of various pests; that he had established a large demand and market for this germicide of the value of several thousand dollars; that for several years he had been licensed to conduct this business, and on June 4, 1923, he had paid appellant the required license fee of $50 for registration for the ensuing year; that subsequently, on August 13, 1923, appellant instituted proceedings against petitioner to cancel his said license on the ground that the germicide was of little or no value for the purposes for which it was intended to be used; that pursuant to said proceedings appellant had procured a citation to be served upon petitioner, requiring him to show cause at a time and place fixed why his said license should not be revoked for the reasons stated in the citation. It was alleged that the proceedings and threatened revocation of license would cause petitioner great and irreparable damage, and that there was no speedy or adequate remedy at law. The petition then prays for an order restraining appellant from proceeding with said hearing, or revoking his license.

The citation or order to show cause is made a part of the petition. It demands of the petitioner that he appear at the office of the director of agriculture in Sacramento on August 27, 1923, and show cause why his license to manufacture and sell the economic poison called "Qua-Sul" should not be canceled under the authority conferred by section 14 of the California Economic Poison Act of 1921, on the ground that it was of little or no value for the purpose for which it was intended to be used.

The citation then proceeded in detail to state the result of expert investigation as to the properties and efficiency of said germicide. It further set out petitioner's advertised claim of efficiency in his printed pamphlets and upon his labeled packages, as follows:

"Qua-Sul, the most efficacious remedy known for mildew, rust, smut, fungus, black-spot, wilt, curl-leaf, red-spider, thrip, aphis, codlin-moth. Qua-Sul is a germicide and fungicide. It is an absolute remedy for mildew, and fungoid diseases, and is the greatest germicide in the world. It will kill the eggs of different pests that deposit their eggs or larvæ in the ground. If sprayed on the trees and fences in a weaker

solution of 1 to 200 it has the same effect there. It is the greatest germicide known, and kills all insect eggs in the soil."

The citation attached to the petition then specifically denies that said compound will "as alleged in the printed circular and labels attached to the containers" effectively control millipedes, wireworms, angleworms, slugs, argentine ants, mildew, rust, smut, fungus, black-spot, wilt, curl-leaf, red-spider, thrips, aphis, or codlin-moth; and denies that the solution when applied to the soil as advertised will destroy insects or eggs, larvæ or pests at a greater depth than one-eighth of an inch from the surface.

To this petition the director of agriculture demurred, on the ground that it failed to state a cause of action for the remedy of prohibition. The demurrer was overruled. The defendant saw fit to rest upon the record, and failed to answer. Whereupon judgment was entered against him. From this judgment he appeals.

The petitioner supports his writ of prohibition on the ground that there is no authority of law to withhold or cancel a license to manufacture or sell a commodity upon the mere ground that it is of little or no value for the purpose for which it is intended to be used; that he is not charged by the citation with adulteration, misbranding, or misrepresentation of the economic poison in question; and that the California Economic Act of 1921 is unconstitutional and void, because it purports to confer illegal judicial powers upon the director of agriculture, an executive officer, because it is special legislation, because it denies the right of trial by jury, and because it deprives one of property without due process of law contrary to section 1 of the Fourteenth Amendment to the Constitution of the United States. Other claims of the unconstitutionality of the act in question are made in the petition, but not urged in the briefs, or upon oral argument.

The appellant insists that the California Economic Poison Act of 1921 is a valid statute under the police powers inherent in the state Legislatures; that the police powers not only authorize the regulation of business in the interest of public health, public peace, and public morals, but in the interest of public welfare, may legislate to prevent fraud, misrepresentation, and imposition.

Under the provisions of this Economic Poison Act, any manufacturer, agent or dealer in any economic poison must file with the director of the agricultural department of California an application for registration of such poison, together with a correct statement of the brands, trade-marks, and kinds of economic poisons to be marketed, specifying the correct names and percentages of all active and inert substances contained in the poison, or in lieu thereof must furnish a sample of the compound; he must procure a certificate of registration and license from the director of the agricultural department, and pay the annual fee therefor. He may then manufacture and sell such economic poison only in conformity with the provisions of said act, and such reasonable regulations as the department may enforce.

The title to this act is "An act to regulate the manufacture, sale, and use of economic poisons; to prevent the adulteration, misbranding, and misrepresentation of economic poisons," etc. The term "economic poison" as used in this act is defined as including "any substance, or mixture of substances intended to be used for preventing, destroying, repelling, or mitigating any and all insects, fungi, weeds, rodents, or other plant or animal pest, * * * which may infest or be detrimental to vegetation. * * *"

It is provided that economic poisons shall be deemed to be misbranded "if the package or label * * * shall bear any statement, design, or device regarding such article or the ingredients or substances contained therein which shall be false or misleading; * * * if it be labeled or branded so as to deceive or mislead the purchaser; * * * if it consists partially or completely of any inert substance or substances which do not prevent, destroy, repel, or mitigate insects, fungi, weeds, rodents, or other plant or animal pests, and does not have the names and percentage amounts of each and every one of such inert ingredients plainly and correctly stated on the label. * * *" Section 7.

This act makes it unlawful for any person to "manufacture, deliver, or offer to deliver, sell, offer or expose for sale in this state any adulterated or misbranded economic poison."

The director of agriculture is authorized and directed by this act to regulate the manufacture and sale of all such economic poisons within the state of California; and to license or revoke licenses for such purposes. To this end rules and regulations may be adopted and the procedure for hearing applications for registration, or revocation of licenses is also provided for.

Section 14 of this act provides that:

"The director of agriculture shall have the power after hearing, as provided for in this act, to cancel or to refuse to register any economic poison which has been shown to have little or no value for the purpose for which it is intended to be used, or has been shown to be generally detrimental or seriously injurious to vegetation. * * * Said director shall * * * have the power to cancel the registration of, or refuse to register, any manufacturer, importer, agent of, or dealer in economic poisons who repeatedly violates any of the provisions of this act."

It is apparent from the petition that, after scientific investigation, the director of agriculture was charging petitioner with violation of the Economic Poison Act in (1) manufacturing and selling an economic poison

which was of little or no value for the purpose for which it is intended to be used; and (2) misbranding and misrepresenting the compound.

The citation served upon petitioner does not specifically charge him with "misbranding or misrepresenting" the germicide. But it does state facts which, if true, would constitute both misbranding and misrepresenting under the definition of misbranding above quoted and found in section 7 of the act. For it is alleged that the labels and the circulars distributed by petitioner to his customers represented that "Qua-Sul was the most efficacious remedy known; and an absolute remedy for; and the greatest germicide known to destroy mildew * * * aphis, codlin-moth * * * fungoid disease * * * eggs and larvæ of insects and pests," etc. These extravagant assertions are specifically denied by the director. And he adds that the germicide is of little or no use for the purpose for which it is intended to be used.

[1] The term "misrepresent" is not used in section 2 of the act, which prohibits one from manufacturing or selling adulterated or misbranded economic poison. The term "misbrand" certainly includes that of misrepresentation. The latter term is used in the title to the act. The evident intent of the Legislature was to prohibit the adulteration, misbranding, and misrepresentation in the use or sale of economic poisons. In construing the act, the court will take into consideration the clear import of the language used, together with the mischief sought to be avoided, and the remedy intended to be afforded by the statute. 25 R. C. L. 1015.

[2] Clearly, the Legislature intended by this act to not only regulate the manufacture and sale of economic poison, but it intended also to protect the large and valuable orchard and horticultural interests of California against fraud, imposition, and misrepresentation as to the efficiency of antidotes for germ and fungoid diseases.

[3, 4] The court will take judicial notice of the fact that innumerable germs and pests infest the orchards, the vineyards and the gardens of our state, and that certain sprays and germicides are most effective in eradicating these pests, and thus increasing the productiveness of the trees and vines to the profit of the farmer and the welfare of the public. Judicial notice will be taken of the evils demanding legislation, the mischief intended to be remedied, and the importance of public interests affected thereby. Ex parte Kohler, 74 Cal. 38, 15 P. 436.

[5, 6] It is not disputed that the public health, public morals, and general public welfare may be preserved under the police powers vested in the state. 5 Cal. Jur. 696. While it is true that legislation under the police powers must not be unreasonable or oppressive, yet all property within the jurisdiction of the state is held subject to reasonable regulations so that it may not be used to the detriment of the equal rights of others. 6 R. C. L. 193. And so it has been held to be a valid regulation of business under the police powers to prohibit fraud, deceit, and imposition. 12 C. J., 920; 6 R. C. L. 208. In Cofman v. Osterhous, State Dairy Comm., 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219, upholding the constitutionality of an act regulating dairy interests, and licensing and authorizing the withholding of licenses under specified conditions, the court said: "The police power of the state is not limited" to the mere regulation of affairs to preserve the good order, public health and safety. "The prevention of fraud and deceit, cheating and imposition, is equally within the power, and a state may prescribe all such regulations as in its judgment will secure, or tend to secure, the people against the consequences of fraud."

In the interest of public health, public morals and public welfare, statutes have been upheld in nearly every state of the Union regulating and licensing various businesses and professions, governing marketing associations of farm products; controlling the manufacture and sale of drugs, meat, milk, butter, cheese, cereals, medicines, beverages, sprays, fertilizer, germicide, and food products of nearly every variety consumed by beast and man. So, also, has the delegation of power to commissions and officers been held to be valid, authorizing them to regulate the business of handling and selling such commodities, specifying the weight, size, contents, and labeling of containers.

While it is true that statutes attempting to regulate the branding and labeling of packages must be reasonable and not impose onerous or unnecessary burdens upon private business under the guise of an exercise of the police powers (Ex parte Dietrich, 149 Cal. 104, 84 P. 770, 5 L. R. A. [N. S.] 873), yet numerous cases have held that misstatements and misrepresentation as to the contents, ingredients, weight, etc., in the labeling of the product constitutes a misbranding and a violation of the police regulations (11 R. C. L. 1106; United States v. Ten Barrels of Vinegar [D. C.] 186 F. 399; People v. Butler, 134 App. Div. 151, 118 N. Y. S. 849; State v. Intoxicating Liquors, 106 Me. 135, 76 A. 268; United States v. Scanlon [D. C.] 180 F. 485; United States v. 100 Cases of Apples [D. C.] 179 F. 985; Brina v. United States, 179 F. 373, 105 C. C. A. 558; United States v. 154 Sacks of Oats [D. C.] 294 F. 340.)

[7, 8] To permit one to advertise, label, and sell germicide as "the most efficacious remedy known; an absolute remedy for, and the greatest remedy known, for mildew, fungus, curl-leaf, thrips, aphis, codlin-moth, eggs and larvæ of pests and insects, etc.," when in truth such compound is not efficacious for any of such purposes, and is of little or no use for such purposes, would be a direct vio-

lation of the letter and spirit of the Economic Poison Act of California. Moreover, it would be encouraging fraud and imposition upon the public. Even though an act may be unconstitutional, equity will not intervene to sanction a fraud or gross imposition upon the public. Jose v. Utley, 185 Cal. 665, 199 P. 1037.

Respondent asserts that the Economic Poison Act confers an illegal and unconstitutional arbitrary power upon the director of agriculture to revoke a license to sell such commodity, and thus deprive him of the right to follow a lawful pursuit. He cites the case of Los Angeles v. Hollywood Cemetery Ass'n, 124 Cal. 344, 57 P. 153, 71 Am. St. Rep. 75, in which it was held that a city ordinance prohibiting the locating and maintaining of a cemetery for the burial of the dead within the county without permission of the supervisors was void. In the course of the opinion this language is used:

"The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupations; they may regulate the manner of conducting the business if it be of a character tending to be injurious; but if the business be lawful, and having no injurious tendency, they cannot say who shall or who shall not exercise the right itself. Under the guise of regulating a business the municipality cannot make prohibition possible by committing to the officers of the municipality the arbitrary power to deny permission to engage in that business. We do not think it was ever intended by the people in ordering the section of the Constitution referred to, or of the Legislature in the statutory enactment, to include, in the power to make and enforce regulations a power purely personal and arbitrary. 'For,' as was said by Matthews, J., in Yick v. Hopkins, 118 U. S. 356 [6 S. Ct. 1064, 30 L. Ed. 220], 'the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery.'"

It will be noted that the language last quoted of Mr. Justice Matthews of the United States Supreme Court was used with reference to an ordinance of San Francisco prohibiting the maintenance of the lawful and useful business of a laundry, unless it be conducted in a brick or stone building. The cause for criticism of such an ordinance is quite apparent. And in the language used by the court in the Hollywood Cemetery Case, above quoted, it will be noted that the court says:

"The supervisors may impose a license, the payment of which shall be a condition to the enjoyment of the privilege of engaging in lawful occupation; they may regulate the manner of conducting the business if it be of a character tending to be injurious."

The "regulation of a business tending to be injurious" is precisely what the Legislature attempted to do by the enactment of the Economic Poison Act. The handling of poisons in nearly every form is recognized as dangerous and likely to become injurious unless carefully regulated. The economical poisons used to eradicate germs and pests from plants and trees, unless scientifically used, may be most injurious. On the contrary, for the benefit of the large and important fruit interests of California, such germicides are of inestimable value. It is for an alleged violation of the reasonable regulations and restrictions provided, not by the director of agriculture, but by the Legislature, that respondent was cited to show cause why his license should not be revoked. In this procedure there is nothing in conflict with the law announced by the court in the case of Los Angeles v. Hollywood Cemetery Ass'n.

So, also, the respondent cites with assurance the case of Hewitt v. State Board of Medical Examiners, 148 Cal. 590, 84 P. 39, 3 L. R. A. (N. S.) 896, 113 Am. St. Rep. 315, 7 Ann. Cas. 750. Pursuant to the authority vested in the state board of medical examiners to revoke the license of a physician for "unprofessional conduct," which was defined, among other things, as consisting of "all advertising of medical business in which grossly improbable statements are made," the license of a Los Angeles physician was revoked. It appears that because this physician had advertised as follows, "cancer cured; the only sure cure known in the world," her license was revoked. The court held that the question as to what constituted "grossly improbable statements" was indefinite and uncertain; and that one should not be deprived of the right to practice the profession for which they had consumed a life time to prepare, merely because some commission might think the advertised statement was "grossly improbable." It is quite apparent that among the many different schools of medicine there would be bound to exist a grave difference of opinion as to what might constitute a cure for cancer or any other chronic disease.

But suppose the medical act in question had authorized the revocation of a physician's license for unprofessional conduct, and had defined such conduct as, for instance, prescribing for any disease a remedy supplied in a container upon which a false label as to its contents was used; and that the physician had supplied, in treatment for a malignant internal disease such as cancer, bread pills in a package labeled "cancer cure; the only sure cure known in the world"? Can it be said that the court, under such circumstances, would have held that such conduct would not justify the revocation of his license for unprofessional conduct? There would then be no uncertainty as to the de-

ceit or the damage that would follow such conduct. A chemical analysis would disclose the fact that the alleged "cancer cure" was nothing but bread pills. There could be no diversity of opinion as to the lack of efficiency of the remedy supplied. While the credulous patient was slowly dying under the treatment of bread pills, except for the deceit of the physician the patient might have been receiving helpful treatment.

Advertising what may be "grossly improbable" is quite different from supplying a poison misbranded and misrepresented, particularly when the commodity is of "little or no value" for the purpose for which it is advertised and sold.

[9] The authorities are practically uniform to the effect that a court should not declare a statute unconstitutional unless it is clearly and palpably so, and is incapable of reconciliation. 5 Cal. Jur. 612.

[10-12] Article 1, § 11, of the Constitution, provides that "all laws of a general nature shall have a uniform operation." This does not mean that the law shall operate alike upon all persons, but that it shall affect all persons uniformly who stand in the same category, or upon those who stand in the same relation with respect to the particular privileges and immunities conferred by the act. 5 Cal. Jur. 816. But this Economic Poison Act purports to operate uniformly upon all persons who "manufacture, sell or use economic poisons." It certainly is not special legislation. In the leading case of Connolly v. Union Sewer Pipe Co., 184 U. S. 560, 22 S. Ct. 439, 46 L. Ed. 690, Mr. Justice Harlan says:

"Classification 'must * * * rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily.'"

But in determining the legality of classification for legislative regulation there should be considered the general subject to be regulated, its character, extent, and purpose, together with those who would be naturally affected thereby. 6 R. C. L. 375; Ex parte Jentzsch, 112 Cal. 468, 474, 44 P. 803, 32 L. R. A. 664. The last case cited held an act purporting to make it a misdemeanor for any one to work in or conduct a barber shop on Sunday to be void. The reason is apparent. There is no natural reason for segregating barbers from other employments and prohibiting them from working on a particular day. But there is good and natural reasons for regulating the business of handling and selling economic poisons. This classificaton is natural and valid.

[13-15] Conferring upon the director of agriculture the duty to regulate the manufacture, sale, and use of economic poisons, together with the means of enforcing this act by licensing or revoking the licenses of dealers, does not violate the provisions of article 3 of the Constitution, nor article 6, § 1, of that document. It is well established that tribunals, such as the board of medical examiners and similar boards, empowered to regulate business and affairs under the police powers, are not exercising judicial authority within the meaning of said provisions. Statutes creating such authority and conferring such powers upon such officers are constitutional and valid. Suckow v. Alderson, 182 Cal. 250, 187 P. 965; Brecheen v. Riley, 187 Cal. 121, 200 P. 1042; Los Angeles v. Spencer, 126 Cal. 670, 59 P. 202, 77 Am. St. Rep. 217; Ex parte Whitley, 144 Cal. 167, 77 P. 879, 1 Ann. Cas. 13; Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625. Nor is the power so conferred upon the director of agriculture arbitrary and final. He can act only pursuant to law, after notice. He acts in a quasijudicial capacity only, and his decisions are subject to review on certiorari. Suckow v. Alderson, 182 Cal. 250, 187 P. 965; Lanterman v. Anderson, 36 Cal. App. 472, 172 P. 625. Nor does the power conferred by this act to revoke a license for violation of the provisions of the act infringe upon the inhibition of article 1, § 14, of the Constitution of California, or the Fourteenth Amendment to the Constitution of the United States, prohibiting the taking of private property without due process of law.

[16, 17] Due process of law does not necessarily mean that a person is entitled to a trial in a court before he may be deprived of what may be equivalent to property rights. It does, however, mean that an orderly proceeding adapted to the nature of the case, shall be accorded to the owner of property, in which he may be heard, and where he may defend, enforce, and protect his personal rights. Santa Clara v. Southern Pacific Ry. Co. (C. C.) 18 F. 385. The general right to engage in a trade, profession or business is subject to the power inherent in the state to make necessary rules and regulations respecting the use and enjoyment of property necessary for the preservation of the public health, morals, comfort, order, and safety; such regulations do not deprive owners of property without due process of law. 12 C. J. 1272, § 1074.

[18-22] No person can acquire a vested right to continue, when once licensed, in a business, trade, or occupation which is subject to legislative control under the police powers. 6 R. C. L. 482, § 481; Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111, 28 L. Ed. 232. Nor do we think the Economic Poison Act is in violation of article 1, § 7, of the Constitution of California, guaranteeing a trial by jury. The trial by jury is assured in only such cases as existed at common law. Koppikus v. State Capitol Comm., 16 Cal. 248. A jury trial may not be demanded in special proceedings, unless the right is given by statute. 15 Cal. Jur. 342. Statutes are not un-

constitutional which provide for the revocation of licenses and permits. 35 C. J. 185; Bowman v. Virginia State Entomologist, 128 Va. 351, 105 S. E. 141. Nor do we find that the act in question infringes upon any of the constitutional provisions relied upon by petitioner.

The regulation of the use and sale of economic poisons for the evident purposes intended by this statute of 1921 is akin to, and probably more important, than the statutes regulating fertilizers. Yet, in 1 R. C. L., at page 789, the able author says:

"One of the most common instances of the existence of the exercise of police powers in reference to agriculture is the regulation of the sale of commercial fertilizers. The controlling purpose of such statutes is to guard the agricultural public against the spurious and worthless compounds sometimes sold as fertilizers, and to fix on sellers a statutory guaranty that fertilizers sold by them shall contain the chemical ingredients as represented, thus furnishing to purchasers a reliable means of proving any deception thus attempted. As these statutes prevent fraud, and promote the prosperity of agricultural industry, they are strictly within the scope of legitimate police regulation." 2 C. J. 999.

[23] Even though the Economic Poison Act were open to attack as an unconstitutional delegation of power, this petitioner is estopped from making such defense. For several years past he has registered his "Qua-Sul" product, and has been licensed to manufacture and sell the same. He was licensed for the year 1923, and enjoying the protection of the very statute, at the time he challenges its constitutionality. One who elects to accept the benefits of a statute is estopped from denying its validity. In the case of Cofman v. Ousterhous, 40 N. D. 390, 168 N. W. 826, 18 A. L. R. 219, where a license to conduct a dairy was revoked under a statute, by the dairy commission, in an appeal to the district court on certiorari, it was said:

"Nor, in any event, can the relator question the right of the dairy commissioner to cancel the license on the ground of the unconstitutionality of the act. * * * It is clear, indeed, that a person who obtains a license under a law, and seeks for a time to enjoy the benefits thereof, cannot afterwards question the constitutionality of the act when the license is sought to be revoked." M. & St. P. Ry. Co. v. Nester, 3 N. D. 480, 57 N. W. 510; Hart v. Folsom, 70 N. H. 213, 47 A. 603; State v. Seebold, 192 Mo. 720, 91 S. W. 491; 19 Ann. Cas. 183.

For the foregoing reasons, the judgment is reversed. The trial court is directed to sustain the demurrer.

We concur: FINCH, P. J.; PLUMMER, J.

73 Cal. App. 402

PEOPLE v. MERAVIGLIA. (Cr. 854.)

(District Court of Appeal, Third District, California. June 26, 1925.)

1. Criminal law ⟸1137(5)—Accused held not entitled to complain of testimony concerning prior conviction, brought out by cross-examination of prosecutrix.

In prosecution for statutory rape, accused is not entitled to complain of testimony that he had previously served sentence in state's prison, brought out deliberately by cross-examination of prosecutrix.

2. Criminal law ⟸1144(2)—In absence of evidence to contrary, it is presumed that grand jury was regularly and legally selected, impaneled, organized, and sworn, and that their proceedings were lawful and regular.

Where indictment for statutory rape was in form prescribed by Pen. Code, § 951, which does not require indictment to affirmatively show that grand jury was sworn, under Code Civ. Proc. § 1963, subd. 15, it is presumed that officers performed their duty, and, in absence of evidence to contrary, that grand jury was regularly and legally selected, impaneled, organized, and sworn by oaths prescribed by Pen. Code, §§ 903 and 904, and that their proceedings were lawful and regular.

3. Indictment and information ⟸196(3)—By plea of not guilty, and failure to demur or move to set aside indictment, accused held to waive any objection as to irregularities in organization or impaneling of grand jury.

In prosecution for statutory rape, by plea of not guilty and by failure to demur and move to set aside indictment, accused waived any objection which he might have taken to any irregularities in organization or impaneling of grand jury.

4. Criminal law ⟸1032(1)—Accused may not reserve objection to irregularities in form of indictment or pleading for attack in appellate court for first time.

Accused may not stand trial on merits without objection, and reserve, in event of adverse judgment, objection which he may have to irregularities in form of indictment or pleading, for attack in appellate court for first time.

5. Rape ⟸35(2), 52(1)—Necessary to prove that prosecutrix was not wife of accused; proof need not be direct.

In prosecution for statutory rape, it is necessary element under statute to prove that prosecutrix was not wife of accused, but this need not be shown by direct evidence, but may be established by circumstances.

6. Rape ⟸52(1)—Evidence that prosecutrix was not wife of accused held sufficient.

In prosecution for statutory rape, where court instructed that proof beyond reasonable doubt that prosecutrix was not accused's wife was necessary, and throughout trial such fact was assumed by all parties and not questioned, and it appeared without conflict that prosecutrix was daughter of accused, was of school age

and bore maiden name, and lived at convent apart from him, in view of Civ. Code, § 59, making marriage between parents and children absolutely void, evidence that prosecutrix was not wife of accused was sufficient.

7. Rape ⟸52(4)—Where prosecutrix testifies that she is 14 years of age, which is undisputed, proof of age is sufficient.

In prosecution for statutory rape, where prosecutrix testified that she was 14 years of age, which was not disputed, proof of age, taken in connection with appearance on witness stand, was sufficient.

8. Criminal law ⟸678(3)—Election by state as to offense on which it would rely held sufficient.

In prosecution for statutory rape, on proof of numerous offenses, in absence of demand for prosecution to make election for offense relied on, statement of court that he assumed prosecution elected to stand on offense of certain date, which was first offense testified to, was sufficient election, in absence of demand by accused for more specific election.

9. Criminal law ⟸678(3)—If no election made at trial, first evidence that tends to prove offense is deemed to be selection.

In prosecution for statutory rape, on proof of several offenses, if no particular offense is elected at trial, first evidence that tends to prove offense is deemed to be selection of state of offense on which it relies.

10. Criminal law ⟸678(1)—Where evidence discloses more than one offense, accused is entitled to require prosecution to elect to stand on some specific offense.

In prosecution for statutory rape, if evidence discloses more than one offense, accused is entitled to require prosecution to elect to stand upon some specific offense.

11. Criminal law ⟸371(9) — Admitting evidence of other offenses showing course of conduct of accused with prosecutrix held not error.

In prosecution for statutory rape, admission of evidence of guilt of crime, described in Penal Code, § 288a, with prosecutrix and other offenses prior to offense chiefly relied upon by prosecution, which show continuous course of lascivious conduct by accused to arouse passions of prosecutrix, was proper.

12. Criminal law ⟸371(9)—Rape ⟸40(2)—Lewd conduct and other offenses held admissible to corroborate prosecutrix, and show disposition of accused.

In prosecution for statutory rape, where prosecutrix is under age of consent, lewd conduct and other offenses between parties may be shown to corroborate prosecutrix, and to show disposition of accused.

13. Witnesses ⟸40(1)—Admitting testimony of child of 9 years held proper.

In prosecution for statutory rape, admitting testimony by 9 year old child, who on examination appeared to be intelligent, well able to express herself and give her impressions, and realized that she was expected to tell nothing but the truth, and was liable to be punished if she swore falsely, was proper.

14. Witnesses ⟸40(1)—Test of competency of child to testify stated.

Test of competency of children as witnesses is that they possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount impressions, and that they have knowledge of nature of oath, and moral sense to realize they should tell nothing but truth, and are likely to be punished for telling falsehoods.

15. Criminal law ⟸696(2)—Admitting answer of witness that accused would not let witness go into room with accused and prosecutrix held not error, in absence of objection.

In prosecution for statutory rape, after witness testified that accused took prosecutrix into bedroom, her answer to question that she did not go in because accused would not let her was competent, and, in absence of motion to strike it out as conclusion, its admission was not error.

16. Witnesses ⟸372(2)—Sustaining objection to question which attempted to attack credibility of prosecutrix because of enmity towards accused held not error.

In prosecution for statutory rape of accused's daughter, where accused attempted to show enmity of prosecutrix because he punished her for leaving convent school, sustaining objection to question whether, on account of running away from school with prosecutrix, two other girls were not expelled, was proper; such testimony not being competent to impeach credibility of prosecutrix.

17. Rape ⟸54(1)—Uncorroborated testimony of prosecutrix is sufficient to warrant conviction.

In prosecution for statutory rape, uncorroborated testimony of prosecutrix is sufficient to warrant conviction.

18. Criminal law ⟸741(1), 742(1)—Weight and confidence to be given to testimony of prosecutrix is matter solely for jury.

In prosecution for statutory rape, weight and confidence to be given to evidence of prosecutrix is matter solely for jury.

Appeal from Superior Court, Nevada County; George L. Jones, Judge.

Natale Meraviglia was convicted of statutory rape, and he appeals. Affirmed.

Ernest B. D. Spagnoli, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

THOMPSON, Justice pro tem. The defendant was indicted by the grand jury of Nevada county for the crime of rape with his own 14 year old daughter, alleged to have occurred on or about January 1, 1925. No demurrer or motion to quash was filed. The de-

fendant pleaded not guilty. He was tried by a jury, and convicted.

The circumstances of the case are extremely revolting. The defendant had been separated from his wife for a number of years. His daughter was living at a convent in Grass Valley. He was guilty of a course of immoral and lascivious conduct toward her for a period of time. This was for the apparent purpose of arousing her passions and intimidating her. His conduct and declarations were reprehensible and disgusting. Every necessary element of the crime was so conclusively proven, and the law affecting these questions is so well settled, that good faith in prosecuting this appeal may well be questioned.

From the judgment of commitment, and the order denying the motion for new trial, this appeal was taken. The defendant urges a reversal of the judgment upon a claim that the record fails to show (1) that the grand jury was sworn; (2) that the prosecutrix was not the wife of the defendant; (3) that her age was not proven; (4) that evidence of actual penetration was lacking; (5) that the prosecution failed to make an election as to the particular offense relied upon; (6) that evidence of prior lewd conduct of the defendant was admitted; (7) that a child of immature years was permitted to testify; (8) that defendant was not permitted to show a certain escapade of the prosecutrix; and (9) that there was a fatal lack of corroboration.

There is so little merit in most of these contentions, and the evidence is of such an offensive character, that little testimony will be quoted. This omnibus challenge to every essential feature of the case is answered by a cursory reading of the record.

[1] Appellant claims there is a lack of evidence sufficient to warrant his conviction. He charges his conviction to prejudice of the jury acquired from knowledge of the fact that he had previously served a sentence in state's prison. But this is not a matter of which he may complain, since this was brought out deliberately by his cross-examination of the prosecutrix.

[2] The indictment was in the form prescribed by section 951 of the Penal Code. Our statute does not require the indictment to affirmatively show that the grand jury was sworn. Upon the impaneling of a grand jury, sections 903 and 904 of the Penal Code prescribe the form and require the oath to be administered. It is presumed that the officers have performed their duty and that the grand jurors have been sworn. Code Civ. Proc. § 1963, subd. 15.

In the absence of evidence to the contrary, it will be presumed that the grand jury was regularly and legally selected, impaneled, organized, and sworn, and that their proceedings were lawful and regular. 10 Stand. Ency. of Proc., 662. In Rinkard v. State, 157 Ind. 534, 62 N. E. 14, it is said:

"The weight of modern authority, as well as sound reason, seems to sustain the proposition that where an indictment, regular upon its face, is returned into open court, and is received and acted upon by the court without objection, it will, in the absence of [any showing] to the contrary, * * * be presumed that the grand jury returning it was duly impaneled, charged, and sworn. If any objections to the organization of the grand jury * * * existed, such objections should have been presented to the trial court by motion or plea in abatement." State v. Broussard, 133 La. 884, 63 So. 390; State v. Vaughn, 132 Mo. App. 135, 112 S. W. 728; State v. Maupin, 196 Iowa, 904, 192 N. W. 828, 195 N. W. 517; People v. Dear, 286 Ill. 142, 121 N. E. 615; State v. Dorr, 139 La. 277, 71 So. 509.

[3] By his plea of not guilty, and by his failure to demur or move to set aside the indictment in this case, the defendant has waived any objection which he might have urged as to any irregularities in the organization or impaneling of the grand jury. 12 Stand. Ency. of Proc. 664.

[4] A defendant may not be permitted to submit to a trial on the merits without objection, taking his chances of obtaining a favorable verdict, and reserve, in the event of an adverse judgment, any objection which he may have to mere irregularities in the form of indictment or pleading, for an attack in the appellate court for the first time. 14 Cal. Jur. 88; People v. Rodney, 131 Cal. 240, 63 P. 351; People v. Monteith, 73 Cal. 7, 14 P. 373.

[5, 6] It is a necessary element of rape under our statute to prove that the prosecutrix was not the wife of the defendant. This need not be shown by direct evidence, but may be established by circumstances. In this case the indictment charged this fact. The court instructed the jury that it was a necessary element, and that they could not convict the defendant unless it was proven beyond a reasonable doubt. Throughout the trial it was assumed by all parties concerned to be a fact, and was not questioned. It appears without conflict that the prosecutrix is the daughter of the defendant, and is a mere school girl, bearing her maiden name, and living at a convent apart from the defendant. Moreover a marriage between parents and children, under the provisions of section 59, Civil Code, is absolutely void. Under such circumstances slight evidence of nonmarriage is sufficient. The evidence of that fact in this case is entirely satisfactory. In 22 R. C. L., at page 1221, it is said:

"It is generally held that it is not absolutely necessary to prove nonmarriage by direct and positive testimony; but, like any other fact, it may be proved by facts and circumstances from which the conclusion may be drawn. Thus where a case was tried apparently on the assumption that the marriage relation did not exist, but it did appear that the victim was a mere school girl, bearing her maiden name, and living with her parents, it was held that the

fact of nonmarriage was clearly established." State v. May, 59 Wash. 414, 109 P. 1026, Ann. Cas. 1912B, 113; People v. Allison, 44 Cal. App. 118, 185 P. 992; People v. Bonzani, 24 Cal. App. 549, 141 P. 1062.

[7] Where the prosecutrix herself testifies that she is 14 years of age, and that fact is not disputed, it is sufficient proof of her age, taken in connection with her youthful appearance upon the witness stand. 22 R. C. L. 1201; 22 C. J. 171; People v. Elgar, 39 Cal. App. 78, 178 P. 168; People v. Pribnow, 61 Cal. App. 258, 214 P. 475. There is an abundance of evidence in the record of actual penetration.

[8] The first and chief offense testified to at the trial conformed with the allegation contained in the indictment, and occurred on January 1, 1925. Numerous other offenses of the same sort were afterward proven. There was no demand of the prosecution to make an election of the particular offense relied upon, although the court did suggest during the course of the trial:

"I assume that the prosecution has elected to stand upon the offense of January 1, 1925."

[9] If the defendant desired a more specific election, he should have said so. If no particular offense is elected at the trial, the first evidence that tends to prove an offense is deemed to be the selection. People v. Williams, 133 Cal. 165, 65 P. 323; 8 Cal. Jur. 230. Moreover, the trial court charged the jury that it must find beyond a reasonable doubt that the defendant committed the offense on the specific date of January 1, 1925.

[10] Where the evidence discloses more than one offense, the defendant is entitled to demand that the prosecution elect to stand upon some specific offense. The reason for this rule is that the defendant is entitled to a unanimous verdict as to a specific offense. Otherwise some jurors might believe him guilty of one of the offenses proven, and other jurors might be convinced as to some other offense proven, and it is apparent that all must concur as to his guilt of one and the same offense. And so it follows that the defendant may demand an election as to the specific one relied upon. But it has been held that the defendant may not sit silent during the trial with respect to an election and speculate upon the outcome, and then for the first time complain of a lack of choice, on appeal. State v. Hamilton, 263 Mo. 294, 172 S. W. 593; 22 Stand. Ency. of Proc. 304. To meet this uncertainty our court has wisely said that, in the absence of a specific demand or selection, it will be presumed that the prosecution relies upon the particular offense as to which he first submits evidence. In this case the evidence is satisfactory as to election and conviction of a specific charge.

[11] The defendant claims that he was prejudiced by admission of evidence of his guilt of the heinous crime described in section 288a of the Penal Code, with the prosecutrix, and other acts of rape, with her, prior to the offense chiefly relied upon by the prosecution. The evidence does show a continuous course of lascivious and adulterous conduct with her, on his part, including the enforcement of the practice described in that section of the Code, but it was all necessarily involved in the story of his treatment of the child to show his lustful and amorous purpose, and the means by which he sought to arouse the passions of his daughter. If his conduct thus involved another distinct offense, it was nevertheless competent and admissible. In fact, such conduct only aids to aggravate the crime with which he was charged.

[12] Where the prosecutrix is under the age of consent, lewd and lascivious conduct and other acts of sexual intercourse between the parties may be shown for the purpose of corroborating the prosecutrix and showing the lustful disposition of the accused. 10 Ency. of Ev. 595; 22 R. C. L. 1207; People v. Wademan, 38 Cal. App. 125, 175 P. 791; People v. Koller, 142 Cal. 621, 76 P. 500.

[13] Nor was it error to permit the witness Maudie, a child of 9 years of age, to testify. The material circumstances to which she testified were that on one occasion she observed the defendant take the prosecutrix into a bedroom, lock the door, and pull down the blinds. Before permitting her to testify she was rather carefully examined as to her qualifications. She appeared to be intelligent, well able to express herself and give her impressions and appeared to realize that she was expected to tell nothing but the truth, and that she was liable to be punished if she swore falsely. As the trial judge aptly said:

"I think the child shows sufficient appreciation of the nature of an oath."

[14] The test of the competency of a child to testify in the trial of the case is that they may possess sufficient intelligence, understanding, and ability to receive and fairly accurately recount their impressions, and that they have knowledge of the nature of an oath, and the moral sense to realize they should tell nothing but the truth, and are likely to be punished for telling falsehoods. 28 R. C. L. 461–463. The record discloses no reason to believe that she did not possess these qualifications.

[15] After this witness had testified that her father and sister had gone into the bedroom, she was asked by the prosecution: "Why didn't you go into the bedroom?" Which was objected to on the ground that it was incompetent and calling for a conclusion. The objection was overruled and the witness answered: "He wouldn't let me." There was no motion to strike this out on the ground that it was a conclusion. The question and

answer certainly are competent. They indicate secrecy and preparation for the commission of the offense. The answer may have been a conclusion, but the question did not indicate that it called for a conclusion. When the conclusion was stated the defendant should have moved to strike it out. This was not error.

[16] The escapade of the prosecutrix, which the defendant complains of being prevented from proving, consisted of an automobile ride with a number of other girls and boys. They left the convent and went to Nevada City and returned rather late. On cross-examination the defendant went into this affair to considerable length. He attempted to suggest that her relationship with some of the boys was improper. No impropriety was shown. He then attempted to prove that the prosecutrix held enmity toward her father, because he punished her severely at the convent because of this escapade. Indeed, the Mother Superior did interfere when he was beating her. She was asked if she didn't hate her father because he had punished her. She replied that she did not, but that she had said she would rather go to her mother who lived in San Francisco. After pages of examination relative to this episode, counsel for the defendant asked:

"Q. And on account of that running away that night, these two Lewis girls were expelled from the convent?"

An objection was sustained to this question on the ground that it was incompetent and not proper cross-examination. This was evidently an attempt to attack the credibility of the prosecutrix by showing that she had incurred hatred toward her father because he had punished her because of alleged indiscretions on this occasion. This was incompetent. In 25 R. C. L. 1211, it is said:

"It is the well-settled general rule that the bad reputation of the prosecutrix, on a charge of statutory rape, may not be shown to impeach her credibility. The law conclusively presumes that the girl could not give her consent, and every act of intercourse with her would be a crime * * * and her conduct, therefore, could not affect her credibility."

At least the evidence sought to be elicited to the effect that two other girls had been dismissed from the convent because of the escapade was too remote. There was no prejudicial error in it.

[17, 18] The uncorroborated testimony of the prosecutrix under the well-established rule of this state is sufficient to warrant a conviction. The weight and confidence to be given to her evidence is a matter to be determined solely by the jury. People v. Britt, 62 Cal. App. 674, 217 P. 767; People v. Rabbit, 64 Cal. App. 264, 221 P. 391; People v. Akey, 163 Cal. 54, 124 P. 718.

The judgment and the order are affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

73 Cal. App. 312

VANASEK v. POKONNEY et al. (Civ. 5135.)

(District Court of Appeal, First District, Division 1, California. June 23, 1925. Hearing Denied by Supreme Court Aug. 20, 1925.)

1. Husband and wife ⊂⊃270(1) — Nature of action to quiet title stated.

Action to quiet title by removal of a particular deed, valid on its face, as a cloud on alleged community status of land, is a proceeding under Civ. Code, § 3412, and not an action to quiet title as against adverse claims under Code Civ. Proc. § 738.

2. Husband and wife ⊂⊃270(9)—Finding as to wife's interest in community property held not to sustain judgment quieting title.

In an action to quiet title to community property, cross-complaint alleging wife had not authorized a deed given by her husband, a finding that wife had a present vested interest is erroneous, and will not support a judgment, in view of Civ. Code, § 172, her interest being only a contingent ultimate interest.

3. Husband and wife ⊂⊃267(1)—Deed given by husband will be set aside only so far as to protect ultimate interest of wife.

In action to quiet title, where wife seeks to set aside deed given by husband on theory that land is community property, *held* that, assuming that she might maintain an action to set aside the transfer by husband, such right was not to recover the land as her separate property, but only to the extent necessary to protect the ultimate interest of the wife.

4. Deeds ⊂⊃195—Supported by presumption of consideration.

A deed is supported by a presumption of consideration, and burden of proof is upon party seeking to avoid deed, and presumption applies to the pleadings as well as to the proof.

5. Husband and wife ⊂⊃270(7)—Action to quiet title as against husband's deed to community land must show lack of consideration or fraud.

In an action to quiet title to community property by a wife as against a deed given by her husband, the cross-complaint upon which action was founded not alleging want of consideration, a finding that husband's grantee had no interest was erroneous and would not support a judgment, because want of consideration or fraud must be alleged, in view of presumptions declared in Civ. Code, §§ 1614, 1615, and Code Civ. Proc. § 1963, subd. 39.

6. Husband and wife ⊂⊃270(5)—Husband necessary party to action by wife to set aside deed given by him.

In action by wife to set aside deed given by husband, and not making him a party, *held*,

that the interest and rights of wife over community property are not connected with those of the husband as to make him a necessary party, and demurrer on such ground must be sustained, notwithstanding amendment to Code Civ. Proc. § 370, as amended by St. 1921, p. 102, and sections 382, 389, relative thereto.

Appeal from Superior Court, Alameda County; Dudley Kinsell, Judge.

Action by Edna Vanasek against Anton Pokonney, Erzsi Novak, Frank Strybl, and others, wherein second named defendant filed a cross-action. From a decree quieting title in second named defendant, defendant last named appeals. Reversed, as to defendant last named.

L. D. Manning, of Oakland, for appellant.

Harold Jacoby, of Oakland (Milton Shepardson, of San Francisco, of counsel), for respondent.

CASHIN, J. The action was commenced by plaintiff, Edna Vanasek, to quiet title to certain land in Alameda county as against Frank Strybl, appellant herein, Erzsi Novak, respondent, Joe Novak, the husband of respondent, and others. Respondent filed her answer to the complaint, denying the alleged title of plaintiff, and therewith her cross-complaint against appellant, alleging therein her marriage to Joe Novak on June 1, 1914, and that at all times thereafter they continued to be husband and wife, the acquisition of the land by them on June 17, 1917, in the name of the husband as community property; that the land was acquired wholly with community funds; that on August 1, 1919, her husband, without her consent, by his several deed, executed and recorded on that day, conveyed the land to appellant, who took with knowledge of the existing marriage relation; that respondent, upon the transfer of the land to her husband, acquired, as the legal effect thereof, in her own right, and continued to own as a member of the matrimonial community, a present vested interest, estate, and property therein equally with her husband; that the Strybl deed was wholly void; that appellant was not and never had been the owner of any estate or interest in the land or any part thereof; that his deed was a cloud on "the title of said matrimonial community and of this cross-complainant thereto and therein," and asked the decree of the court adjudging the Strybl deed to be void, and that she be adjudged, as against plaintiff and the appellant, to be the owner of the land.

The cross-complaint contained no allegation of want of consideration for the transfer to appellant, or that there was fraud in the transaction, and no allegation of ownership or title in respondent other than as a conclusion from the community status of the land. Her husband was not made a party to the cross-complaint, was not served with summons in the action, and made no appearance therein.

Appellant demurred to the cross-complaint, alleging want of sufficient facts to constitute a cause of action and the nonjoinder of Novak, the husband, as a necessary party thereto.

The demurrer being overruled, appellant answered, alleging title in himself by virtue of the Novak deed; that a valuable consideration, to wit, $500, had been paid therefor to Novak, the husband, which was the reasonable value of the land, and that the purchase was made in good faith upon the representation by Novak that the land was his separate property.

After trial the court found generally that all the allegations of the answer and cross-complaint of respondent were true, and specifically that the land was community property purchased wholly with community funds; the conveyance thereof by Novak, the husband, to appellant; his knowledge of the community status of the land; the want of consent by respondent to the conveyance; that "at all of said times mentioned in said pleadings said matrimonial community was and now is the owner of said community real property, and that Joe Novak and the said Erzsi Novak, as members of said matrimonial community, each was and now is the owner respectively of an equal, certain, and definite and present interest in the property so purchased, and the court finds that said interest vested in them respectively upon the delivery of said deed to said Joe Novak, and that said interest ever since has been and now is so vested in them respectively"; and further that appellant "is not now and at none of the times mentioned in the pleadings in this action was he the owner of any estate, right, title, or interest in or to said real property or any portion thereof"; that appellant and plaintiff were asserting an interest in the property adverse to respondent, all without right, and concluded as the legal effect of the findings that the Strybl deed was wholly void, conveyed no interest in the land, and should be canceled of record; and thereupon entered a decree adjudging respondent as against appellant and plaintiff to be the owner in fee of the land, and that her title thereto be forever quieted against all and every claim of plaintiff and appellant and each of them.

Plaintiff did not appeal. The appeal taken by Strybl is upon the judgment roll, the evidence not being brought up.

Respondent contends that the findings are sufficient to support the judgment, and therefore that the judgment must be affirmed.

[1] The action, by fair construction of the allegations of the cross-complaint, is one to remove a cloud upon the alleged community status of the land—the deed to Strybl, which on its face is not void—and is thus a pro-

ceeding under the provisions of section 3412 of the Civil Code, and not simply an action to quiet the alleged title of respondent as against adverse claims of appellant, as provided in section 738 of the Code of Civil Procedure. The distinction in purpose and the difference in requirements as to pleading between the two proceedings are pointed out in Castro v. Barry, 79 Cal. 443, 446, 21 P. 946, 947, wherein the court said: "The distinction between the two kinds of action is clear. They are different not merely in form (for we have no forms of action in the common law sense), but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to plaintiff's rights, and which may be ordered to be destroyed in whosesoever hands it may happen to be. While in the latter, the proceeding is for the purpose of stopping the mouth of a person who has asserted or who is asserting a claim to the plaintiff's property, whether such claim be founded upon evidence or utterly baseless;" and that "in an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated." Hyatt v. Calkins, 174 Cal. 580, 582, 163 P. 1007; Hibernia Sav. & Loan Soc. v. Ordway, 38 Cal. 679, 681.

Such was the purpose of the pleader in the instant case so far as it was deemed essential to a right of recovery. After alleging the acquisition of the land as community property, and that a conveyance thereof was made without her consent, in a separate paragraph the conclusion is drawn therefrom, and alleged that respondent was, by reason of the community status of the land, the owner of a definite vested interest and estate therein equally with her husband; and in the same paragraph that appellant is not and never was the owner of any estate or interest in the land or any part thereof, no facts other than as above being alleged showing or tending to show that appellant's deed was invalid or that he did not acquire thereby and then own an interest in the land. While a general allegation of ownership in plaintiff or of the invalidity of an adverse claim of defendant is usually held to be one of ultimate fact and not a conclusion of law, yet the same averment may be one of fact or of a conclusion of law, according to the context (Levins v. Rovegno, 71 Cal. 273, 12 P. 161; Turner v. White, 73 Cal. 300, 14 P. 794; Heeser v. Miller, 77 Cal. 192, 19 P. 375); and in the instant case a consideration of the whole pleading makes it clear that the allegation that appellant owned no interest or estate in the land was not an allegation of ultimate fact, but a conclusion as to the legal effect of the facts, from which respondent also concluded that her interest therein was of the character alleged, and thus stated no issue of fact.

[2, 3] It is apparent from the record that it was the conclusion of the court that respondent was at all times after June 17, 1917, as the legal effect of the community status of the land, the owner of a present, vested, definite interest and estate therein. On June 17, 1917, section 172 of the Civil Code in form, as amended in 1891 (St. 1891, p. 425), was in force; and it follows, in accordance with the decisions in the cases of Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22, that respondent did not acquire a vested interest or estate therein by the conveyance thereof to her husband as community property; and, assuming that she might before the dissolution of the community maintain an action to set aside a transfer of the property by her husband whose act was not brought within the proviso enacted as an amendment to said section in 1891—a question suggested but not decided in the Spreckles Case, supra, and in Dargie v. Patterson, 176 Cal. 714, 719, 169 P. 360—such right is not to recover the land as her separate property or as a vested interest or estate in her, but as part of the community fund, the relief in such case going only to bind the property to the extent necessary to protect the ultimate interest of the wife in case the marriage should be dissolved by divorce or the death of the husband, and not to set aside the conveyance in its entirety. Dargie v. Patterson, supra.

[4] If the finding that appellant had no right, title or interest in the land was not intended by the court as a conclusion of law, thus inadvertently placed among the findings of fact, the only allegation in the cross-complaint in form supporting such finding was the conclusion to that effect alleged therein and hereinbefore considered. It may fairly be inferred from the cross-complaint that the conveyance to appellant was by deed of grant. Such a deed is supported by a presumption of consideration, the burden of proving want of consideration is upon the one seeking to avoid it, and the presumption in its effect applies to the pleadings as well as to the proof. Civ. Code, §§ 1614, 1615; Code Civ. Proc. § 1963, subd. 39; Blair v. Squires, 59 P. 211[1]; Boye v. Andrews, 10 Cal. App. 494, 500, 102 P. 551. There being no allegation that the transaction was tainted with fraud, unless the assumption of respondent that, having a vested interest, the execution of a deed by her husband without her consent would be equivalent thereto, it was necessary, in order to state a cause of action, to allege a want of consideration for the deed, or facts showing that the consideration was so inadequate as to support

[1] Reported in full in the Pacific Reporter; not reported in full in 127 Cal. xviii.

the conclusion that the transfer was made for the purpose of fraudulently depriving her of her rights. This defect in the pleading is to be considered in the instant case only in connection with the findings, the appellant not having been misled or prejudiced thereby, he having in his answer raised the issue. He was, however, entitled to a finding on the issue made. If the finding that he had no interest in the land was intended by the court not as a conclusion of law but as a finding against the allegation that there was a sufficient consideration for the deed—that being the only material issue upon which a specific finding was not made—such would be consistent with the other findings and the pleadings and responsive to the only remaining issue; and we are not warranted, in view of the record, in assuming that the court based such finding, considered as one of fact, on other issues, made at the trial but not pleaded, and on such assumption construe it as supporting negatively a judgment in favor of respondent or a judgment against appellant to the extent that respondent owned the whole and appellant no interest in the land.

If the conclusion mentioned be one of law, then the conclusions of law following the findings of fact and the judgment are not supported thereby.

[5] Considered as a conclusion from the other facts found, including inferentially a want of consideration for the deed, the findings do not support the conclusions of law or the judgment to the extent that the Strybl deed was wholly void, conveyed no interest in the land, or that respondent is the owner in fee thereof; but do, as the effect of the latter construction, support a judgment in form and effect binding the property to such an extent as will protect the interests of the wife in case the marriage should be dissolved by divorce or the death of the husband. Dargie v. Patterson, supra.

The question remains whether Novak, the husband, was a necessary party to an action seeking the relief asked, or which might, in view of the facts shown by the record, be properly granted.

[6] Whatever may be the correct theory on which to base the wife's right to sue, we are of the opinion that the husband is a necessary party to the action. While he may be estopped by his deed from maintaining the action, yet, in order that he may be bound by the judgment as between him and his wife as to the character of the property transferred, whether community or his separate property, and also in order that there may be a complete determination of the controversy, and where the judgment must in terms or effect revest in him the title to any interest therein recovered in the action, he should be joined. Bachman v. Sepulveda, 39 Cal. 688. The situation appears in principle analogous to the cases where an action is brought against third parties by a stockholder to recover or protect the property of a corporation, or by a cestui que trust for the recovery of property fraudulently conveyed by a trustee, where the trustee is estopped by his acts or refuses to sue, in which cases it has been uniformly held that the corporation or trustee is a necessary party defendant in order that they may be bound by the judgment. Cook on Corporations (7th Ed.) § 738; Beach v. Cooper, 72 Cal. 99, 13 P. 161; Wickersham v. Crittenden, 93 Cal. 17, 28 P. 788; Perry on Trusts, § 886; Butler v. Butler, 41 App. Div. 477, 58 N. Y. S. 1094; Le Gendre v. Goodridge, 46 N. J. Eq. 419, 19 A. 543. It is provided by section 382 of the Code of Civil Procedure that those who are united in interest must be joined as plaintiffs or defendants, and, as provided in section 389 of said Code, as construed in Mitau et al. v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275, all who are interested in the subject-matter of the litigation should be made parties thereto in order that complete justice may be done, and that there may be a final determination of the rights of all parties interested in such subject-matter.

The interest in or rights of the wife over community property, as defined by the decisions hereinbefore cited, seem to be so connected with the interest and rights of the husband therein and thereover, in origin, incidents and consequences, as to make it difficult to conceive of a situation where it could more reasonably be held that parties are united in interest; and where, as here, the action has for its purpose, and, according to the prayer of the cross-complaint, seeks the cancellation of the husband's deed and the quieting of the alleged title of the wife in what is, as the legal effect of the facts pleaded, community property, we are of the opinion that the husband was a necessary party, and that the demurrer on the ground of his nonjoinder should have been sustained.

Our conclusion in this respect is not affected by the amendment to section 370, Code of Civil Procedure (Stats. 1921, p. 102), removing with few exceptions the disabilities of married women as to suing and being sued alone, the provisions of sections 382 and 389 of the Code of Civil Procedure affecting and controlling all actions by those who stand in the relations therein defined to other persons and to the subject-matter of the action.

From the foregoing it is our conclusion that Joe Novak was a necessary party to the action between appellant and respondent, that the demurrer on the ground of his nonjoinder should have been sustained, and that the findings do not support the judgment as against appellant.

The judgment as against appellant Frank Strybl is reversed.

We concur: TYLER, P. J.; KNIGHT, J.

73 Cal. App. 162

PEOPLE v. MEHRA. (Cr. 849.)

(District Court of Appeal, Third District, California. June 8, 1925. Rehearing Denied July 8, 1925. Hearing Denied by Supreme Court Aug. 6, 1925.)

1. Intoxicating liquors ⊂=236(9) — Unlawful possession will not warrant nuisance conviction.

Unlawful possession of intoxicating liquor alone will not warrant a conviction, under Volstead Act, tit. 2, § 21 (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj), for maintaining a common nuisance, but there must be some evidence of facts or circumstances reasonably raising the inference of a purpose to sell.

2. Intoxicating liquors ⊂=143—Unlawful possession is not nuisance.

Private possession of intoxicating liquor in a private place, though unlawfully obtained and constituting crime of unlawful possession, does not constitute nuisance under Volstead Act, tit. 2, § 21 (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj).

3. Intoxicating liquors ⊂=239(8)—Instructions in nuisance prosecution held erroneous.

Instructions in prosecution for maintaining liquor nuisance, authorizing conviction without proof that place kept was place of common resort for sale and distribution of liquor, and defining the offense as unlawful possession inside of building, *held* erroneous.

4. Criminal law ⊂=200(4)—Plea of former jeopardy held not available in prosecution for maintaining common nuisance, because testimony used to in part establish offense was previously used in prosecution for possession of intoxicating liquors.

Plea of former jeopardy in prosecution for maintaining a common nuisance is not by Pen. Code, § 654, made available to defendant because he has been convicted of unlawful possession of intoxicating liquors, and same testimony which was used to prove the former offense is employed to in part establish the offense of maintaining the common nuisance; such crimes being different offenses, and Const. art. 1, § 13, and Pen. Code, § 1017, subd. 3, guaranteeing defendant only against double jeopardy for same offense.

On Petition for Rehearing.

5. Criminal law ⊂=202(3)—Defendant prosecuted in superior court for identical offense of which he had been previously convicted in justice's court, should be discharged.

Where defendant was prosecuted in the superior court under information which purported to charge offense of maintaining common nuisance under Volstead Act, § 21 (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj), but which in fact charged offense only of unlawful possession of intoxicating liquors, defendant having been previously convicted in justice's court for the same act, is entitled, under Pen. Code, § 1262, to be discharged.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

N. R. Mehra was convicted of maintaining a common nuisance, and he appeals. Judgment reversed, and defendant discharged.

Howe, Hibbitt & Johnston, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted under an information charging him with willfully and unlawfully maintaining a common nuisance at a certain building or house numbered 1109 Fifth street, in the city of Sacramento, state of California. From this judgment the defendant appeals and assigns as grounds for reversal the following, to wit: (1) That the evidence is insufficient to establish the charge of maintaining a common nuisance; (2) that the court erred in its instructions to the jury; (3) that the defendant had been once placed in jeopardy for the same offense.

We will consider the assignments of error in the order in which they are above set forth. The evidence upon which the defendant was convicted consists of the testimony of two arresting officers, and, in so far as it relates to the offense charged, we set forth the testimony in full.

Officer Nelson testified:

"I saw the defendant on the 28th day of October, 1924, at about 11 o'clock in the morning; it was at 1109 Fifth street, city of Sacramento. Officer Balsz went with me. Just as you come off the sidewalk at 1109 Fifth street—I don't know whether it is a clubroom, or dining room, or kitchen, or what you would call it, but Mehra was in there. I asked him where his room was, and he told me it was room 3, in back, and took me back to his room, which was in the rear of 1109 Fifth street. He had the key to the padlock that was on the door. We searched the room, and found the contents of that jug on the table there back of the dresser in a barley sack. The dresser was standing across the corner of the room. I do not know the defendant's business or occupation. He did run a kind of Hindoo Club, I believe it is."

Officer Balsz testified:

"I accompanied Officer Nelson on the 28th of October, 1924, to the premises, No. 1109 Fifth street, Sacramento. We asked the defendant where his room was. He accompanied us to the room. We searched the room, and found the jug of jackass brandy. The jug has been identified. We talked to the defendant while there, but discovered later he did not understand us—could not answer in our language. He did not just say that it was his room, he did not say anything, but he took us right to this particular room and opened the door with a key, and I took it for granted it was his room. We took the jug to the

police station. We placed Mehra under arrest at that time."

The remainder of the testimony of these witnesses deals with the question of former jeopardy, and is not relevant to the first assignment of error.

Section 21 of title 2 of the Act of Congress (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj), having for its purpose the carrying into effect of section 1 of the Eighteenth Amendment to the Constitution, prohibiting the manufacture, sale, and barter of intoxicating liquors for beverage purposes, reads as follows:

"Any room, house, building, boat, vehicle, structure, or place where intoxicating liquor is manufactured, sold, kept, or bartered in violation of this title, and all intoxicating liquor and property kept and used in maintaining the same, is hereby declared to be a common nuisance, and any person who maintains such a common nuisance shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000 or be imprisoned for not more than one year, or both."

The appellant contends that the testimony in this case, and which we have set forth, did not and does not establish any offense within the language of section 21 above quoted, in that the mere fact that intoxicating liquor is found in one's possession, whether upon the person or in a building, does not, in and of itself, constitute any crime denounced by the above section, or any other provision of the act of Congress prohibiting traffic in intoxicating liquors. To answer this contention requires consideration of both the language of the Constitution and of the act of Congress in question. Section 1 of the Eighteenth Amendment reads:

"After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within * * * the United States * * * for beverage purposes is * * * prohibited."

Section 21 of the Enforcement Act must be read in the light of the constitutional provision, and the words "manufactured, sold, kept or bartered" interpreted in the light thereof. The words "manufactured, sold and bartered" have a clear and certain meaning, and need only to be mentioned to be understood. It is the word "kept" that calls for a legal definition. Should it be read as part of the sentence in which it is found, or does it denominate an offense itself, in and of itself, irrespective of the purpose for which liquor may be kept? In considering this question, and determining what is meant by the use of the word "kept," the Supreme Court of the United States, in the case of Street v. Lincoln Safe Deposit Co., 254 U. S. 88, 41 S. Ct. 31, 65 L. Ed. 151, also reported in 10 A. L. R. 1548, after quoting the portion of section 21 which we have hereinbefore set forth, said:

"The word 'kept' in this section is the only one of possible application to the case at bar and the words with which it is immediately associated are such that as here used it plainly means kept for sale or barter or other commercial purpose."

That case decides that there is a distinction between the mere fact of possessing liquors and keeping liquors, contrary to the provisions of said section 21, that is, while the possession, in and of itself, may be unlawful, unless that possession is coupled with the purpose of selling, bartering, or other commercial use, the offense of maintaining a common nuisance is not committed. In Singer v. United States, 288 F. 695, the Circuit Court of Appeals of the Third Circuit thus deals with the same question:

"The words 'sold' and 'kept' in this section are the ones applicable to the case at bar. [Section 21, supra.] The word 'sold' tells its own meaning. The word 'kept,'" read in connection with the words with which it is immediately associated, 'means kept for sale or barter or other commercial purpose,'" citing Street v. Lincoln Safe Deposit Co., supra.

"The test of the statutory nuisance, therefore, is not the number of sales or the length of time liquor is kept upon the premises, but is whether the place is maintained for the keeping and sale of liquor in the sense of the statute. Other essentials being present, a single sale may establish the fact. Young v. United States (C. C. A. 9th) 272 F. 967; Wiggins v. United States (C. C. A. 2d) 272 F. 41; Gray v. United States (C. C. A. 6th) 276 F. 395; United States v. Eilert B. & B. Co. (D. C.) 278 F. 659. And the keeping of liquor for this unlawful purpose for a single day may constitute the offense. Feigin v. United States (C. C. A.) 279 F. 107."

In this case, both offers to sell and sales were established by the testimony.

In Reynolds v. United States, 282 F. 256, the Circuit Court of Appeals for the Sixth District considered the question with which we are dealing, and said:

"Maintaining a nuisance, however, as punished by section 21, implies a continuity of action for a substantial period. One might be guilty of manufacture in a room, and yet not guilty of maintaining a nuisance therein. It follows that the landlord may be prosecuted under either section, according to the facts of the case."

This ruling was again affirmed by the same court in Hattner v. United States, 293 F. 381. It is there said:

"The National Prohibition Act, tit. 2, § 21, penalizing as a nuisance the maintaining of premises on which liquor is manufactured and sold, implies a continuity of action for a substantial period."

In the case of Fassolla v. United States, 285 F. 378, the Circuit Court of Appeals for the Ninth District, in considering what evidence is necessary to establish the crime of maintaining a nuisance, held as follows:

"Evidence that defendant made a sale of liquor for beverage purposes on his premises, and that he had a quantity thereon, held sufficient to sustain a conviction on three counts charging respectively unlawful sale, unlawful possession, and maintaining a 'common nuisance.'"

In this case there was evidence that the officer went to the front door of the premises, gave the password, secured admission, paid $3 for a half gallon of wine, and, on searching the premises, found and seized a quantity of intoxicating liquor, consisting of a number of bottles, several demijohns containing various quantities of wine from 1 gallon to 3 or 4, and, in answer to the contention that it did not make the defendant's residence his place of business and maintained as a common nuisance, the court further said:

"The plaintiff in error relies on the fact that the liquor was manufactured and kept at his dwelling place, and not at a place of business; but by selling it he made it a place of business, and by keeping it there for sale he made his residence a common nuisance, within the provisions of the Prohibition Act, and his possession of the liquor was unlawful."

In Barker v. United States, 289 F. 249, the Fourth Circuit Court of Appeals held as follows:

"Though a single sale of liquor, or the mere unlawful possession, does not under all circumstances violate National Prohibition Act, tit. 2, § 21, making it punishable to maintain a nuisance by keeping a place for the violation of the act, the circumstances surrounding the sale or the single act of possession may be such as to warrant the inference that the single act was part of a habit, and therefore sufficient to sustain a conviction for nuisance."

In that case the evidence showed the possession of 2 gallons of corn whisky, a part of which was found in his residence, and a part under the counter of his store close by, and at his barn on the same premises were about 100 gallons of mash fit for distillation into whisky. No sale was proved. The court was of the opinion that the attendant circumstances were sufficient to show the purpose for which the liquor was being kept, and that it was being kept, as well as manufactured, for commercial purposes, and constituted maintaining the premises as a common nuisance.

In Scott v. State, 37 N. D. 90, 163 N. W. 813, A. L. R. 1917F, 1107, the Supreme Court of North Dakota held that a single sale would warrant a conviction on an information for keeping and maintaining a common nuisance by keeping a place where intoxicating liquors are sold as a beverage in violation of the prohibition law of this state. The act under which the defendant was prosecuted defined common nuisance as: (1) A place where intoxicating liquors are sold, bartered, or given away, in violation of law; (2) where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage; and (3) where intoxicating liquors are kept for sale, barter, or delivered in violation of law. It was held that evidence of one sale was sufficient to show the keeping of a place for the unlawful sale of intoxicating liquor, although the evidence did, in fact, establish more than one single act, and also established the drinking of liquor on the premises.

[1] In Barngrover v. State, 229 P. 301, the Court of Criminal Appeals of Oklahoma had before it the identical question presented to us in this case. The Oklahoma statute, among other things, specified that all places where any such liquor is kept, or possessed by any person, in violation of any of the provisions of this act, constituted a public nuisance. In construing this statute and the word "kept" it was held that to sustain a conviction of such a charge there must be proof tending to show that the place was a place of public resort, where intoxicating liquors were consumed, or from which distribution was made. In that case there was no testimony of sale other than that a certain person who apparently came from the place kept by the defendant had in his possession a bottle of whisky. A search of the place disclosed a small quantity of whisky, and also in the upper stories of the building a quantity of hay, which, by the odor emitted, indicated that whisky had been poured thereon. There was some testimony also as to the reputation of the place, indicating that intoxicating liquors were kept there for sale. Under this state of the evidence the court held that, even though the jury found that there was or had been whisky in the house, it did not necessarily follow that the defendant had it there for the purpose of sale, or for any illegal purpose, constituting a necessary element of maintaining a public nuisance. In other words, there must be something in addition to the mere unlawful possession of intoxicating liquor before a conviction for keeping a common nuisance could be had.

[2] In an extended note appended to the case of Scott v. State, supra, as reported in L. R. A. 1917F, beginning with page 1110, are collated a large number of cases dealing with the proof necessary to support a conviction of keeping a common liquor nuisance. An examination of these cases reveals the fact that not a single case holds that the mere showing of illegal possession is sufficient to establish such charge. A number of the cases do hold that a single sale, taken in connection with the attendant circumstances indicating a purpose and intent to conduct the business of unlawful selling intoxicating liquors, will support such a conviction, while a large number of the cases hold that a single sale is insufficient, and

that there must be a series of sales. The better reasoning, we think, supports the holding that, in addition to possession, where the law raises, as in California, no presumption of purpose, from the mere fact of possession, there must be shown to establish the fact of maintaining a common nuisance, a series of sales or a single sale, accompanied by such attendant circumstances as reasonably raise the inference of the purpose for which the possession of the intoxicating liquor is had, or possession, in connection with surrounding circumstances, such as the large quantity of liquor on hand, the various kinds of liquor, the containers in which it is kept, the character of the place, the manner in which it is fitted up, the use of passwords in gaining access to the premises, evidence of people visiting the place in unusual numbers or at unusual times, all of which may reasonably raise the inference of a purpose to sell and sufficiently support the charge of maintaining a common nuisance. But we have found no case which upholds a conviction upon a lesser degree of evidence. Any other holding would lead to the conclusion that, wherever a bottle of liquor may be unlawfully in any one's home, a conviction for maintaining a common nuisance may be had. It is not the crime of keeping, but the purpose for which the intoxicating liquor is is unlawfully kept, that is aimed at in the statute prescribing punishment for maintaining a nuisance. In the case at bar there is no testimony whatever of maintaining room No. 3 at No. 1109 Fifth street, in the city of Sacramento, for any purpose. The testimony simply shows the finding of a jug of whisky or jackass brandy in the bedroom unlocked by the defendant. If it were there for his own use, even though unlawfully obtained, it is evident that nothing within the language of a common nuisance was being maintained. Private possession in a private place may constitute the crime of unlawful possession, but that act, in and of itself, does not constitute any other criminal offense, under section 21 of the act of Congress usually known as the Volstead Law. In People v. Frankovich, 64 Cal. App. 184, 221 P. 671, this court had before it the prosecution for maintaining a nuisance under section 21 of title 2 of the Volstead Act, and we refer to the facts set forth in the opinion in that case as a good illustration of what constitutes maintaining a public nuisance. Even where the statute provides that the unlawful possession of intoxicating liquor is prima facie evidence that such intoxicating liquor is possessed for the purpose of unlawful sale or disposition, the presumption does not arise that the place or establishment where the liquor is kept is conducted as a common nuisance, or is maintained as a place for the unlawful sale of intoxicating liquor. In State v. Lesh, 132 Wash. 309, 232 P. 302, the Supreme Court of Washington under such a statute held that the possession of liquor creating presumption of intent to unlawfully sell or dispose of it does not create presumption of intention to sell it at a place maintained for sale of liquors, and refusal to so instruct was error. This case bears upon all three assignments of error herein. The trial court was asked to give the following instruction:

"While the unlawful possession of intoxicating liquor is prima facie evidence that such intoxicating liquor was possessed for the purpose of unlawful sale or disposition, the mere fact of the unlawful possession of intoxicating liquor in any place or establishment does not raise any presumption of law that such place or establishment was a place or establishment opened up, conducted, or maintained for the unlawful sale of intoxicating liquor. * * *"

The refusal to give this instruction was held error. The Supreme Court further said:

"We think appellant was entitled to have this request or the substance of it given. Its meaning is that, while there flows from the mere possession of intoxicating liquor a presumption of intention to unlawfully sell or dispose of it, there is no presumption flowing from mere possession that there is an intent to sell or dispose of the liquors at a place opened up, conducted, or maintained for that purpose. While we do not hold that the request was wrong, we are of the view that it would have been better and more complete had it contained the idea that the proof of possession might be considered by the jury, together with other facts in determining whether appellant was a jointist. [Maintaining a nuisance.] The instruction given, unless qualified as suggested, might easily mislead the jury into the belief that an inference of guilt as a jointist would arise from the mere fact of possession."

This latter sentence refers to the instructions which were given by the court to the effect that possession was prima facie evidence that the liquor was kept for purposes of unlawful sale, etc.

Upon the first assignment of error, we hold that the evidence in this case is not sufficient to support a conviction of maintaining a common nuisance. As the case must go back for a new trial, it is necessary to pass upon both the second and third assignments of error. At the request of the people, the court gave two instructions, which we have numbered 7 and 8, as follows:

Instruction No. 7: "The provisions of the National Prohibition Act of October 28, 1919, commonly called the Volstead Act, forbids the possession of intoxicating liquor containing one-half of 1 per cent. or more of alcohol by volume for beverage purposes, and, if you believe from the evidence in this case to a moral certainty and beyond all reasonable doubt that the defendant did, at the time and place charged in the information, to wit, at No. 1109 Fifth street, maintain the house at said number,

and did then and there knowingly have in his possession intoxicating liquor for beverage purposes, and that said liquor then and there contained more than one half of 1 per cent. of alcohol by volume, then I instruct you that the house in which said intoxicating liquor was kept and possessed is, under the law, a common nuisance, and the person maintaining such common nuisance is guilty of a misdemeanor."

Instruction No. 8: "Upon the plea of once in jeopardy and former conviction, the court instructs the jury that evidence sufficient to convict for unlawful possession of intoxicating liquor under the Volstead Act would not alone support a conviction for maintaining a nuisance. A person may be unlawfully in possession of intoxicating liquor without being guilty of maintaining a nuisance.

"In order to convict the defendant for maintaining a common nuisance under section 21 of title 2 of the Volstead Act, there must be evidence of the keeping or possession of the house where the liquor was unlawfully kept, which element is not necessary to the proof of the crime of unlawfully possessing intoxicating liquors.

"The court further instructs you that the conviction of defendant in the police court of the city of Sacramento on November 6, 1924, of the crime of unlawful possession of intoxicating liquors, as charged in the complaint in the police court, as a matter of law, does not bar a prosecution of defendant for maintaining a nuisance at 1109 Fifth street, as charged in the information on file in this case, and upon defendant's plea of once in jeopardy and former conviction, it is your duty to return a verdict for the people."

[3] By instruction No. 7 the jury is expressly told that the having in possession at house No. 1109 Fifth street of intoxicating liquor containing more than ½ per cent. of alcohol by volume constituted the crime of maintaining a common nuisance. This interpretation excludes from section 21 of title 2 of the Volstead Act the very gist of the offense denounced by the act of Congress, to wit, the maintaining of a place of common resort for the sale and distribution of intoxicating liquor—a place where people may go and buy the prohibited article.

By the eighth instruction the jury is advised that the offense of unlawful possession is transformed into a different crime, if that unlawful possession is inside instead of outside of a building. The statute makes no such distinction. Unlawful possession, as unlawful possession, is simply unlawful possession whether the forbidden article is upon the person or within a building. The mere fact that the defendant takes a flask of whisky or a bottle of jackass brandy into his residence does not, in and of itself, constitute his home a common nuisance. Such an interpretation of section 21 of title 2 of the Volstead Act would make the offense of unlawful possession and maintaining a common nuisance one and the same, and therefore amenable to the plea of once in jeopardy, where conviction has first been had on account of the unlawful possession. Neither one of the instructions comply with the cases which we have cited holding that the liquor must be kept for sale or barter, or, as said in most of them, for a commercial purpose. Where the testimony shows only unlawful possession, whether in or out of a building, conviction can be had only for the offense of unlawful possession, and instructions based thereon and advising that conviction can be had upon such testimony in a prosecution for maintaining a common nuisance are erroneous, and do not correctly state the law.

Both instructions permit of conviction upon testimony showing simply unlawful possession. In the case of Key v. State (Okl. Cr. App.) 234 P. 791, where the defendant was charged with willfully and unlawfully having in his possession certain intoxicating liquors, with intent to sell, barter, etc., the trial court instructed the jury as follows:

"If you believe from the evidence beyond a reasonable doubt that the defendant, Gus Key, did in Carter County, Okl., on or about the 31st day of January, 1922, have possession of Jamaica ginger, you will find the defendant guilty," etc.

In passing upon this charge, the Supreme Court ruled as follows:

"The instructions given by the court are fundamentally deficient. Possession alone of intoxicating liquor is not a crime against the laws of this state, much less the possession alone of a medicated alcoholic compound in a drug store; there must be coupled with such possession an unlawful intent to convey, sell, or otherwise furnish the same in violation of the prohibition ordinance and laws of the state. While the statute makes the possession of more than one quart of spirituous liquor in one's place of business 'prima facie evidence of an intent to violate the law,' this phase of the case was not submitted to the jury, as the trial court refused to give the defendant's requested instruction based on his theory of defense in rebuttal of any such presumption, if any, arising from the quantity of the compound possessed. The court not only failed to instruct the jury on this theory of defense, but the instructions given make evidence of possession conclusive proof of guilt."

While the statute under which this case was being prosecuted differs in its wording from section 21 of title 2 of the Volstead Act, its meaning, as interpreted by the Supreme Court of the United States, is the same, as is held by the Oklahoma court, that the word "kept" means kept for sale, which makes the ruling of the Oklahoma Supreme Court directly applicable, in that mere unlawful possession alone is not sufficient to sustain or support the charge given to the jury in that case, and likewise the holding must be that the charge given to the jury in this case that proof of possession in a house is sufficient to establish the offense of maintaining a

common nuisance is not a correct statement of the law. There must be proof, and a correct statement of the law requires the proving and finding that the liquor kept is kept for the purpose of barter or sale, and an instruction which permits of a conviction without including this element in a nuisance charge is not a correct statement of the law.

Is the plea of once in jeopardy well founded? To support this plea the defendant introduced in evidence a record of his conviction of the unlawful possession of the intoxicating liquor mentioned in the testimony, which we have hereinbefore set forth, and a large number of authorities have been cited to support appellant's contention. Appellant's argument rests upon section 654 of the Penal Code, which reads:

"An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. In the cases specified in sections six hundred and forty-eight, six hundred and sixty-seven, and six hundred and sixty-eight, the punishments therein prescribed must be substituted for those prescribed for a first offense, if the previous conviction is charged in the indictment and found by the jury."

We have no controversy and take no exception to the rulings had in the different cases cited by appellant, but we think the whole argument is founded upon a misapprehension of the plain wording of this section. As we have seen, the first clause of that section, "an act or omission which is made punishable in different ways by different provisions of this Code," may be punished under either of such provisions, but in no case can it be punished under more than one. The error of appellant lies in the failure to apprehend the fact that the act or omission constituting the crime known as the unlawful possession of intoxicating liquor is a separate and distinct offense from that of maintaining a nuisance for the sale of such liquor. The act or omission is not made punishable in different ways. The Volstead Act names different acts constituting different offenses, and punishes each act separately. There is not a word in the Volstead Act, as we read it, which makes an act punishable in different ways. They are all different acts, different offenses, and different punishments. In People v. Arnarez, 230 P. 193, in a case where the defendant was charged with unlawfully manufacturing liquor, and the jury returned a verdict of unlawful possession, this court held:

"A reference to the Volstead Act, the penal provisions of which were incorporated into the law of this state, shows that the offense of unlawful possession of intoxicating liquors and the manufacture of intoxicating liquors or sale for beverage purposes are separate and distinct offenses, even though they are so connected that, under the procedure admissible to be followed and ordinarily followed in the federal courts, said offenses are set forth in distinct and separate counts, and the jury authorized to find the defendant guilty upon the particular count or counts sustained by the evidence. See Fassolla v. U. S. (C. C. A.) 285 F. 378, in which the defendant was prosecuted under a count charging unlawful sales, and under a count charging unlawful possession. * * * The offense of unlawful possession in the crime of unlawful manufacture are separately and distinctly defined in the Volstead Act, and separate and distinct penalties for the separate offenses fixed and particularly set forth. We see no difference in the application of the principle concerning distinct offenses in this case from that which was applied by the federal court in the cases of Bell v. U. S. (C. C. A.) 285 F. 145; Massey v. U. S. (C. C. A.) 281 F. 293; Singer v. U. S. (C. C. A.) 288 F. 695, and Page v. U. S. (C. C. A.) 278 F. 41, where it was held, as set forth in 33 C. J. 617, that 'the offense of unlawfully possessing liquor is a distinct offense from that of the unlawful transportation of liquor, and the offense of unlawfully possessing liquor is a distinct offense from that of maintaining a nuisance for the unlawful sale of liquor.'"

In Panzich v. United States, 285 F. 871, the Ninth Circuit Court of Appeals held:

"Acquittal on a charge of selling liquor is not inconsistent with conviction for maintaining a common nuisance by keeping a place where liquor was unlawfully kept for sale."

In State v. Wold, 96 Me. 401, 52 A. 909, the Supreme Court of Maine ruled that—

"Having liquors in possession with intent to sell in violation of law, and maintaining a common nuisance are distinct offenses, and an acquittal of the former is no bar to a conviction on the latter, even upon the same facts," citing Com. v. McCauley, 105 Mass. 69; Morey v. Com., 108 Mass. 433; Com. v. Sullivan, 150 Mass. 315, 23 N. E. 47.

In Singer v. United States (C. C. A.) 288 F. 695, supra, summing up the cases on the question of alleged double prosecutions, the court used the following language:

"They have held specifically that the offense of unlawfully possessing liquor is a distinct offense from that of the unlawful transportation of liquor, and that the offense of unlawfully possessing liquor is a distinct offense from that of maintaining a nuisance for the unlawful sale of liquor. For these several offenses, separate convictions may be had and separate sentences imposed," citing the cases which we are considering herein.

The mere fact that testimony showing the unlawful possession of liquor and a prosecution had upon such a charge is used in part as the testimony to establish the offense of maintaining a common nuisance, which must go further and establish an additional and, as said by the foregoing authorities, a different offense from that of unlawful posses-

sion of the liquor, does not constitute a second prosecution for the same offense. It is simply using the testimony applicable to one offense as a part of the testimony for establishing a distinct and separate offense. That these offenses are separate see Ferry v. U. S. (C. C. A.) 292 F. 583; Beyer v. United States (C. C. A.) 282 F. 225. In Ex parte Moore, 233 P. 805, the District Court of Appeal of the Second District of this state, considering the question of the Volstead Act defining separate and distinct offenses, approved the rule which we are considering in the following language:

"However, we do not find it necessary in this case to determine whether the evidence is sufficient to show probable cause for believing petitioner guilty of selling the liquor, for it unquestionably suffices to show probable cause for believing him guilty of possessing it unlawfully. 'Possession,' says the court in Beyer v. United States (C. C. A.) 282 F. 226, 'is a crime separate and distinct from the crime of the sale of liquor.' In title 2, § 3 (section 10138½aa) of the National Prohibition Law, it is expressly declared that 'no person shall * * * possess any intoxicating liquor except as authorized in this act.' Possession, therefore, except as authorized by the Volstead Act, is one of the acts which the Wright Act, by its adoption of the 'penal provisions' of the federal statute, denounces as a criminal offense."

In People v. Townsend, 214 Mich. 267, 183 N. W. 177, 16 A. L. R. 902, the Supreme Court of Michigan in dealing with the plea of once in jeopardy, sets forth the following test:

"The test is not whether the defendant has already been tried for the same act, but whether he has been put in jeopardy for the same offense. A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either does not exempt the defendant from prosecution and punishment under the other."

In the case at bar, as we have seen, a prosecution and conviction of the unlawful possession of intoxicating liquor simply does not and would not support a conviction for maintaining a common nuisance for the sale or barter of such liquor. Some additional facts must be made to appear before a conviction on a nuisance charge can be had. This case is identical with the test here imposed. The additional fact to be proven, i. e., the keeping for sale, etc., is necessary. That the testimony, sufficient in a former care, is used in part to prove the case upon the prosecution of the nuisance charge, which must go further and establish what in some states has been held to be a continuous and persistent intent to violate the law by maintaining a place for the unlawful sale of liquor, does not, in any sense, subject the defendant to a double prosecution for one offense. The offense and the acts are separate. In State v. Marchindo, 65 Mont. 431, 211 P. 1093, the Supreme Court of Montana, passing upon a similar question, held that the offenses are separate and distinct, and a prosecution for one does not bar a prosecution for what is denoted as a separate and distinct offense. After reviewing a long list of authorities, that court thus expresses its view:

"Our opinion is that the authorities cited herein sustain the principle that the true test to be applied in cases of this nature is whether the same evidence would sustain a conviction under each count, or does each count require proof of an additional fact which the others do not. Or, to state it in another way: Would the evidence required to support a conviction upon one of the counts have been sufficient to warrant a conviction upon the others? Applying this test, it is apparent that in the information in this case the same evidence would not sustain a conviction under each count; that each count required proof of an additional fact which the others did not.

"It is apparent that evidence sufficient to convict for unlawfully selling intoxicating liquor would not alone support a conviction for either the unlawful possession of such liquor or for maintaining a nuisance. A person may be unlawfully in possession of intoxicating liquor without making any sale thereof or being guilty of maintaining a nuisance, and be convicted of such unlawful possession. In order to convict for maintaining a common nuisance under section 19 of the act, there must be proof of the keeping or possession of the place where the liquor is either unlawfully kept or sold, which element is not necessary to the proof of either the crime of unlawfully selling or unlawfully possessing intoxicating liquor."

In the case at bar the gravamen of the charge is the keeping of a place for the unlawful sale of liquor, as heretofore defined, and the mere unlawful possession of such liquor is not sufficient to sustain the nuisance charge.

In People v. Brannon, 233 P. 88, the District Court of Appeal for the Second District of this state, in a very carefully prepared opinion, clearly draws the distinctions between acts punishable differently and different offenses to prove which the testimony introduced may, in part, show the same acts. We quote therefrom the following:

"The prohibition of the Constitution is against putting a person twice in jeopardy for the 'same offense.' Article 1, § 13. See, also, Pen. Code, § 1017, subd. 3. It is the identity of the offense, and not of the act, which is referred to in the constitutional guaranty against putting a person twice in jeopardy. The Supreme Court of Ohio, in an opinion of exceptional vigor and rugged forcefulness, repudiates the tendency of some courts to construe the words 'same offense' as meaning the same act or transaction. 'The constitutional provision,' says that court in State v. Rose, 89 Ohio St. 383, 106 N. E. 50, L. R. A. 1915A, p. 256, 'uses the word "offense." Layman and lawyer alike understand the word "offense" to here mean simply a crime. * * *

The words "same offense" mean same offense, not the same transaction, not the same acts, not the same circumstances or same situation. * * * It is not enough that some single element of the offense charged may have a single element of some other offense as to which the defendant had theretofore been in jeopardy, but the constitutional provision requires that it shall be the "same offense." * * * Numerous decisions can be cited to sustain the contention of the defendant as to his former jeopardy. Some of these decisions may be accounted for by a difference in the constitutional provisions, but more of them are accounted for by the fact that the courts have usurped the power of the law maker and the constitution maker and have added something to or subtracted something from the plain provisions of the laws and constitution. * * * Courts too frequently fall into the very common error of assuming to interpret everything in the line of legal language. The utter folly and wholesale abuse of construing words that need no construction and of interpreting language that needs no interpretation has led to much of the judicial confusion and most of the irreconcilable diversity of court decisions. There can be no stability about law until there be certainty about law, and when the constitution maker or statute maker uses a plain phrase, a simple sentence and a workaday word, with a clear, simple and unmistakable meaning, it is almost criminal in a court to scramble what is simple and confuse what is clear, under the mask of its right to construe.' "

[4] From what has been said there is no escape from the conclusion that there is no merit in the plea of former jeopardy in this case. The law carefully and distinctly defines the offenses of unlawful possession of intoxicating liquor, unlawful sale of intoxicating liquor, unlawful manufacture of intoxicating liquor, and the maintenance of a common nuisance. These offenses are all separate and distinct. They are distinct offenses, not simply different punishments affixed to the same act. They are separately defined, set forth, and made punishable by the Volstead Act, and the mere fact that the evidence or testimony used in one case to prove the crime there charged may be used, in part, to prove a different offense upon a different charge does not support the plea of former jeopardy. The act of Congress having made the offenses with which we are dealing separate, and the state of California, through what is known as the Wright Act (St. 1921, p. 79), having incorporated the same into the penal laws of this state, officers and courts are under the legal necessity of following the law just as it is written. We think it clearly appears that Congress, in defining and making penal the distinct offense of maintaining a common nuisance, was evidently framing a law so as to curb the activities of persistent offenders, and not to punish twice for the same offense.

For the reasons set forth under the first and second assignments of error herein the judgment of the trial court is reversed and the cause remanded for further proceedings.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [5] Petition for rehearing by the plaintiff; petition by the defendant for modification of the order heretofore made and entered in this action. From the fact that the information in this cause charged only unlawful possession, an offense of which the superior court has no jurisdiction, and the record shows that the defendant has already been convicted in the justice's court of the identical offense for which this prosecution is had upon the same testimony, and that no legal conviction can be had herein, it follows that the portion of the order remanding said cause to the trial court for further proceedings should be vacated, and no new trial directed.

The order heretofore entered is therefore amended to read: Judgment reversed, and defendant discharged, as required by section 1262 of the Penal Code. Petition for rehearing denied.

---

73 Cal. App. 183

PEOPLE v. FULLER. (Cr. 843.)

(District Court of Appeal, Third District, California. June 8, 1925. Rehearing Denied July 8, 1925. Hearing Denied by Supreme Court Aug. 6, 1925.)

1. Intoxicating liquors ⟸238(1)—In prosecution for maintaining common nuisance, evidence held sufficient to warrant submitting cause to jury.

Where evidence in prosecution for maintaining common nuisance showed that defendant kept house purported to be maintained for letting furnished rooms, that several gallons of various kinds of liquor were concealed therein, and that house was resorted to by numerous persons at unusual hours, who remained but a short time, some of whom came in taxicabs, *held* sufficient to warrant submitting cause to jury.

2. Intoxicating liquors ⟸239(8)—Instruction in prosecution for maintaining common nuisance held erroneous.

In prosecution for maintaining a common nuisance under Volstead Act, § 21 (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj), instruction that defendant was guilty if he maintained a certain house, and knowingly had in posession intoxicating liquor for beverage purposes, *held* erroneous without charge concerning purpose for which liquor was kept, and error was not cured by Const. art. 6, § 4½.

On Petition for Rehearing.

3. Criminal law ⊂=202(3)—Defendant prosecuted in superior court for identical offense of which he had been previously convicted in justice's court, should be discharged.

Where defendant was prosecuted in the superior court under information which purported to charge offense of maintaining common nuisance under Volstead Act, § 21 (U. S. Comp. St. Ann. Supp. 1923, § 10138½jj), but which in fact charged offense only of unlawful possession of intoxicating liquors, defendant having been previously convicted in justice's court for the same act, should, under Pen. Code, § 1262, be discharged.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

J. S. Fuller was convicted of maintaining a common nuisance, and he appeals. Judgment reversed, and defendant discharged.

Ray T. Coughlin, of Sacramento (George E. Foote, of Sacramento, of counsel), for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted under an indictment charging him with willfully and unlawfully maintaining a common nuisance at a certain house or building, numbered 1417 Twenty-Second street, in the city of Sacramento, county of Sacramento, state of California. From the judgment of conviction and the order denying his motion for a new trial the defendant appeals, and assigns as grounds for reversal, to wit: (1) That the evidence is insufficient to establish the charge of maintaining a common nuisance; (2) that the court erred in its instructions to the jury; (3) that the defendant had been once placed in jeopardy for the same offense.

This case was submitted upon the briefs filed in the case entitled People of the State of California, etc., v. N. R. Mehra (Criminal No. 849) 238 P. 802, this day decided by this court, wherein the same questions were involved, and it will therefore suffice to refer to the said opinion for the authorities cited and upon which the opinions in that case and in this case are founded.

Conviction was had in this case upon the following testimony:

T. W. Pearson, a police officer, testified as follows:

"On the 8th of October, 1924, I visited the premises known as 1417 Twenty-Second street in the city of Sacramento, county of Sacramento, state of California. I went there about 9 p. m. I was accompanied by Officer Babayco. The building is a two-story dwelling situate on the corner adjoining an alley on Twenty-Second street. We entered the building that evening. We went up to the back door and knocked. The defendant came to the door. We said, 'Hello, Speed,' and the defendant opened the door, and admitted us. I had not been in that house before that night. We had been around there, but not in the house. We noticed frequent visitors to the place, men and women entering the house during the day and during the night, machines driving up, taxis, people coming in and staying a little while, and coming out again. Some of the evenings there were constant machines there, sometimes two or three at a time. At the particular night in question we went into the kitchen off the back porch. The defendant was there. There was a lady there also. She gave the name of Ruth Davis. When we got inside we told him we were police officers, and had come to search the place. We asked him if he lived there, and he said he did. We noticed the people coming and going, but could not say as to their sobriety, but we have seen people that were coming in and out of there, staying a few moments and coming out. We could hear them talking a half a block away. We were not close enough to tell whether they were under the influence of liquor. We searched the place. I went into the pantry; there was a sink there, lots of glasses, several empty bottles, a buzzer running to the front door. The button is in a cabinet right back of the front door in a sort of clothes cabinet. Mr. Babayco searched the upstairs. I saw the liquor that Mr. Babayco found. We found three one-gallon jugs of wine, four one-quart bottles of brandy, one quart bottle of wine, and a pint bottle of brandy. We took possession of the liquor, and arrested the defendant, and also Ruth Davis. We did not know the defendant's name, but we noticed that 'Speed' was what everyone else said who went to the door, so we gave the same password. We said, 'Hello, Speed,' and he opened the door. Since that time I have noticed the sign there reading 'Furnished rooms to let.'"

Officer Babayco testified:

"I accompanied Pearson to 1417 Twenty-Second street on the night of October 8, 1924. It was about 9 o'clock in the evening. I saw the defendant, Fuller, there at that time. We went in the back yard and we saw a few fellows come out of there, and they used the word of 'Speed,' so we walked up to the back door, and said, 'Hello, Speed,' knocked at the door first, and he opened the screen door, and admitted us. On the second floor we found a trap in the floor of one of the bedrooms. It was just about the center of the room. There was a rug on top of this trap. One of the corners was not tacked to the floor; the rest of it was. All that was necessary was to lift the corner of the rug up, and to lift it up far enough and you could see the trap. I lifted the trap up, and found all the wine and jackass in there. It was a square hole between the ceiling of the first floor and the second floor. It must be about 12 inches deep, 16 by 16 inches square. I found in there three one-gallon jugs of wine and four one-quart bottles of jackass brandy, and then three one-quart bottles of wine, and two one-pint bottles of jackass brandy."

[1] The defendant pleaded guilty in the police court to the charge of unlawful possession of the same liquor. While the testimony in this case does not show any actual sales of liquor, it does show that the place was being resorted to by a number of people at unusual hours; that such people were resorting to the place for some purpose that required but a comparatively short stay. Their coming and going in such numbers and staying only so short a time and at unusual hours stamped the place as being one used for purposes other than that of merely letting furnished rooms. The place where the liquor was concealed, the quantity of liquor on hand, the various sizes of the containers, the empty bottles found in the sink, the conveyance of people thereto in taxis, the unusual hours of visitation, and the fact of unlawful possession of intoxicating liquor, all taken together, we think, presents a question for the jury to determine whether the place was or was not then being used as a place for the unlawful sale and distribution of intoxicating liquor. Under the authorites which we have cited in the case of People v. Mehra, supra, we think there was sufficent evidence to warrant the submission of this cause to the jury upon the charge set forth in the indictment.

Upon the question of once in jeopardy, the authorites cited in the Mehra Case are also conclusive against the contentions of this appellant.

Upon the conclusion of the testimony, the court gave to the jury the following instructions relative to maintaining a nuisance. These instructions we have numbered 6 and 7 and are as follows, to wit:

Instruction 6: "The provisions of the National Prohibition Act of October 28, 1919, commonly called the Volstead Act, forbids the possession of intoxicating liquor containing one-half of 1 per cent. or more of alcohol by vol ume for beverage purposes, and, if you believe from the evidence in this case to a moral certainty and beyond all reasonable doubt that the defendant did, at the time and place charged in the indictment, to wit, at number 1417 Twenty-Second street, maintain the house, and did then and there knowingly have in his possession intoxicating liquor for beverage purposes, and that said liquor then and there contained more than one-half of 1 per cent. of alcohol by volume, then I instruct you that the house in which said intoxicating liquor was kept and possessed is, under the law, a common nuisance, and the person maintaining such common nuisance is guilty of a misdemeanor."

Instruction 7: "If you believe from the evidence to a moral certainty and beyond all reasonable doubt that the defendant, J. S. Fuller, in the city of Sacramento, county of Sacramento, state of California, in the month of October, A. D. 1924, did then and there maintain the house at number 1417 Twenty-Second street, in the city of Sacramento, and did willfully and unlawfully possess and keep in the house on the premises maintained by him at number 1417 Twenty-Second street, in said city of Sacramento, certain intoxicating liquors then and there containing more than one-half of 1 per cent. of alcohol by volume, then I instruct you that his keeping or possessing of such intoxicating liquor in said house on said premises constitutes, under section 21 of the Volstead Act, a common nuisance, you should find the defendant guilty as charged."

[2] It will be seen by these instructions that the question of the purposes for which the intoxicating liquors were possessed or kept was entirely taken away from the consideration of the jury, and the jury directly informed that possession of the liquor at or in the house in question constituted the offense of maintaining a common nuisance. As we have seen by the authorities cited in the Mehra Case, supra, such is not a correct statement of the law. Under such instructions the jury would be warranted in finding the defendant guilty, even though no crime specified in the section of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½ jj), under which he is being prosecuted, had been committed. Mere having possession of intoxicating liquors is not sufficient. It must be kept for sale, barter, or other commercial purposes. Unlawful possession of liquor in a building, or outside of a building, is simply unlawful possession of liquor. The mere fact that the man owns a building or controls a house or a building, and unlawfully has possession of intoxicating liquors therein, does not constitute the crime of maintaining a common nuisance. The instructions which we have quoted directs the jury to convict upon a state of facts showing nothing further.

While, as we have stated, we think the facts set forth in the transcript in this case warranted the submission of the case to the jury, we cannot say that the error of the court is obviated by section 4½ of article 6 of the Constitution. We find in the transcript no instructions accurately defining the offense for which the defendant was being prosecuted, but we do find that the instructions given on the subject directly authorized the jury to find the defendant guilty upon a state of facts not constituting the crime charged in the indictment. Under such circumstances we cannot say that there has not been a miscarriage of justice. The remainder of the testimony outside of possession are facts from which inferences may be drawn, and the jury should have been instructed concerning the purposes for which intoxicating liquor was kept and the inferences allowable to be drawn from all the attendant circumstances.

For the reasons hereinbefore given, and, also as set forth in the opinion in the case of People v. Mehra, supra, upon the briefs in which case this cause has been submitted, the judgment and order of the trial court are reversed, and the cause remanded for

further proceedings, in accordance with this opinion and the opinion in the Mehra Case.

We concur: FINCH, P. J.; ANDERSON, Justice pro tem.

On Petition for Rehearing.

PER CURIAM. [3] Petition for rehearing by the plaintiff; petition by the defendant for modification of the order heretofore made and entered in this action. From the fact that the information in this cause charged only unlawful possession, an offense of which the superior court has no jurisdiction, and the record shows that the defendant has already been convicted in the justice's court of the identical offense for which this prosecution is had upon the same testimony, and that no legal conviction can be had herein, it follows that the portion of the order remanding said cause to the trial court for further proceedings should be vacated and no new trial directed.

The order heretofore entered is therefore amended to read: Judgment reversed, and defendant discharged, as required by section 1262 of the Penal Code. Petition for rehearing denied.

---

73 Cal. App. 208

PEOPLE v. BUONOCORE. (Cr. 850.)

(District Court of Appeal, Third District, California. June 12, 1925.)

1. Intoxicating liquors ⊂⊃213—Information held not to charge offense of maintaining common nuisance; "beverage."

In prosecution for maintaining common nuisance, information reciting that defendant unlawfully maintained a common nuisance, in that he kept in possession and on certain premises intoxicating liquor for "beverage purposes and not for sacramental or medicinal purposes," *held*, in view of Pen. Code, § 952, subd. 3, not to charge the offense, since to constitute offense defendant must maintain a place for unlawful sale of liquor; the word "beverage," when used in statute relating to intoxicating liquors, meaning only liquor that is capable of being drunk.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Beverage.]

2. Criminal law ⊂⊃93—Unlawful possession of intoxicating liquors is not an offense within jurisdiction of the superior court.

Information charging unlawful possession of intoxicating liquors at a certain building does not constitute an offense within jurisdiction of the superior court.

3. Intoxicating liquors ⊂⊃143—Offense of maintaining common nuisance cannot be established by proof only of unlawful possession of intoxicating liquors within building.

Offense of maintaining common nuisance cannot be established by proof only of unlawful possession of intoxicating liquors, though such possession be within a building; evidence being required to show the building is maintained as a place for the unlawful sale of the liquor.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Salvatore Buonocore was convicted for maintaining a common nuisance, and he appeals. Reversed and remanded, with directions.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of maintaining a nuisance upon an information in the following words and figures, to wit:

"Salvatore Buonocore is accused by the district attorney of said county of Sacramento by this information of the crime of maintaining a common nuisance, committed as follows: "The said Salvatore Buonocore, on the ——— day of November, A. D. 1924, in the said county of Sacramento, in the said state of California, and before the filing of this information, did then and there willfully and unlawfully maintain a common nuisance at a certain building or house situate at 412 R street, in the city of Sacramento, county of Sacramento, state of California, in that the said defendant did then and there willfully and unlawfully possess and keep on the premises aforesaid certain intoxicating liquor for beverage purposes, and not for sacramental or medicinal purposes, the said intoxicating liquor then and there containing more than one-half of 1 per cent. of alcohol by volume, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California."

The defendant's motion for a new trial being denied, the cause has been appealed to this court. Upon being arraigned on the information referred to, the defendant filed a demurrer stating six grounds of objection, only two of which we need to consider, to wit, the second, which reads as follows: "That said information does not comply with section 952 of the Penal Code of the State of California in this: That it cannot be ascertained therefrom the offense charged or the particular circumstances of the offense charged which are necessary to constitute a complete offense," and the fourth assignment, to wit: "That said information is defective in this: That it charges two of the same offenses in the same paragraph and said defendant can-

not understand whether or not he is charged with the unlawful possession of intoxicating liquor or is charged with maintaining a common nuisance."

[1, 2] It is evident from a reading of the information that the intent of the pleader was to charge the defendant with maintaining a common nuisance. It is also evident from a reading of the information that the pleader did not have in mind the acts necessary to constitute the offense of maintaining a nuisance. The pleader did not set forth in the information, as required by the third subdivision of section 952, supra, acts to constitute the offense with which the pleader was seeking to charge the defendant. By name the pleader charges the defendant with maintaining a common nuisance, but, when it comes to stating the acts upon which the accusation was based, there is stated nothing further than the acts constituting unlawful possession. The mere statement that the intoxicating liquors are possessed for beverge purposes does no change the offense charged from that of unlawful possession to that of maintaining a common nuisance. The word "beverage," when used in statutes relating to intoxicating liquors, simply means liquor that is capable of being drunk. 33 C. J. 493; 7 C. J. 1148; and 1 Words and Phrases, First and Second Series. Nor does the fact that the liquors are alleged to have been possessed at a certain house, numbered 412 R street, in the city of Sacramento, add anything to the designation of the crime. As we have heretofore shown in the opinion filed in the case of People v. Mehra, 238 P. 802, decided by this court on the 8th day of June, 1925, unlawful possession in a house is no different from unlawful possession upon the person. Unlawful possession is simply unlawful possession. The crime of maintaining a nuisance, as clearly shown in the opinion to which we have referred, consists in keeping liquor for sale, barter, or commercial purposes, and not simply in the mere unlawful possession of liquor. The offense as set forth in the information in this case is simply that of unlawful possession at a certain building or house, and does not constitute an offense within the jurisdiction of the superior court. The demurrer does not raise directly the question of jurisdiction, but, as the demurrer must be sustained for the reasons before given, we make this statement in order that expense to the county may be saved in framing informations charging the maintenance of nuisances in liquor cases. We may also add that in the case of People v. Mehra (Cal. App.) 238 P. 802, and also in the case of People v. Fuller (Cal. App.) 238 P. 809, the sufficiency of the information to charge an offense other than simply the offense of unlawful possession was not considered, because counsel did not tender that question to the court for decision. The demurrer to the information herein should have been sustained. This case also presents the same questions relative to the instructions given by the court as presented in the case of People v. Mehra and People v. Fuller, supra, and for the reasons therein stated it must be held that the instructions given by the court to the jury were prejudicially erroneous. What we have also said in the two cases referred to relative to the plea of former jeopardy is applicable here.

[3] The offense of unlawful possession and the offense of maintaining a nuisance are different, and, while unlawful possession would necessarily be shown in proving the maintenance of a nuisance, to wit, a place for the sale, barter, and distribution of intoxicating liquors for commercial purposes, the latter offense is not established by simply showing possession within a building. The demurrer in this case shows that the defendant was in possession of a considerable quantity of wine; that the defendant had purchased a ton of grapes; had crushed the same; and had possession of the wine derived from the crushing of said grapes in a cellar of the dwelling house occupied by him. The defendant sought to show that this possession was for his own use; that is, for the use of himself and family. The transcript shows that the defendant while upon the stand was asked the following question: "What did you have that wine for?" Following this question a considerable colloquy ensued which we need not here set forth further than to state that the court sustained the objection of the prosecution thereto, and, in so doing, stated its views as follows:

"The objection will be sustained. The Constitution, or the Volstead Act, or the Wright Act, which provides that a person can use it for their own use, doesn't relieve them from the penalty provided by law for having this in their possession or maintaining a nuisance."

Just previous to this ruling the court stated that it was immaterial that the defendant had the wine for his own use. This ruling on the part of the court was clearly erroneous. A person may be unlawfully in possession of intoxicating liquor, but, if his possession is for his own use, such possession does not constitute the crime of maintaining a nuisance. The offense is still unlawful possession, and, while the prosecution had not proven anything more than unlawful possession, the defendant was being prosecuted for the offense of maintaining a nuisance, even though he was charged with such an offense, and he had a right to show the purposes for which he had possession. While not necessary to a decision herein, we have expressed our views upon this question in order that the distinction between the offense of unlawful possession and the offense of maintaining a nuisance may be, if possible, more clearly set forth, and also the testimony

that may be properly presented to the jury in the different cases. For the reasons herein stated, and in the opinions in the cases to which we have referred, the judgment and order of the trial court are reversed and the cause remanded, with directions to the trial court to sustain the defendant's demurrer to the information herein.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 213

PEOPLE v. RICO. (Cr. 857.)

(District Court of Appeal, Third District, California. June 12, 1925.)

Criminal law ⊜1186(4)—Where a defendant is convicted of an offense with which he is not charged, no erroneous rulings can be held as cured or nonprejudicial.

Where a defendant is convicted of an offense with which he is not charged, no erroneous rulings can be held cured or nonprejudicial, under Const. art. 6, § 4½.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Manuel Rico was convicted for maintaining a nuisance, and he appeals. Reversed and remanded, with directions.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER. J. The defendant was convicted of maintaining a nuisance, and from the judgment following conviction appeals to this court. The information upon which the defendant was tried is identical in form and substance with the information in the case of People v. Salvatore Buonocore, 238 P. 812, this day decided, save and except the location of the building or house in which the intoxicating liquors were found. To this information the defendant filed a demurrer in form and substance the same as that considered in the case just referred to, and for the reasons therein stated we hold that the demurrer should have been sustained. The instructions given in this case are identical with the instructions considered and held erroneous in the case of People v. Mehra, 228 P. 802, and People v. Fuller, 238 P. 809, decided by this court on the 8th day of June, 1925, and for the same reasons it must be held that the instructions were erroneous. This action was also prosecuted upon the fact that the defendant was found in possession of a small flask of intoxicating liquor, and, for the reasons stated in the opinion filed in the case of People v. Mehra, supra, it must be held that such fact does not constitute the offense of maintaining a nuisance. Where a defendant is convicted of an offense with which he is not charged, no erroneous rulings can be held as cured, or nonprejudicial, under the provisions of section 4½ of article 6 of the state Constitution.

Upon the authority of the cases just referred to in the opinions, deciding the cases to which we have referred, it is ordered that the judgment of the trial court be and the same is hereby reversed, and the cause remanded, with directions to the trial court to sustain the defendant's demurrer to the information filed in this case.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 214

PEOPLE v. JOHNSON. (Cr. 853.)

(District Court of Appeal, Third District, California. June 12, 1925.)

Criminal law ⊜409—The corpus delicti of an offense cannot be established by evidence of an extrajudicial admission of defendant.

The corpus delicti of an offense cannot be established by evidence of an extrajudicial admission of defendant.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

Nels Johnson was convicted of maintaining a nuisance by having unlawful possession of intoxicating liquor, and he appeals. Reversed.

Richard P. Talbot and George E. Foote, both of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of maintaining a nuisance by having unlawful possession of intoxicating liquor at 3016 W street in the city of Sacramento on the ——— day of December, 1924. The conviction was had upon the theory that unlawful possession of intoxicating liquor within a building constituted the crime of maintaining a common nuisance. The information in this case is similar to the information in the cases of People v. Buonocore, 238 P. 812, and People v. Rico, 238 P. 814, this day decided by this court, but, as counsel for the defendant has urged no objection to the information, we refrain from making any ruling thereon. The testimony in this case showing unlawful possession only, what we have said in the case of People v. Mehra, 238 P. 802, decided by this court on the 8th day of June, 1925, is applicable here. The instructions given by the court in this case are also identical with the instructions given in the Mehra

Case, and for the reasons therein stated, must be held erroneous.

In this case, according to the testimony of one witness, there appears an extrajudicial admission of the defendant that he had peddled some liquor, but the rule is well established that the corpus delicti of an offense cannot be established by such testimony. For the reasons set forth in the opinion filed in the case of People v. Mehra, supra, the judgment of the trial court must be and the same is hereby reversed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 216

PEOPLE v. HOGEL. (Cr. 863.)

(District Court of Appeal, Third District, California. June 12, 1925.)

Criminal law ⊂=410—Argument of counsel in addressing either court or jury is not admissible in any subsequent trial for the same cause.

Argument of defendants' counsel in prosecution for maintaining a nuisance made upon preliminary examination of defendant and another *held* improperly admitted; such statements not coming within the principle applicable to admissions formally made and entered in course of trial.

Appeal from Superior Court, Sacramento County; Charles O. Busick, Judge.

F. P. Hogel, true name F. P. Hogle, was convicted for maintaining a nuisance in having possession of intoxicating liquor, and he appeals. Reversed.

George E. Foote, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. The defendant was convicted of the offense of maintaining a nuisance by having in his possession a jug containing about a gallon of intoxicating liquor at a certain building or house occupied by him at 714 in the alley between M and N streets, in the city of Sacramento, and appeals from the judgment of conviction. The evidence in this case shows nothing further than the mere possession of the liquor referred to, and upon the authority of the case of People v. Mehra, 238 P. 802, and People v. Fuller, 238 P. 809, decided by this court on the 8th day of June, 1925, it must be held that the evidence is insufficient to sustain a prosecution for the alleged offense of maintaining a nuisance. The instructions in this case are identical with the instructions held erroneous in the cases to which we have referred, and the same ruling must be had here. The plea of once in jeopardy was also interposed, upon which appeal the same ruling must be had as in the cases to which we have referred. In this case no demurrer was interposed to the sufficiency of the information to charge the offense of maintaining a nuisance, and, while it is apparent that the crime of maintaining a nuisance is not charged in the information, in the absence of any objection urged by counsel for the defendant, we refrain from making any ruling thereon. The transcript shows that in the trial of this case the prosecution, over the objection of the defendant, read to the jury a portion of the argument made by counsel for the defendant upon the preliminary examination of the defendant and one Roberts. The argument to which we refer is as follows:

"Mr. Foote: No defense. I think, your honor, there may be some question here as to the ownership of the liquor, but it would seem that, as to the defendant Roberts, it is the police officers' testimony that Hogle was the owner of the place. Now, I don't think that the testimony could or would warrant the court in holding the defendant Roberts to answer in the superior court on the charge of maintaining a nuisance, because it wouldn't matter whether it was his liquor or Hogle's liquor or anybody else's. He just happened to be there, and I think the court, in justice to Roberts, should dismiss the charge against him, and then, if Mr. Hogle has any defense in the Superior Court, why, of course, he could make that in the event your honor holds him to answer. * * *

"Of course, we feel that the evidence against him is insufficient, but we are willing to submit the matter to the court, but, in justice to Mr. Roberts, why, I don't think the district attorney here even states the mere presence—I might go to a place where there was some intoxicating liquor there and the police might arrest me. I don't see where, if I was a visitor there, I could be held for maintaining a nuisance. The law is that he must be in possession of the premises, and there is no testimony here that Roberts was in possession of the premises. Roberts was fined $200 or 90 days, and he is doing the 90 days, and I think it would be unjust to inflict any more punishment upon him."

The defendant, being on the witness stand in this trial, was asked if he did not hear his counsel make these statements at the preliminary examination. We do not think it necessary to cite any authorities to show that the mere argument of counsel in addressing either the court or jury is not admissible in any subsequent trial. They do not come within the principle applicable to admissions formally made and entered in the course of a trial.

The judgment of the trial court is hereby reversed.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 391

SHERLOCK et ux. v. ALTURAS STATE BANK et al. (Civ. 2833.)

(District Court of Appeal, Third District, California. June 25, 1925. Rehearing Denied with Modifications July 25, 1925. Hearing Denied by Supreme Court Aug. 24, 1925.)

1. **Chattel mortgages ⟸262(1)—Sale must be in accordance with law unless expressly provided otherwise.**

Sale under a chattel mortgage must be as provided by law, unless expressly otherwise directed by mortgagor either in the mortgage or other manner of authorization.

2. **Chattel mortgages ⟸176(4)—Finding that defendant's sale of mortgaged sheep was unauthorized, sustained.**

In a chattel mortgagor's action against the mortgagee for conversion of sheep covered by the mortgage through a private sale thereof by the mortgagee alleged to have been made without authority, evidence *held* to sustain a finding that no authority to make the sale had been given.

3. **Chattel mortgages ⟸176(4) — Statutory ratification of mortgagee's private sale, made without authority, not shown.**

Where mortgagor gave a mortgage to defendant on 1,600 head of sheep, and defendant without authority from mortgagor sold 617 of the sheep at private sale, crediting the mortgagor among other ways by deposit of $120 in bank of defendant, mortgagor later drawing $131 from the bank, having been informed she could draw that much, *held*, evidence did not show a ratification sufficient to comply with Civ. Code, § 1589.

4. **Appeal and error ⟸1056(6)—Exclusion of testimony as to value, which is supported by other evidence, if error, is harmless.**

In an action for conversion of sheep, the ruling out of testimony offered as to their value, if error, was not prejudicial, since the record showed ample testimony to support the findings as to such value.

Appeal from Superior Court, Modoc County; F. M. Jamison, Judge.

Action of conversion by Walter Sherlock and wife against the Alturas State Bank and others. From a judgment for plaintiffs, defendants appeal. Affirmed.

C. S. Baldwin, Oscar Gibbons, and Robnett & Wylie, all of Alturas, for appellants.

J. E. White, of San Francisco, for respondents.

PLUMMER, J. This is an appeal by the defendants Alturas State Bank, A. Hafer, and J. F. Hansen from a judgment in favor of the plaintiffs in an action brought against the defendants for the alleged conversion of 617 head of sheep belonging to the plaintiffs, taken and removed by the defendants from a larger band of sheep owned by said plaintiffs. It appears from the transcript that the plaintiff Anna Sherlock was the owner of a certain band of sheep numbering some 1,600 head, running and being in the county of Modoc, in the state of California. On or about the 5th day of November, 1921, the plaintiffs made and executed a certain promissory note payable to the defendant Alturas State Bank, in the sum of $8,500 payable eight months after date, bearing interest at the rate of 8 per cent. per annum. At the same time and to secure the payment thereof, the plaintiffs executed a certain chattel mortgage covering said band of sheep and the increase thereof, and delivered the same to the defendant Alturas State Bank. No question is raised as to the sufficiency and regularity of said mortgage. The mortgage is in the usual form and, among other things, contains the following provisions:

"It is also agreed that if the mortgagors shall fail to make any payments as in the said promissory note provided, then the mortgagee may take possession of said property, using all necessary force so to do, and may immediately proceed to sell the same in the manner provided by law, and from the proceeds pay the whole amount in said note specified."

The note was not paid at maturity and considerable correspondence ensued between the plaintiff Anna Sherlock and the defendant A. Hafer, the cashier and representative of the defendant Alturas State Bank, relative to the sale and disposition of said band of sheep and also of certain lands and premises belonging to the plaintiffs. On or about the 30th day of September, 1922, the defendant A. Hafer, acting for the defendant Alturas State Bank, purported to sell and turned over and delivered to the defendant J. F. Hansen 617 sheep selected from said larger band of 1,600 head mortgage as aforesaid, and received in payment from the said Hansen the sum of $6,170. Upon receipt of a check from Hansen, drawn in favor of the plaintiff for said sum, the defendant A. Hafer, without having communicated with the plaintiffs as to the manner in which said check was drawn, indorsed the names of the plaintiffs on said check, turned the same over to the defendant bank, and thereupon the defendant bank indorsed a credit on the note owing by the plaintiffs to said bank in the sum of $5,500, indorsed a credit of $500 on the note held by the bank in favor of one P. C. Webber, theretofore executed and delivered by the plaintiffs, and placed to the credit of the plaintiff Anna Sherlock the sum of $120, aggregating the full amount of the check drawn by the defendant Hansen as aforesaid.

The plaintiffs, alleging that said sale was made without authority and against their protests and for a sum considerably less than the value of the sheep, began this action. The court found the value of the sheep to be $12.-

50 per head, and entered judgment to the effect that plaintiffs were entitled to and gave plaintiffs credit upon the note herein referred to, held by the defendant bank in the further sum of $2,092.50. The court also found that the $500, claimed to have been paid by the bank, to P. C. Webber, was not in fact paid by the bank, and, by stipulation, in open court at the time of the hearing hereof, it was made to appear that the said P. C. Webber note has been paid by plaintiffs, since the beginning of this action and was not, in fact, ever paid by the defendant bank.

Upon this appeal it is urged:

(1) That plaintiffs waived a judicial sale, and therefore there was no conversion;

(2) That the sale as made was previously authorized by the plaintiffs;

(3) That the sale was ratified by plaintiffs by reason of their voluntary acceptance of the benefits after having full knowledge of all the facts.

The findings of the trial court were against all of these contentions, the trial court holding that no authorization had ever been given to make the purported sale; that the sale as made was against the consent of the plaintiff Anna Sherlock, who was found by the court to be the owner of said sheep; and that the said plaintiff immediately demanded a return of said property. The court also found that there was no ratification of said sale.

At the time of the execution of the chattel mortgage and during the times mentioned herein, the band of sheep covered by the said mortgage was also leased to the Charles Grenade Company of Alturas, Modoc county, Cal., and in the mortgage it was provided that one-half of the net proceeds from the band of sheep mortgaged to the appellant upon the note herein referred to, until the sum was fully paid and that the Charles Grenade Company might turn over such moneys or proceeds to the defendant Alturas State Bank. Until the period of the alleged conversion set forth in plaintiffs' complaint, the defendant Alturas State Bank had not, nor had any of the defendants herein, had any possession of said band of sheep, or of any portion thereof. It further appears that on or about the 27th day of September, 1922, the defendants Hafer and Hansen examined said band of sheep, had some conversation relative to the sale of what was called the "cross-breds" included in said band; the thoroughbreds of said band being called "coarse wools." On the 27th day of September the defendant Hafer telegraphed to the plaintiff Anna Sherlock as follows:

"Have sold seven hundred at ten dollars. Will deliver Friday. If you want come up, draw on us."

This telegram was received by the plaintiff Anna Sherlock on the 28th, who thereupon immediately replied as follows:

"Cannot accept offer ten dollars for seven hundred sheep. Must sell all. Please do not deliver sheep. Letter. Walter and Anna Sherlock."

This telegram was received by the defendant Hafer on the 28th day of September, 1922, and the contents thereof communicated to the defendant Hansen on the same day. Notwithstanding the receipt of this telegram, the defendant Hafer proceeded to sell 617 head of sheep to the defendant Hansen, and the said defendant Hansen received and paid therefor the sum mentioned on the 30th day of September, 1922. It thus appears that the defendants had knowledge of the direction of the said plaintiff Anna Sherlock, the owner of said sheep, not to consummate the proposed sale, before there had been any delivery thereof and, also, before any portion of the purchase price had been paid. Under this state of facts, the appellant claims that the plaintiffs had given the defendant Hafer a prior authorization to sell said sheep. We do not find any written authority to that effect, but we do find the following correspondence between the parties relative to the sale of the entire band of sheep: The first letter is by the defendant Hansen to the plaintiff, Anna Sherlock, and, omitting address and signature, is as follows:

"I wish you would write me a line and advise me whether you think it would be advisable to sell them for a little less, if we should happen to get an offer on them? We have a lot of people that wants to buy, but have no money to buy them with, so for that reason it is going to be hard to make a sale, but I think probably I could sell them for eight and one-half, or nine dollars per head. It looks like when you say ten dollars, that it scares them all out as they think the price is too much. Please advise me as to what you think about the price?"

To which letter the plaintiff Anna Sherlock replied:

"Your letter of August 3d came last night and I hasten to answer same. Now I realize all that you say about age and coarse wool, and the asking and selling price, but I also believe that in thirty to sixty days there will be a better price. You see the South American countries have a great shortage of sheep and wool this year and with the big tariff of thirty-three cents on scoured wool, there should be a good stiff market this fall. Walter wrote to C. E. Sherlock and told him to confer with you and I believe if you write to him, he will make an effort to get a good price for them.

"Of course, if the folks who make inquiry for them at $10.00, cannot buy because they have no money, the same condition would obtain at nine dollars, or even eight and one-half; if they have no money, they cannot buy at any price. Now, we are willing to take a net price of twenty-five thousand dollars for the whole thing, and I believe Chas. Grenade Co. will take them at that. Of course this price is between us and if C. E. Sherlock could get a better price, I think I am entitled to a little consideration."

There was also some oral testimony to the effect that there had been some conversation and correspondence between the defendant Hafer and the plaintiff Anna Sherlock, in which the plaintiff Anna Sherlock stated that if she could sell the whole band of sheep and the lands belonging to her and pay up all of her indebtedness, she would be glad to do so, but we have been pointed to no testimony which either directly or indirectly authorized the defendant Hafer to sell only a part of the sheep included in said band. Some argument has been made as to whether the 617 head of sheep selected from said larger band were not the pick of the band, but as no finding has been made thereon, it is needless for us to discuss that question. The letter referred to in the telegram sent to the defendant Hafer on the 28th of September, 1922, and received by him on that day, is as follows:

"We received your telegram last night, and after thinking it over know that you would agree with us that if we could not sell all the sheep, that Grenade would not run the ones that are left, so we would not know what to do with them. Then, too, the residue would be deemed culls and bring only the price of culls. Now we must try and get a sale of everything, so that all creditors will be taken care of. That is only justice. I had word from Andrew Leonard, asking if we would sell six hundred. Of course we would not consider such a sale. As soon as a proper sale can be made I will go up there and help to settle things the best I can. * * *"

The remainder of the letter has no bearing upon the question.

Upon the trial of the case, the defendant Hafer, upon the subject of his authority to sell, testified as follows:

"Q. By the Court: Mr. Hafer, at the time you sold these sheep, did you sell them as agent of Mrs. Sherlock, or did you sell them under the authority of the mortgage? A. I sold them under the authority of the mortgage, to satisfy the mortgage.

"Q. By the Court: Mr. Hafer, did you authorize Mr. Hansen to take them by virtue of the mortgage? A. Yes sir."

It was stipulated by counsel during the course of the trial that the sale of said sheep was not made in the manner provided by law, that the notices required to be given were not given, and that the proceedings provided to be had and taken upon a sale, either of pledged property or foreclosure sale, were not taken and had. There does appear in the transcript some testimony on the part of the defendant Hansen that the plaintiff Anna Sherlock and himself did discuss the question of a private sale. His testimony is as follows:

"A. I said that if we had to foreclose this mortgage under the law the cost would be so much, and that if we put the sheep up at a sheriff's sale, they would bring nothing like what they would at a private sale, and the best plan was to make a private sale of them if possible.

"Q. What, if anything, did she reply to this suggestion on your part? A. She said, 'That is the only way.' She said: 'Under no consideration whatever do I want this mortgage foreclosed. Under no consideration whatever.'"

It also appears that in one of the letters written by the plaintiff Anna Sherlock to this witness that she used the following expression:

"Do the best you can about the sheep, but do not be in too big a hurry. I am sure we will get a better price later."

We do not need to discuss the cases cited by appellant which hold that a mortgagor of chattels may either by the terms of the mortgage or by subsequent authority authorize a mortgagee, or its agent, to take possession and sell personal property other than as provided by law upon the ordinary foreclosure of a mortgage, or the sale of personal property, for the simple reason that the provision of the mortgage, which we have hereinbefore set forth, does not authorize any such procedure; nor is there any provision in the mortgage by which any such authority is given; nor do we find anything in the testimony in the transcript different from that which we have set forth herein, save and except the alleged testimony of the plaintiff Anna Sherlock that she had never authorized any sale of a portion of said band of sheep, and that immediately upon being advised of the sale about to be made of 617 head thereof, she telegraphed and wrote as hereinbefore set forth. The law is well settled that a power of sale, if given in a chattel mortgage, must be exercised in accordance with the provisions thereof. Henderson v. Fisher, 38 Cal. App. 270, 176 P. 63. This was a case in which this court said:

"The failure to sell in accordance with the manner provided by law rendered the sale void."

In this particular case it was found by the court that the property was sold for less than its value, and the identical judgment was entered therein with the judgment entered in the instant case, to wit:

"Additional credit directed to be entered on the indebtedness owed by the mortgagor."

See, also, Blodgett v. Rheinschild, 56 Cal. App. 728, 206 P. 674; Bendel v. Crystal Ice Co., 82 Cal. 199, 22 P. 1112; Parke v. Frank, 75 Cal. 364, 17 P. 427; Peet v. People's Trust, etc., Bank, 56 Cal. App. 46, 204 P. 413.

[1, 2] Other cases might be cited, but these cases sufficiently establish the rule which we have just set forth, to wit, that the sale must be as provided by law, unless expressly otherwise directed by the mortgagor, either in the mortgage or by some subsequent manner of authorization. We think the facts disclosed by the record in this case, and which

we have hereinbefore set forth, amply support the finding of the trial court that the owner of the band of sheep in question had given no authorization to the defendant Alturas State Bank, the mortgagee, or its agent and cashier, Hafer, to make sale of a part of said sheep, whether the pick thereof or otherwise, and that the defendant Hansen had knowledge of the telegraphic protest of said plaintiff against the sale of a portion of said sheep. No point is made by counsel on either side that the number of sheep sold and delivered does not comply with the number mentioned in the telegram sent by the defendant Hafer, and therefore we do not consider the discrepancy in determining this case.

After the alleged sale had been made by the defendant Hafer to the defendant Hansen, the defendant Hafer wrote to the plaintiff Mrs. Anna Sherlock and inclosed with his letter a deposit slip in the following words and figures:

Alturas State Bank.

Deposited by Mrs. A. D. Sherlock, Alturas, Cal., Sept. 30, 1922:	
Checks as follows	$6,170 00
Less on Dannhauser note	550 00
	$5,620 00
Less paid note	5,500 00
	$ 120 00

Thereupon, and before beginning of this action, the plaintiff Anna Sherlock went to Alturas, interviewed all of defendants, demanded the return of the sheep, which were not returned, and also in the month of November withdrew from the defendant bank the sum of $131. It is upon the fact of the withdrawal of said sum of $131 that the appellants base their contention that the proceedings relative to the sale of said sheep were ratified by the owner, Anna Sherlock, citing in support thereof section 1589 of the Civil Code, which reads:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The trial court found against the contentions of the appellants on the subject of ratification, and it is argued that this finding is against the evidence. It may be premised that ratification is not tendered as an issue in the pleadings, but does appear to have been tendered by the testimony and found by the court. Appellants have set forth a portion of the testimony upon which this contention is based, but a review of the whole testimony shows that the trial court correctly determined this question. The testimony of the plaintiff upon this question, on cross-examination, is as follows:

"Q. Now with this letter in which Mr. Hafer said he was depositing $120 on your checking account you got a copy of this deposit slip, is that correct? A. Yes.

"Q. What did you do with that $120, if anything? Do you understand the question? A. Yes, I understand the question.

"Mr. White: I submit that there is no showing that she got $120, or if she did anything with it.

"The Court: Let her answer if she knows. A. I don't know now.

"Q. Did you draw it out of the bank? A. I drew some money out of the bank.

"Q. Didn't you draw all that was on your checking account out of the bank about the 3d day of November? A. I drew out $131 on the 6th and 7th of November.

"Q. Was there anything left in your checking account after you drew the money out? A. There should have been.

"Q. Was there? A. I don't know.

"Q. Mrs. Sherlock, didn't you draw every cent out of your checking account on the 3d day of November, 1922, that the bank books showed was there? A. I drew out $131.

"Q. I don't think you understand the question.

"Mr. White: I submit that the bank books are the best evidence of what the bank books showed.

"Q. Didn't you draw on the 3d day of November, 1922, every cent that you had in your bank account, or that you had power to draw at that time? A. No, sir.

"Q. How much money did you think you had power to draw? A. I thought I had some more money there.

"Q. How much more money did you think you had? A. $165.

"Q. Did you ask the bank officials how much you could draw? A. I asked Mr. Cummings; yes, sir.

"Q. You asked him how much you could draw, and he told you $131, didn't he, Mrs. Sherlock? A. I do not know what he told me, but I drew $131.

"Q. Let me get that straight, didn't you at that time draw every cent that they told you you had power to draw? A. I just told you I did not draw all I thought I had the right to draw.

"Q. Didn't you on the 3d day of November draw every cent you were told you had the power to draw at that time? A. I have answered that."

[3] The testimony of the officers of the bank show only that Mrs. Sherlock was informed as to the amount she could draw out. It appears that the bank was about to be closed and was closed shortly afterwards and that Mrs. Sherlock went to the bank to secure some funds. We think the testimony falls very short of complying with the section of the Code in relation to ratification, in that it fails to show a number of material elements, and does not show that the plaintiff was aware that she was withdrawing all the money she had on deposit, but that she was under the impression she had considerable more.

[4] Upon oral argument of this cause it was made to appear that at the time of the

trial appellants sought to secure admission in evidence of a letter in which the plaintiff Anna Sherlock had written that if she could secure a certain sum for the entire band of sheep owned by her and, also, for the lands and premises owned by her in Modoc county, she would be willing to accept the figure therein named, and that the land was worth a certain sum, and therefore that the plaintiff was willing to sell the band of sheep for a sum per head not greater than that obtained for the 617 head of sheep delivered by the defendant Hafer to the defendant Hansen. The admission of this testimony was sought in order to offset the testimony of the plaintiff as to the value of the sheep per head. While, for such purposes, we think the testimony was admissible, yet it is true that an offer to sell is not evidence, in and of itself, of the market value of the thing offered to be sold, especially when coupled with conditions as appear in this case, yet even though it be held that the ruling out of such testimony was error, it cannot be considered as prejudicial, because the record discloses ample testimony to support the findings of the court as to the value of the sheep delivered by the defendant Hafer to the defendant Hansen as hereinbefore set forth.

We think the judgment of the trial court should be affirmed, and it is so ordered.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

---

73 Cal. App. 368

ROEMER et al. v. NUNES et al. (Civ. 5180.)

(District Court of Appeal, First District, Division 2. California. June 24, 1925.)

1. Appeal and error ⊂⊃863—Court cannot reverse order denying motion to vacate judgment, because complaint fails to state a cause of action.

On appeal from an order denying a motion to vacate a judgment, court cannot reverse the order, because complaint fails to state a cause of action.

2. Judgment ⊂⊃18(2)—Not rendered void, because complaint fails to state a cause of action.

A judgment is not void, because complaint does not state a cause of action, if court had jurisdiction of parties and subject-matter and complaint apprised defendant of nature of plaintiff's demand.

3. Appeal and error ⊂⊃863—Judgment not void and not subject to be set aside on appeal from order denying motion to vacate it, where complaint sufficiently stated cause of action to give court jurisdiction of the cause.

Judgment for plaintiff, on note against defendant as partner of maker, *held* not void, because complaint, after alleging defendant's liability, set out note, which showed obligation to be individual debt of maker, where defendant, though served with summons, did not appear until after judgment had been entered against him, and complaint was sufficient to inform him of the nature of plaintiff's claim and gave court jurisdiction.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

Action by Alfred Roemer and others, copartners, doing business under the firm name and style of Roemer, Roemer & Silva, against Frank S. Nunes and M. S. Nunes. Judgment for plaintiffs by default. From an order denying the motion to set aside the judgment, defendant last named appeals. Affirmed.

Fred A. Schaeffer, of Santa Maria, for appellant.

Preisker & Goble, of Santa Maria, for respondents.

LANGDON, P. J. This is an appeal by defendant M. S. Nunes from an order denying his motion to set aside a judgment entered against him for $2,658.58 after his default had been entered. The motion was made upon the ground that the judgment roll shows upon its face that the judgment against said defendant is void. This position is predicated upon a contention that the complaint does not state a cause of action against said defendant.

In the caption of the complaint, Frank S. Nunes and M. S. Nunes, copartners, are named as defendants. In the body of the complaint it is alleged:

"That defendants are copartners doing business as a copartnership. That on or about the 2d day of January, 1919, the defendants made, executed, and delivered a certain promissory note, which in words and figures is more particularly set forth as follows, to wit:

" 'Agreement to Purchase.

" '$699.44. Santa Maria, Cal., Jan. 2, 1919.

" 'One day after date I promise to pay to Roemer, Roemer & Silva, copartners at the city of Santa Maria, state of California, the sum of six hundred ninety-nine and 44/100 dollars for the following described property, to wit: Mdse. per bill received.

" 'I acknowledge receipt of said property and agree to keep the same in good order and repair. I also agree that until the total price of said property with interest is fully paid, said property will remain the property of said firm of Roemer, Roemer & Silva, and that I will not incumber or dispose of the same until full payment has been made by me. I agree to pay interest on the amount unpaid at the rate of 8 per cent. per annum payable annually. When the total price and interest has been fully paid, and not before, the title to said personal property shall vest in the undersigned by virtue of this instrument. I agree to pay

all taxes and assessments of any kind whatsoever which may become due and payable upon said property. I agree that if I fail to pay any of said sums when due or to become due, or fail to perform any of the aforesaid or hereinafter mentioned conditions, or should said property be attached or levied upon, or should said property be burned or otherwise destroyed, then at the option of the said firm of Roemer, Roemer & Silva the entire unpaid balance of this contract with interest shall in any of said cases immediately become due and payable to the said Roemer, Roemer & Silva, and the said firm may enforce payment of the entire amount unpaid, or if said firm so elects the said firm of Roemer, Roemer & Silva may take possession of said property. It is understood that delay in enforcing any of the provisions of this agreement shall be no waiver of the rights of the said firm, but in case of any extended delay, the said firm may proceed to enforce the terms hereof by giving me a one day's notice by mail, addressed to me at Guadalupe, Cal., of the said firm's intention to require me to comply strictly with the terms of this agreement without further delay. In case suit is brought under this contract for payment or to recover possession of said personal property, I promise to pay a reasonable attorney's fee in said suit in all matters herein mentioned which may be incurred or paid by said firm of Roemer, Roemer & Silva.

"'[Signed] Frank S. Nunes.'"

Then follows an allegation of nonpayment of said note:

"For a second cause of action it is alleged: That the defendants are copartners doing business as a copartnership. That on or about the 11th day of March, 1918, the defendants made, executed, and delivered a certain note in writing to the plaintiffs which in words and figures is more particularly set forth as follows, to wit:

"'$1,060.79. Santa Maria, Cal. Mch. 11, 1918.

"'On demand after date, without grace, at 12 o'clock M., I promise to pay to the order of Roemer, Roemer & Silva at the First National Bank of Santa Maria one thousand and sixty and 79/100 Dollars, United States gold coin, value received, with interest from date until paid, at the rate of 10 per cent. per annum, interest payable at maturity, and if not so paid to become a part of the principal and bear like interest until paid. And further agreeing that if the same is not paid when due, and suit be brought to collect the same, to pay a reasonable per cent. on the sum due as attorney's fees for collection.

"'[Signed] Frank S. Nunes.'"

Then follows an allegation of nonpayment and this prayer:

"Wherefore, plaintiffs pray judgment against the defendant for the sum of six hundred ninety-nine and 44/100 dollars together with interest thereon from the 2nd day of January, 1919, at the rate of 8 per cent. per annum, and the sum of one thousand sixty and 79/100 dollars, together with interest at the rate of 10 per cent. per annum from the 11th day of March, 1918, and the sum of two hundred fifty dollars attorney's fees, together with costs of this suit."

It is to be observed that while it is alleged that the defendants made, executed, and delivered a certain promissory note, the instrument set forth and designated a promissory note shows that it was signed by Frank S. Nunes; that it is in the singular form throughout. The complaint does not state that the note or contract sued upon was made for the benefit of M. S. Nunes or for any partnership to which he was a party. While the complaint contains an allegation that the defendants are copartners doing business as a partnership there are no averments that the obligation sued upon was a partnership one nor that the defendants are being sued as copartners.

[1-3] Clearly this pleading is defective, and could have been attacked upon demurrer. However, appellant, though served with summons and a copy of the complaint, did not appear, and made no objection to the complaint until after his default and judgment had been entered against him. This being an appeal from an order denying a motion to vacate a judgment, and not an appeal from a judgment, this court cannot reverse said order, because the complaint fails to state a cause of action. For it is settled that such a situation does not render a judgment void. In the case of Christerson v. French, 180 Cal. 523, 182 P. 27, it was said:

"The respondent contends further that the judgment is void because the complaint fails to state a cause of action. It is well established that a judgment is not void if the court has jurisdiction of the parties and of the subject-matter, irrespective of whether or not the complaint states a cause of action so long as it apprises the defendant of the nature of the plaintiff's demand. Blondeau v. Snyder, 95 Cal. 521 [31 P. 591]; Mayo v. Ah Loy, 32 Cal. 477 [91 Am. Dec. 595]; In re James, 99 Cal. 374 [33 P. 1122, 37 Am. St. Rep. 60]; Canadian, etc., Co. v. Carlita [Clarita], etc., Co., 140 Cal. 672 [74 P. 301]; Brush v. Smith, 141 Cal. 466 [75 P. 55]; Crouch v. Miller, 169 Cal. 341 [146 P. 880]; Gillespie v. Fender, ante [180 Cal.] p. 202 [180 P. 332]; California Casket Co. v. McGinn, 10 Cal. App. 5 [100 P. 1077, 1079]. We think the complaint herein sufficiently states a cause of action to inform the defendant of the nature of the claim against him, and to give the court jurisdiction of the cause."

Likewise, in the instant case, we think the complaint sufficiently states a cause of action to inform the defendant and appellant of the nature of the claim against him, and to give the court jurisdiction of the cause. The judgment therefore is not void and not subject to the attack which appellant has made upon it.

The order appealed from is affirmed.

We concur: NOURSE, J.; STURTEVANT, J.

73 Cal. App. 304

FRANKLIN v. CHURCHILL CO. et al.
(Civ. 2854.)

(District Court of Appeal, Third District, California. June 22, 1925. Hearing Denied by Supreme Court. Aug. 20, 1925.)

1. Judgment ⟸743(2)—In mandamus to compel issuance of patent to state lands, judgment held conclusive of rights of petitioner to land.

In an action under Pol. Code, § 3414, to determine conflicting claims to state lands, judgment of Supreme Court, refusing application of defendant for mandamus to compel issuance of patent to it for lands involved, *held* conclusive of its rights in controversy.

2. Appeal and error ⟸1194(3)—Judgment, pleaded in same form as offered at former trial, refusal of which was held error by Supreme Court, held sufficiently pleaded.

Judgment, pleaded in substantially same form in which it was offered at first trial of case, by supplemental complaint, refusal of which was held error by Supreme Court, *held* sufficient.

3. Appeal and error ⟸171(3)—Failure to plead that judgment was duly made or prove facts giving court jurisdiction held immaterial.

Where in first trial of case, refusal to allow judgment to which defendant was a party to be pleaded as supplemental complaint was *held* reversible error, and on second trial, the pleading was accepted and case tried and decided upon theory that it raised issue of res judicata, failure to plead that judgment was duly given or made, or to prove facts giving court that rendered it jurisdiction, at time it was offered in evidence, *held* not vital omissions.

4. Appeal and error ⟸1071(2)—That negative conclusion of law not necessary to support judgment was confusing, held not to require reversal.

That a negative conclusion of law of trial court, which was not necessary to support judgment, might be confusing, *held* not to warrant reversal, especially where evidence would warrant no finding which would support contentions of party seeking reversal.

Appeal from Superior Court, Siskiyou County; H. D. Gregory, Judge.

Action by W. B. Franklin against the Churchill Company and others, to determine rights of parties growing out of conflicting applications to purchase certain public lands. Judgment for plaintiff, and defendants appeal. Affirmed.

Jacob P. Wetzel, of San Francisco, for appellants.

Arthur W. Bolton, of San Francisco, and Tapscott & Tapscott, of Yreka, for respondent.

SHIELDS, Justice pro tem. This is an action brought under the provisions of section 3414 of the Political Code to determine the rights of the parties hereto growing out of conflicting applications to purchase certain lands of the state of California, alleged herein to be swamp and overflowed lands. The facts related to the controversy are confused and complicated, but in so far as they appear to be necessary to the decision of this appeal they may be thus briefly stated.

On the 11th day of October, 1872, one Presley A. Dorris made application under the law of 1868 for a large body of land, some 5,120 acres, of which the land involved in this action is a part. Thereafter, and upon certain proceedings being had, on the 4th day of June, 1874, the register of the state land office issued to Dorris a certificate of purchase for said larger body of land, as swamp and overflowed land. This certificate of purchase was numbered 4185 and covered this entire area of about 5,120 acres including, as stated, the lands here in question.

The interest of Dorris in this certificate, and of any right which might arise under it, passed by mesne conveyances to Churchill Company, the defendant herein. The purchase of this land was not completed by Dorris nor by any of his successors in interest, including the Churchill Company, the present owner and holder of the certificate.

Thereafter and on the 10th day of April 1917, the plaintiff herein made application to the surveyor general of the state of California to purchase the lands involved in this action, the same being a part of the larger tract covered by certificate No. 4185, theretofore issued to Presley A. Dorris. The contest, which thereupon arose as to which of the two applicants was entitled to purchase the land involved herein, was thereupon referred by the surveyor general to the superior court of Siskiyou county for adjudication. In pursuance of this reference this action was begun on the 12th day of June, 1917.

It further appears that before the application of the plaintiff herein had been filed, and on the 4th day of April, 1916, the state of California began an action in the superior court of Siskiyou county to foreclose the rights of Churchill Company to the larger tract of land claimed by it under certificate of purchase No. 4185 and to cancel said certificate. Such proceedings were had in that action that a judgment was rendered against the Churchill Company as prayed for, foreclosing its rights to said lands and to said certificate, but providing that any time within 12 months the said Churchill Company might redeem said lands by paying to the county treasurer all delinquent interest, accrued interest, and costs. This judgment was rendered on the 4th day of January, 1917. Thereafter and before the

expiration of the 12 months provided for in the judgment, and after the filing of the complaint herein, the defendant Churchill Company presented to the county treasurer of Siskiyou county its certificate of purchase and tendered him all costs, interest, and principal due on account of the purchase price of the larger tract of land covered by said certificate of purchase, and took the other steps required by law to entitle it to demand a patent. The tender and demand were refused by the county treasurer on the ground that there was then pending the contest involved in this action, and similar contests for other portions of the land covered by this certificate No. 4185.

The Churchill Company thereafter, and before the trial of this action in the Superior court of Siskiyou county, began a proceeding in mandamus in the Supreme Court of the State of California to compel the issuance to it of the patent, to which it contended it was legally entitled. This proceeding was entitled "Churchill Company, a Corporation, Petitioner, v. W. S. Kingsbury, Surveyor General, etc., Respondent." Issue was joined in this proceeding and, upon the facts being stipulated by the parties, the matter was heard by the Supreme Court.

[1] That court on the 24th day of July, 1918, rendered its decision in which it held that "the petitioner has not established his right to any relief" and in which it ordered that the alternative writ of mandate previously issued should be discharged and that the proceeding be dismissed. See Churchill Co. v. Kingsbury, 178 Cal. 554, 174 P. 329. Thereafter the case now before the court came on for trial. The plaintiff herein moved the trial court for leave to file a supplemental complaint setting up the judgment in the case of Churchill Co. v. Kingsbury, which he claimed was a final adjudication that the defendant had no right to purchase the land involved in this action. Permission to file such supplemental complaint was denied, and after making a record of his claim of right to file such supplemental complaint, and after the court's refusal to permit him to do so, plaintiff offered no evidence, and upon judgment going against him, he appealed to the Supreme Court from such judgment. Upon the hearing of such appeal, the judgment was reversed with instruction to the lower court to permit the filing of the supplemental complaint setting up the judgment in the action of Churchill Co. v. Kingsbury. A retrial of this action was thereafter had, and from the judgment therein in favor of the plaintiff this appeal was taken. The judgment in the Churchill v. Kingsbury Case was pleaded by supplemental complaint and introduced in evidence at the trial. It is with reference to the effect of this judgment that this appeal is chiefly concerned. Plaintiff contends that this judgment was a final and complete adjudication that the defendant had no right under certificate of purchase No. 4185, or otherwise, to locate or purchase the lands here involved. This claim was fully concurred in by the trial court, which decided the case against defendant upon this theory. In this view we fully concur, not alone upon independent reasoning, but as well because we believe that the Supreme Court has so declared. In 1917 one Reynolds filed an application to purchase a portion of the larger tract of land previously located by Presley A. Dorris and covered by certificate of purchase No. 4185, which certificate had been in the meantime and was then held and owned by the Churchill Company, the defendant herein. The contest which thereupon arose was, as was the contest here, referred to the superior court of Siskiyou county for determination. At the trial of this latter case, Reynolds offered in evidence the proceedings in the mandamus case of Churchill Co. v. Kingsbury, 178 Cal. 554, 174 P. 329. Reynolds claimed that the judgment in this case was conclusive against the Churchill Company. Objection to this offer was sustained by the trial court. Judgment went against the plaintiff, and he appealed. It will be seen that the proceedings in this case exactly paralleled the proceedings here. Upon this appeal the Supreme Court said:

"We have reached the conclusion that the mandamus proceedings are conclusive of the rights of the respondent [Churchill Company] to purchase the land under its certificate of purchase." Reynolds v. Churchill Co., 187 Cal. 546, 202 P. 865.

In this opinion the Supreme Court further said:

"It follows from the foregoing that the trial court was in error in excluding the judgment and record in the mandamus proceeding, which record was conclusive against the Churchill Company. The trial court should have rendered judgment declaring that the Churchill Company had no right of purchase." Id. 550, 202 P. 867.

This case was in all substantial respects identical with the case now before us. If the trial court in that case should, as stated by the Supreme Court, "have rendered judgment declaring that the Churchill Company had no right to purchase" the land there in controversy, it should, as it did, have done so in this case. We do not have to make this deduction from the identity of the cases; the Supreme Court has so ordered in this case. In an opinion rendered by that court on appeal after a previous trial of this case, it is definitely said that upon a new trial, upon a presentation of the judgment in Churchill v. Kingsbury, the trial court must decide against the defendant, and bases this conclusion upon the reasons stated in Reynolds v. Churchill Co., which in direct terms it specifically adopts. Franklin v. Churchill Co., 187 Cal. 556, 202 P. 869.

This statement of the effect of the judgment and the duty of the trial court has clearly become the law of the case. 4 Corp. Jur. 1213; Cooley v. Miller & Lux, 168 Cal. 128, 142 P. 83; Peoples Lumber Co. v. Gillard, 5 Cal. App. 437, 90 P. 556. The judgment was presented as suggested, and the trial court very properly decided "that the Churchill Company had no right to purchase" the land, as it was directed to do by the Supreme Court.

[2] This disposes of the only vital point in the case. Appellant contends that, admitting the binding force of the judgment, it was not sufficiently pleaded, and therefore that it should not have been admitted in evidence. It was pleaded in substantially the same form in which it was offered at the first trial of the case.

[3] The Supreme Court, as above appears, held that it was error by the trial court to have refused to permit it to be filed. This amounts to an adjudication of the sufficiency of the supplemental complaint as a pleading. But aside from this, the judgment was one to which the defendant was a party, it was one which was made the subject of litigation on the first trial and appeal of this case, and it was one in which when the first judgment rendered in this case was reversed, was so reversed for the sole purpose of permitting the plaintiff to plead it by a supplemental pleading as here attempted. When to this is added the fact that the pleading was accepted by the trial court and the case tried and decided upon the theory that it raised the issue of the bar of the Churchill v. Kingsbury judgment, it is now too late to inquire whether or not it was properly pleaded, or so pleaded with formal artificiality. The failure to plead that this judgment was "duly" given or made, or to prove the facts giving the court that rendered it jurisdiction, when it was offered in evidence, were not vital omissions under the facts here presented.

In this case the judgment in Churchill Co. v. Kingsbury was an adjudicated fact in the case, and its effect and validity had already been declared, in advance of its introduction in evidence at this trial. Upon no conceivable theory can it be held that the defendant was injured by the acceptance of the pleading by the trial court, or by the admission of the judgment upon the issue which it raised.

It is further contended that many issues raised by the pleadings were not decided by the court, or covered by its findings. Without discussing this question, which under the circumstances is wholly unimportant, it is enough to say that the findings as made abundantly support the judgment, and that from the evidence no finding upon any issue in the case could have been made in favor of the defendant which would weaken this judgment, or warrant a different one. Under such circumstances, the defendant having suffered no injury nor been denied any possible right, the failure to find upon the issues referred to was without injury, and therefore immaterial.

[4] Appellant makes the further point that the conclusions of law prepared by the trial court are confusing, in that it is stated in such conclusions that certain findings marked by letters of the alphabet do not entitle the defendant to any right, or serve to validate his certificate of purchase. The record discloses no such findings as those referred to. The conclusion criticized, however, is a negative one and not necessary to the support of the judgment. Moreover, as the evidence would warrant no finding which would serve the contention of the defendant, we must hold that this mistaken reference was without injury to it. Other points voluminously discussed by the parties become entirely irrelevant to this controversy when the conclusion is reached, as we have reached it here, that the judgment in the mandamus case terminated any right the defendant might have had to purchase the lands involved under its certificate of purchase.

As to the right of the plaintiff to purchase the land, the trial court has found in his favor. As this finding is supported by substantial evidence, this court, of course, will not disturb it.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

73 Cal. App. 467

PRYOR v. FRUIT DISTRIBUTORS' SERVICE CO., INC. (Civ. 4653.)

(District Court of Appeal, Second District, Division 1, California. June 30, 1925. Hearing Denied by Supreme Court Aug. 27, 1925.)

1. Sales ⟸377—Complaint held to state cause of action for defendant's breach of contract to purchase from plaintiff his crop of lettuce.

In action for damages for defendant's breach of contract to purchase from plaintiff his crop of lettuce, complaint *held* to state cause of action.

2. Sales ⟸54—Contract for purchase of lettuce, if uncertain, would be interpreted most strongly against defendant.

Where contract, by which defendant agreed to purchase plaintiff's crop of lettuce, was written by defendant's manager, if uncertain, it should be interpreted most strongly against defendant, in view of Civ. Code, § 1654.

3. Sales ⟸23(3)—Defendant's offer to purchase plaintiff's lettuce crop, and plaintiff's acceptance thereof, construed as one entire contract by which both parties were bound.

Defendant's offer to purchase plaintiff's crop of lettuce, and plaintiff's acceptance thereof, were to be construed together as constituting one entire contract by which both parties were bound.

4. Sales ⟸181(12)—Evidence held to sustain finding that lettuce, which defendant refused to purchase, was of marketable quality.

In seller's action for buyer's breach of contract to purchase from seller his crop of lettuce, evidence *held* to sustain implied finding that 5,062 crates of lettuce, refused by buyer, were of marketable quality.

5. Trial ⟸232(5)—Instruction, defining words "marketable lettuce" held sufficient.

In action for buyer's breach of contract to purchase seller's crop of lettuce, instruction, defining words "marketable lettuce" as meaning such as was fit to be offered for sale in a market, and which might be lawfully sold and bought, etc., *held* sufficient, in view of Civ. Code, § 1644, where no special meaning was given to the phrase as used in the contract.

6. Sales ⟸195—Buyer not excused from proceeding with contract to purchase lettuce because of prior contract.

Buyer was not excused from proceeding with contract to purchase plaintiff's crop of lettuce, because latter had made a prior contract with another for marketing of entire crop, where there was nothing in that contract which would interfere with plaintiff's contract with buyer, or prevent buyer from obtaining both title and lawful possession of the lettuce.

7. Sales ⟸388—Instruction on measure of damages held erroneous as stating that amount actually received on sale of lettuce was value thereof.

In seller's action for buyer's breach of contract to purchase seller's lettuce crop, instruction, stating in substance Civ. Code, §§ 3311, 3353, authorizing jury in computing seller's damages to deduct from contract price, proceeds received by seller on sale, and to remainder thus obtained to add expenses incurred by him in hauling, packing, and paying transportation on lettuce to market, *held* erroneous, as stating that amount actually received on sale of lettuce was in fact the value thereof.

8. Appeal and error ⟸1068(4)—Erroneous instruction on measure of damages in seller's action for buyer's breach of contract held not prejudicial.

In seller's action for buyer's breach of contract to purchase seller's crop of lettuce, error in instruction on plaintiff's measure of damages that amount actually received on sale of lettuce to other parties was in fact value thereof, *held* not prejudicial, where amount of receipts and expenses was definitely established without conflict, and lettuce was disposed of in best way possible, and jury awarded plaintiff less damages than under evidence he was entitled to.

Appeal from Superior Court, Kern County; Howard A. Peairs, Judge.

Action by L. E. Pryor against the Fruit Distributors' Service Company, Inc. Judgment for plaintiff, and defendant appeals. Affirmed.

Hearing denied by Supreme Court; Houser, Justice pro tem., not participating.

C. L. Shinn and E. E. Noon, both of Los Angeles, for appellant.

Kaye & Siemon, of Bakersfield, for respondent.

CONREY, P. J. In this action the plaintiff recovered judgment against defendant on account of defendant's breach of a contract to purchase from plaintiff his crop of lettuce. The defendant appeals from the judgment.

Appellant's first point is that, for the reason that under a proper construction of the contract defendant was not required to accept more than three cars of lettuce, the complaint does not state a cause of action. The complaint alleged that on March 22, 1922, plaintiff and defendant entered into a contract, whereby the plaintiff agreed to sell to the defendant and the defendant agreed to buy from the plaintiff his crop of lettuce then growing on his ranch near Delano, in Kern county, which contract was in writing and reads as follows:

"Delano, Cal., 3-22-22.

"We will accept 3 cars of lettuce at 1.60 per crate, also accept the balance of your crop (L. E. Pryor) at the same price. The lettuce is to not be cut until ready, and all lettuce is to be of marketable quality. The above price is on packed crates. We will pay cost of hauling from field, also pay all cost of packing including packing material.

"Yours truly,

"Fruit Dist. Service Co., Inc.,

"By P. W. Williams, Mgr."

It is alleged that thereafter in performance of said contract plaintiff delivered to the defendant and defendant received and paid the contract price for three carloads of said lettuce; that on or about April 7, 1922, the defendant repudiated said contract and then and thereafter refused to accept any further lettuce from the plaintiff; that the plaintiff performed all the conditions required by him to be performed under the terms of said contract, and subsequent to the repudiation of the contract plaintiff produced a total of 5,062 crates of lettuce. The complaint then stated the excess of the amount due from the defendant under the contract for said 5,062 crates of lettuce over the value thereof to the plaintiff, together with the expenses properly incurred by the plaintiff in carrying the said lettuce to market, and demanded judgment for said excess in amount as thus ascertained.

Appellant contends that the subject of the written memorandum was not single and entire, but that it contained two propositions, the first being to accept three cars of lettuce at $1.60 per crate, and the second to accept the balance of the crop at the same price. As to the second proposition or the second part of the proposition, appellant contends that the complaint shows nothing more than that appellant offered to accept at the stated price the remainder of the crop over and above the specified three cars of lettuce; and that before the additional lettuce was produced, defendant withdrew its offer to purchase the same. Appellant claims that it had the right to withdraw this offer, because the plaintiff, by the document signed by defendant, did not bind himself to deliver any lettuce to the defendant.

[1, 2] We think that the complaint stated a cause of action. It directly alleged that the plaintiff agreed to sell and that the defendant agreed to buy the entire crop. Although the contract is alleged to be in writing and is set out in the complaint, there is nothing in the document sufficient to negative or which necessarily conflicts with the facts alleged as above stated. On the contrary, the references to "all lettuce" and to "the above price" clearly included the entire crop. The written promise of defendant to "accept" implied an existing offer. The contract was written by defendant's manager. If uncertain it should be interpreted most strongly against the defendant. Civ. Code, § 1654. Moreover, the plaintiff introduced at the trial, without objection from the defendant, evidence tending to prove such offer, acceptance of which was contained in said written instrument.

It is further worthy of note that there was no demurrer to the complaint, and that the answer of the defendant alleged that in addition to said writing signed by the defendant there was at the same time executed another writing signed by the plaintiff and delivered to the defendant, which writing was as follows:

"3–22–22, Delano, Cal.

"This is to certify that I will deliver you (Fruit Dist. Service Co., Inc.) enough lettuce for 3 cars 320 crates to the car; lettuce to be from the first that matures. I will not cut lettuce until it is ready. The price is to be $1.60 per pack out crate. You are to pay for the hauling, packing including all packing supplies. Also right accept or reject balance of lettuce.

"Yours truly, L. E. Pryor."

At the trial it was admitted by the plaintiff that he signed and delivered this second document, but at the same time he testified that at the time of such signature and delivery the sentence reading, "also right to accept or reject balance of lettuce," was not contained in the document. This is one of the disputed facts in the evidence shown in the record. Since the jury's verdict implies a finding that said sentence was not in the document as signed and delivered by the plaintiff, this is an established fact of the case.

It further appears from the evidence that prior to the defendant's refusal to take the balance of the crop, the defendant's own construction of the contract was that it had bought the entire crop. For, in a letter of date April 4, 1922, by the defendant to the plaintiff, it said:

"In reference to the balance of your crop. Wish to advise that we are willing to take the balance of the crop, in fact, are in favor of same, provided we are able to get a better grade and pack than we have had. We want good quality which we bought."

[3] Appellant contends that the court erred in giving to the jury an instruction stating that if the sentence, "also right to accept or reject balance of lettuce," was not a part of the writing at the time of its delivery to the defendant, then the two writings constituted a valid and binding contract for the purchase and sale of the entire lettuce crop of the plaintiff. Appellant's argument in support of this contention is that the document set out in the complaint is merely in the form of an offer of defendant regarding two separate propositions; that the document was not signed by the plaintiff; that no tender was made of the balance of the crop, and that no acceptance by the plaintiff of said offer was communicated to the defendant before the withdrawal of the offer. We think that under the evidence the two documents should be construed together as constituting one entire contract by which both parties were bound. The question of tender is not pertinent to the suggested objection to the instruction. The point relating to acceptance of defendant's "offer" has been covered in our discussion of the complaint. The court did not err in giving said instruction.

After the three cars had been shipped, a fourth car was loaded and prepared for shipment. This car was rejected, and the defendant refused to take any more of the crop. The principal excuse offered by it for such refusal, other than the claim that there was no contract, was that the rejected lettuce was not of marketable quality. H. S. Moyes, defendant's inspector, gave testimony to the effect that it was not of marketable quality.

"Marketable lettuce must be lettuce that is of edible quality. Many times vegetables are sold that would not—should not—be eaten if the health authorities got them first. I would say that a certain percentage of the lettuce in the packing house wouldn't be marketable. All of it was not marketable, even though it may have been sold to dealers, and marketed and went to the consumer."

Defendant produced some other testimony to like effect. On the other hand, plaintiff testified that he produced 5,062 crates of good lettuce after the three cars were shipped to the defendant, a large part of which was sold. These sales were made after the defendant had refused the fourth car and after defendant had given notice that he would not take any more of the crop, and after the plaintiff had notified the defendant by telegraph as follows:

"Further shipment of lettuce is ready for marketing, and I will cut and pick tomorrow April 15th, pursuant to our contract, and in event of your failure to arrange for due disposition of same shall dispose of same to best possible advantage for you and hold you responsible for loss incurred if any."

It was on April 18 that the defendant definitely rejected the whole crop by letter signed by the defendant, by its authorized representative, and in the following terms:

"Wish to advise that I consider your crop of lettuce very poor quality and undesirous for shipping. Therefore reject all."

Prior to that time, by letter of date April 8, defendant referred to its rejection of the fourth car, and said that for stated reasons, "we do not care to handle your lettuce under any condition."

[4, 5] From the testimony there was evidence sufficient to sustain the implied finding of the jury that the 5,062 crates of lettuce were of marketable quality. But appellant contends that the court erred in the definition which it gave to the jury of the word "marketable" in its instruction on that subject. Said instruction reads as follows:

"The term 'marketable lettuce' means such as was fit to be offered for sale in a market; such as may be lawfully sold or bought, and if you find from the evidence that the lettuce which the plaintiff produced was of a marketable quality, according to the foregoing definition, and if you should find from the evidence that the lettuce which was produced by him was actually marketed or sold to the wholesale trade, with the exception of that which remained in the field, if any, and you also find that the lettuce which remained in the field, if any, could have been sold on the market or was of a marketable quality provided there had been any demand for it, then I charge you that it is your duty to find the value of all of such lettuce to the plaintiff, and to determine the amount which he should recover from the defendant in accordance with the other instructions given to you by the court."

The definition of the word "marketable," as contained in the foregoing instruction, does not differ materially from the definitions of that word as found in the principal English dictionaries. It does not differ from the meaning of the word as understood in their ordinary and popular sense. This therefore is a sufficient definition, unless a special meaning was given by usage to the phrase "marketable lettuce," as used in the contract. Civ. Code, § 1644. The defendant attempted to show that the words in question did have a special meaning, by proving certain specifications of the United States Bureau of Standards, which had been used for about three years as establishing a standard in order to obtain a government certificate of quality of such merchandise—presumably for interstate shipment. But the defendant failed to prove that this government standard was mentioned in the negotiations for the contract. The witness Furokawa testified that any lettuce that would not comply with one of the two grades established by the government standards would not be marketable, and that "all the trade follows the specifications." But he further testified that a great deal of lettuce was sold that did not come up to those specifications. The witness W. S. Braddus, a man of extensive experience as a grower, shipper, and market man in the vegetable business, testified that by marketable lettuce he understood lettuce that would sell on the market, and that he was not familiar with said United States Bureau of Standards market specifications on lettuce. We are of the opinion that the disputed phrase was correctly defined by the court in its ordinary and popular sense, and that the court did not err in its instruction to the jury on that subject.

[6] Appellant contends that it was excused from proceeding further with its contract after learning that the plaintiff had made a prior contract with Braddus for the marketing of his entire lettuce crop. It appears that on March 10th the plaintiff and Braddus had entered into a contract under which it was agreed that Braddus should pack and ship plaintiff's lettuce crop and receive therefor a stated commission based on the amount of sales. There was nothing in that contract which would interfere with the subsequent contract made between plaintiff and defendant, or prevent defendant from obtain-

ing both title and lawful possession of the merchandise in question. Therefore this excuse fails.

[7] Concerning the measure of damages, the court first stated in substance the terms of sections 3311 and 3353 of the Civil Code, and further instructed the jury that it was their duty to determine first the number of crates of marketable lettuce produced by the plaintiff which he might have delivered to the defendant; second, the value of the crates produced by him at the contract price of $1.60 per crate; third, value of the lettuce so produced, to the plaintiff; that by "value to plaintiff" was meant the price which he could have obtained for the lettuce in the market nearest to Delano, less the expenses which the plaintiff was put to in the way of hauling, packing, and transporting the lettuce to such market. Thus far appellant makes no objection to said instruction. His objection relates to the remainder thereof, which reads as follows:

"Having determined the three foregoing factors, you will then compute the damages which the plaintiff is entitled to recover from the defendant, if any, in the following manner: From the contract price of the lettuce, which you find that plaintiff produced, you will deduct the proceeds received by him on the sale thereof, and to the remainder thus obtained, you will add the expenses incurred by him in hauling, packing, and paying transportation of the lettuce to the market. The result thus obtained will be the amount of damages which the plaintiff should recover from the defendant."

[8] Appellant contends that by the language last above quoted the court abandoned the earlier part of the instruction, and instructed the jury that the amount actually received on the sale of the lettuce was in fact the value thereof. We think that this criticism is sound, and that the instruction should not have been thus given. But we are also of the opinion that under the evidence this error was not prejudicial to the extent that it caused any miscarriage of justice. The amount of the receipts and of the expenses was definitely established without conflict in the evidence. In like manner it was shown by the uncontradicted testimony of Braddus, who marketed the lettuce for plaintiff, that he made the best disposition of it at that time possible, using his experience as a shipper. In view of these facts, there would not be any appreciable difference between the net results of the sales and the actual value to the plaintiff, of that lettuce. With regard to that part of the crop which the plaintiff did not sell (amounting to 1,350 crates), he testified that he was unable to market it; that he did not pick it because the marketing conditions at that time would not justify the expense of packing and shipping; that he tried to market it "all the way from April the 15th until it was finally abandoned in the field, and this was all I was able to market." There is no evidence to the contrary. It follows that this part of the crop was without value to the plaintiff, or at all. Under such circumstances, there was little for the jury to do in estimating damages, other than to make a computation, based upon the facts proved. Under that computation, the amount of damages incurred would have been a little over $9,600. The amount awarded by the jury was only $8,000. It thus plainly appears that the defendant probably did not suffer any injury by reason of the error complained of in the instruction relating to the measure of damages.

The judgment is affirmed.

We concur: HOUSER, J.; CURTIS, J.

Supreme Court may review entire proceeding and grant such relief as seems proper.

2. Receivers ⊜35(1)—Ex parte appointment of receiver of private business corporation to be confined to cases of greatest emergency and irreparable injury.

Ex parte appointment of receiver of private business corporation should be confined to cases of greatest emergency and where the failure to appoint will entail irreparable injury.

3. Receivers ⊜6—Improper to appoint receiver, where remedy less drastic, and insuring litigant's adequate protection is available.

It is improper to appoint a receiver, where remedy less drastic, and insuring litigant's adequate protection is available.

4. Receivers ⊜32—Allegations as to imminency of insolvency of corporation held insufficient to justify order appointing receiver.

Allegation, that corporation was in imminent danger of insolvency, *held* insufficient to establish insolvency justifying order appointing receiver, within Code Civ. Proc. § 564, either on ex parte application for such order or on a hearing after notice, because a mere conclusion.

5. Receivers ⊜38—Evidence held not to establish imminent insolvency of corporation.

Evidence, adduced on hearing of motion to vacate ex parte order appointing receiver, *held* insufficient to show imminent danger of insolvency of corporation, within Code Civ. Proc. § 564, justifying appointment of receiver, either on ex parte application for such order or on a hearing after notice.

6. Receivers ⊜48—Noncompliance with statute, requiring consent to appointment of receiver, held to preclude appointment of interested person.

Failure to comply with statute (Code Civ. Proc. § 566), requiring consent to appointment of interested person as receiver, and absence of even oral consent to such appointment in open court, *held* to preclude appointment of such person as a receiver, assuming such appointment would otherwise be valid.

7. Prohibition ⊜3(3)—Petitioners held entitled to remedy of prohibition, notwithstanding available remedy by appeal.

Petitioners, whose motion in trial court to vacate ex parte appointment of a receiver was denied, *held* entitled to remedy of prohibition, notwithstanding available remedy by appeal from orders of which complaints were made.

196 Cal. 604

A. G. COL CO. et al. v. SUPERIOR COURT IN AND FOR SANTA CLARA COUNTY et al. (S. F. 11682.)

(Supreme Court of California. Aug. 7, 1925.)

1. Prohibition ⊜28—When Supreme Court, on prohibition, may review entire proceeding and grant relief deemed proper stated.

Where entire record of receivership proceeding is before Supreme Court on application for prohibition to prevent further proceedings,

In Bank.

Original application for writ of prohibition by the A. G. Col Company and another, to be directed to the Superior Court, in and for the County of Santa Clara, and the Honorable J. R. Welch, as judge thereof, and two others, to prevent further proceeding in the matter of appointment of a receiver. Orders appointing receivers annulled.

Simeon E. Sheffey, of San Francisco, for petitioners.

W. E. Foley, N. E. Wretman, and Maurice J. Rankin, all of San Jose, for respondents.

HOUSER, Justice pro tem. The matter which is here presented for determination by this court purports to be a petition for a writ of prohibition. Through some inadvertence, an order to show cause why an "alternative writ of prohibition should not issue" was served upon the respondents. In view of the fact, however, that throughout the hearing the understanding of both the petitioners and the respondents has been shown to have been that the proceeding be treated as final in its nature, such intention will receive recognition and indorsement by this tribunal. The salient facts relating to the controversy appear to be as follows:

For a number of years next preceding the date of the filing of the petition herein, A. G. Col Company has been engaged in the wholesale produce business at the city of San Jose. On or about November 23, 1923, the corporation known as A. G. Col, Incorporated, was organized by the stockholders of the A. G Col Company for the purpose of taking over the business of the A. G. Col Company, and which act seems to have been accomplished.

A corporation known as the California Sweet Potato Corporation, in which A. G Col and J. P. Napoli were stockholders, filed a suit against L. E. Bontz, the A. G. Col Company, A. G. Col, Incorporated, and several of the officers, directors and stockholders thereof, in which it was alleged that from April 24, 1922, to May 4, 1923, defendants therein, L. E. Bontz, C. W. Hunt, and one R. A. Bronson, were the directors of the plaintiff, California Sweet Potato Corporation, and that during said time L. E. Bontz was the president, R. K. Bontz was the secretary, and C W. Hunt was the vice president thereof; that on or about August 22, 1922, the said officers, with the exception of said R. A. Bronson, purchased all the capital stock and all the assets of the A. G. Col Company; that in payment therefor the said defendants issued capital stock of the plaintiff therein, California Sweet Potato Corporation, and "wrongfully and without any right converted the same [presumably the stock and assets of the A. G. Col Company] to their own use and took possession of said property"—which act on the part of said last-named defendants, on information and belief, is alleged by said plaintiff to have been done pursuant to a conspiracy among said defendants to defraud said plaintiff of said property. The complaint contained the further allegation that the organization of the A. G. Col Company, Incorporated, was without any authority from the plaintiff, or any consideration paid to it therefor, but was brought about for the purpose of cheating the plaintiff of its said property. On information and belief, the plaintiff also alleged in its complaint that the said defendants had threatened to sell and dispose of all of said property and had incumbered the same "to the extent of $20,000 and upwards," and that, unless restrained by an order of court, the defendants would sell the property or further incumber the same, and make it impossible for the plaintiff to secure possession and control thereof in as good condition as it was at the time the said suit was filed against the said defendants—to the damage of the plaintiff in an amount impossible of calculation—and that it was necessary:

"That a receiver be appointed to take charge of and manage the said Wholesale Fruit & Produce, Warehouse & Commission business in order to properly preserve and protect the rights and interests of this plaintiff."

It was further alleged in said complaint, on information and belief, that the defendant therein "A. G. Col Company, Inc., never had, or possessed any real capital or assets and is a dummy organization used by the individual defendants herein for the purpose of concealing their operations and that said corporation is in imminent danger of insolvency." The complaint also contained the direct allegation that said individual defendants, when they were officers of the plaintiff, California Sweet Potato Corporation, did not keep proper books of account, and did not account, in cash or property, for a large amount of the capital stock of the said plaintiff, which, on information and belief, is alleged to be of the value of $60.000, and of which sum each of said individual defendants was alleged to be a beneficiary; also, that the facts as set forth in the complaint were not discovered by the present officers of the plaintiff corporation until the month of April, 1925. The prayer was that it be adjudged that defendants hold the property in trust for the plaintiff; that an accounting be had; that a receiver of the said "Wholesale Fruit & Produce, Warehouse & Commission business" be appointed; that the defendants be restrained and enjoined from disposing of said property, or incumbering the title thereto; that the stock of the A. G. Col Company and all property owned by it on August 22, 1922, be delivered by the defendants to the plaintiff; and for general relief.

It further appears that after said complaint was filed, on application of the plaintiff therein, the respondent herein, the superior court issued an ex parte order appointing A. G. Col receiver in said suit, based solely upon the said complaint and an affidavit of N. E. Wretman, one of the attorneys of record for the plaintiff, and who was assistant secretary of the plaintiff therein, in which affidavit was recited the fact of service of the complaint and the summons in said suit upon each of the defendants therein, and, in addition thereto, the statement, upon informa-

tion and belief of the affiant, that after such service had been had the defendants in said suit were not managing and conducting the business and enterprise referred to in said complaint in the usual and ordinary manner, in that they were collecting all outstanding accounts, and were "converting most of the goods, wares and merchandise on hand into cash with a view to disposing of same in such a manner as not to be within the reach of a permanent receiver when appointed after the hearing of said motion"; that, in and by said order of said superior court, said receiver was vested with all the usual powers and rights of receivers, including the power to take, care for, and keep possession of the property, books of account, books, and papers relating to said enterprise; and that thereupon the said receiver qualified as such officer and immediately took charge and possession of the business of the corporation defendants.

Within two days after said ex parte order by the respondent superior court appointing said receiver had been made, the defendants in the suit made application to the said superior court for an ex parte order setting aside the said ex parte order appointing a receiver therein, which application was by the court refused and denied, but, at the same time, an order was made by the court shortening time for service of notice of a motion for an order to set aside said ex parte order by which the receiver had been appointed, and fixing the time for the hearing of such motion at 2 o'clock p. m. of the same day on which the application for the order, setting aside the ex parte order appointing the receiver, had been denied.

At the hearing of said motion, evidence was received of certain facts, including the following: J. C. Jewett, who was the manager of the defendant A. G. Col Company, and the defendant A. G. Col, Incorporated, made affidavit and therein specifically denied each of the allegations contained in the affidavit of N. E. Wretman, to which reference heretofore has been had; and especially denied in said affidavit that said corporations were, or that either of them was, collecting all the accounts and converting most of the goods, etc., into cash with a view of disposing of the same in such manner as not to be within the reach of a receiver. Affiant further deposed that the said business was being conducted in an efficient, honest, and highly successful manner; that the nature of the business demanded that its perishable assets be converted daily into cash, which was done, and that the moneys so received were daily deposited to the credit of A. G. Col, Incorporated, in a bank in the said city of San Jose, and drawn out solely for necessary purposes in the conduct of the business.

The said affidavit contained further specific denials of each of the allegations set forth in the complaint in said suit, including denials to the effect that the defendant A. G. Col, Incorporated, never had or possessed any real capital or assets; that it was a "dummy corporation," etc., or that it was "in imminent danger of insolvency;" denied the existence of the or any conspiracy, as alleged in the complaint, or at all; denied that the defendants, or either of them, had converted to their or his personal use any of the property referred to in the complaint, other than such as "they were justly, legally, and equitably entitled to convert the same to"; denied that any of the defendants kept secret any transactions relating to the purchase of the property described in the complaint, but asserted that full knowledge thereof was had by "all parties," and that the plaintiff, California Sweet Potato Corporation, never had any interest whatsoever in said property; denied that the issuance of the capital stock of the plaintiff corporation (in the matter of the purchase of the A. G. Col Company) was unauthorized, or that said capital stock was converted by the defendants to their own use; but to the contrary, alleged that said plaintiff received payment therefor in the sum of $40,000, in accordance with the terms of a certain agreement (a copy of which being attached to said affidavit and made a part thereof); and which agreement, although not entirely clear in all its terms, is evidence of knowledge by the plaintiff corporation of the facts surrounding the transaction and of the plaintiff's participation therein.

The said affiant further deposed in substance that all the operations of said A. G. Col, Incorporated, were regular in all respects; that as to its financial condition, it was wholly solvent and able to meet its just obligations as fast as they matured; and that it was not "in imminent danger of insolvency, or in danger of insolvency at all."

At the hearing, the affidavit of Simeon E. Sheffey, attorney representing the defendants, was also received in evidence. Among other things, it appeared therefrom that the certificate of 200 shares of the capital stock of the plaintiff, California Sweet Potato Corporation, alleged in the complaint to have been wrongfully converted by defendants to their own use, was in fact issued to A. G. Col (the receiver) personally and not as an officer of said corporation plaintiff, nor in trust for said corporation; that at said time said A. G. Col was a party defendant in an action in the superior court in the city of San Francisco, wherein H. Edwards, assignee of defendant E. L. Jewett, sought to recover from the plaintiff corporation the sum of $75,000 on account of certain moneys alleged to have been advanced by said Jewett to the plaintiff corporation, and on account of the payment by said Jewett as surety of certain moneys due on promissory notes of the plaintiff corporation. Said af-

fidavit contained the further statement, on information and belief, that said A. G. Col "is now a stockholder in plaintiff corporation"; that in another action in the superior court of Stanislaus county the said A. G. Col and others are plaintiffs, and the plaintiff corporation, E. L. Jewett, C. W. Hunt, and L. E. Bontz are defendants; in which action N. E. Wretman appears as attorney representing the California Sweet Potato Corporation.

N. E. Wretman, who had made affidavit regarding the manner in which the business of the defendant, A. G. Col, Incorporated, was conducted, was called as a witness at said hearing, and testified in substance, among other things, that he had never seen a statement of the assets and liabilities of the defendant A. G. Col, Incorporated; that he knew, or had been informed of, no debts of the said defendant corporation other than an indebtedness of $20,000 which was evidenced by a mortgage of record, and one other debt of $10,000; and that he had no information as to whether or not the said defendant corporation was able to meet its current obligations as the same fell due, but had information to the effect that it had an overdraft on its account at the bank, and had based his statement, contained in his affidavit heretofore referred to, to wit, that A. G. Col, Incorporated, was at that time in imminent danger of insolvency, upon information which he had received from A. G. Col that said defendant "had no money to start with, and that they are moving ahead with this litigation the way they do and that they are urging their collections unduly the last week or so," and upon information of the way in which defendants Jewett, Bontz, and Hunt had run the business of the California Sweet Potato Corporation.

A. G. Col testified that, at the time of his appointment as receiver for the defendant corporations, he was the owner of 200 shares of the capital stock of the plaintiff, California Sweet Potato Corporation, but that after his appointment as receiver, and on the morning on which the hearing was had, he had transferred said stock to his son, M. P. Col; also that the corporation, A. G. Col, Incorporated, owed one creditor, Mable Jewett, the sum of $32,000; that the company had other obligations outstanding; and that in his opinion the value of its property was about $50,000 and book accounts owing to the corporation defendant amounting to approximately $40,000.

Grant J. Hunt and J. C. Jewett each testified in substance that he was entirely familiar with the business affairs of the defendant corporations; that each of said corporations was solvent, and in no danger of insolvency; that they were paying their current debts and liabilities as the same fell due; and that they were not squandering or attempting to squander or waste the assets of said corporations, or place the same beyond the reach of any order which might be made by the court.

Mr. Hunt also testified that the "book overdraft" at the bank, amounting to $1,000 or $2,000 would have been taken care of by the deposit of funds before checks representing the overdraft could be presented for payment; and that no special efforts had been made on any day in the month of June, 1925, to hurry collections.

Mr. Jewett also testified that during the five months immediately preceding the hearing, the defendant, A. G. Col, Incorporated, had made a profit on the operation of its business of approximately $15,000; that, within the three or four days next preceding the hearing, the said defendant had been pressing the collections of some large overdue accounts.

The affidavit of E. M. Rosenthal, which was also a part of the evidence before the court, showed that, from the date of the incorporation of A. G. Col, Incorporated, he acted as the auditor of its business books and accounts, and was thoroughly familiar with all its financial transactions; that during the five months next preceding June 1, 1925, an audit of the books of said corporation showed a net profit of $15,594.81; that on May 31, 1925, the balance sheet disclosed quick assets amounting to $83,507.51, fixed assets of $70,926.95, and a net worth of said corporation, over all its liabilities, of $54.578.64; that a healthy financial condition existed as to said corporation, and that its business was conducted in a careful and conservative and businesslike manner and that its entire income was deposited in the Bank of San Jose and at all times disbursed only for its operating expenses, and for the purchase of produce which it handled.

The evidence also satisfactorily showed that J. P. Napoli was a stockholder in the California Sweet Potato Corporation; and that at the close of the hearing the court ordered that—

"The appointment of Mr. Col heretofore made is set aside and terminated, and Mr. Joseph Napoli is appointed receiver pendente lite."

[1] The foregoing, while not by any means stating the entire evidence before the trial court, is nevertheless a condensed statement of the material evidence relating to the appointment of the receiver, ex parte and finally, which is shown by a transcript of the reporter's notes taken on the hearing and the various affidavits and pleadings filed in the case. It thus appears that the entire record is placed before this court in this proceeding. It is therefore competent, notwithstanding the fact that a writ of prohibition is prayed, that this court review the entire proceedings, and grant such relief as may be proper in the premises. Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; Traffic Truck

Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306; Swim v. Superior Court, 193 Cal. 539, 226 P. 2; Finn v. Butler (Cal. Sup.) 235 P. 992.

[2] By numerous authorities, the principle is unequivocally announced that, from the standpoint of the business welfare of a defendant corporation, the appointment of a receiver on an ex parte application is so dangerous an expedient that it should be done only in cases of the greatest emergency and where, without such appointment, irreparable injury will unquestionably result. Fischer v. Superior Court, 110 Cal. 129, 42 P. 561; Hobson v. Pacific States M. Co., 5 Cal. App. 94, 89 P. 866; Ryan v. Murphy, 39 Cal. App. 640, 179 P. 517.

[3] It is also a well-established rule that a receiver should not be appointed where a remedy less drastic in its nature and scope is available, and which will insure to the litigants adequate protection.

In the case of Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 239, 133 P. 1155, 1158, it is said:

"And a receiver should not be appointed where the desired result can be obtained by less stringent means calculated to protect the rights of all parties. Hayes v Jasper Land Co., 147 Ala. 340 [41 So. 909]; Secord v. Wheeler Gold M. Co., 53 Wash. 620 [102 P. 654, 17 Ann. Cas 914]. 'Where an injunction will protect all the rights to which the applicant for the appointment of a receiver appears to be entitled, a receiver will not be appointed.' 34 Cyc., p. 25; Hickey v. Parrot Silver, etc., Co., 25 Mont. 164 [64 P. 330]."

See, also, Jones v. Smith (C. C.) 40 F. 314; Fischer v. Superior Court, 110 Cal. 129, 42 P. 561.

The California Sweet Potato Corporation in the prayer of its complaint asked that it be decreed that the property described therein was held in trust by the defendants for the benefit of the plaintiff; that an accounting be had, and that the stock referred to in the complaint be delivered to the plaintiff.

It is clear that every presumed right (other than the appointment of a receiver) of the California Sweet Potato Corporation, for which it prayed in its complaint, could have been fully and completely protected and made available by a writ of injunction, or by other remedies provided by statute. It would appear that there was no such emergency, pending or imminent, which required so harsh a remedy as the ousting of the regularly qualified and acting and financially successful officers of the defendant corporations, and the substitution therefor of a receiver for the management and control of the business of the corporations.

Section 564 of the Code of Civil Procedure provides that—

"A receiver may be appointed * * * in the cases when a corporation * * *is * * * in imminent danger of insolvency. * * *"

It is therefore apparent that before the court would have been justified, on that ground, in making an ex parte order appointing a receiver, it must have appeared by appropriate allegations in the complaint that the financial condition of the corporations defendant was such that they were "in imminent danger of insolvency." It is said in the case of Dabney Oil Co. v. Providence Oil Co., 22 Cal. App. 233, 237, 133 P. 1155:

"Section 564 of the Code of Civil Procedure provides in what cases the court may appoint a receiver, and in the absence of facts showing that the case falls within some or more of the provisions of the section, no authority exists for such appointment."

The only allegation of the complaint which can be said to clearly constitute an attempt on the part of the plaintiff to comply with the requirements of the statute is that—

"Plaintiff is informed and believes * * * that said corporation (A. G. Col, Incorporated) is in imminent danger of insolvency."

[4] In the first place, it should be noted that the statement regarding the imminency of the insolvency of the corporation defendant is not direct, but that it is made on information and belief, and, consequently, is entitled to little weight; but, even assuming that its capacity as a pleading is not affected thereby, according to adjudications heretofore announced by this court, it is insufficient.

In the case of Bank of Woodland v. Stephens, 144 Cal. 659, 79 P. 379, which, among other things, involved the question of the right of the court to appoint a receiver in a suit to foreclose a mortgage, it was held that an allegation "that the security is insufficient," without stating facts upon which to base such allegation was insufficient to justify the appointment of a receiver. The court said:

"Such a statement is no more than a conclusion. It is no better than the statement sometimes contained in a complaint for an injunction, that if the acts threatened are committed 'the plaintiff will suffer irreparable injury which cannot be compensated in damages.' This is always held insufficient to authorize or support an injunction. The same rule should be applied here. The appointment of a receiver involves the taking of the defendant's property from his possession—a measure more violent and drastic than an injunction. It should never be allowed in cases of mortgage foreclosure, except upon a statement of facts showing that the actual value of the mortgaged premises is less than the debt secured, with interest and costs, and that resort to the rents and profits is necessary."

The same conclusion is reached by the court in Title Ins. & Trust Co. v. California Development Co., 164 Cal. 58, 127 P. 502, where the following language appears:

"The only attempt to establish the second ground mentioned consisted of an allegation in

the complaint stating 'that as plaintiff is informed and believes and therefore avers the aforementioned property is probably insufficient to discharge the mortgage debt aforesaid.' Neither the value of the property, nor any facts indicating its value, are set forth in the complaint or in the affidavit. The decision in Bank of Woodland v. Stephens, 144 Cal. 660, 79 P. 379, is directly to the point that this is not a sufficient allegation of fact to justify the appointment of a receiver under this clause of the section."

[5] But, aside from any question of the sufficiency of the pleading, the facts adduced on the hearing of the motion to vacate the ex parte order appointing the receiver were not sufficient to sustain the necessary conclusion by the court that the defendant therein, A. G. Col, Incorporated, was "in imminent danger of insolvency." The only evidence, other than the naked conclusion—on information and belief—contained in the affidavit of N. E. Wretman that said corporation was "in imminent danger of insolvency," which at all bore on the issue, was that said defendants had incumbered the property owned by the defendant corporations "to the extent of $20,000 and upwards"; and, further—on information and belief—"that the defendant A. G. Col Company, Inc., never had, or possessed any real capital or assets." It also appeared that the defendant corporation had an overdraft at the bank, which would have been covered by deposits made by the defendant before the checks representing the overdraft had been presented for payment. The other assumed facts set forth in the complaint related more particularly to the issues therein presented of accounting by the defendants, or to that of a trust in them—all for the benefit of the California Sweet Potato Corporation. On the other hand, the assumed facts contained in the affidavits introduced by the defendants, together with the uncontradicted facts as testified to by witnesses, clearly demonstrated that the "information and belief" relied upon by Mr. Wretman for his said statements contained in the complaint and in his supporting affidavit were untrustworthy and unreliable.

Counsel for respondents now contend, for the first time, that aside from the special statutory requirement that either insolvency or imminency of insolvency of the corporation be made to appear before a receiver can be lawfully appointed, the general and inherent powers of a court of equity may be invoked under the further provisions of section 564 of the Code of Civil Procedure, which authorize the appointment of a receiver in those cases where a receiver has "heretofore been appointed by the usages of courts of equity"; also, where "any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured."

In the French Bank Case, 53 Cal. 495, it was ruled (syllabus):

"The general and ordinary jurisdiction of courts of equity does not embrace the power to appoint a receiver of the property of a corporation in aid of a suit prosecuted against the corporation by a private person, but such power, if it exist at all, must be derived from a statute conferring it upon the court.

"Section 564 of the Code of Civil Procedure does not confer it."

But, under this proceeding, it is unnecessary to determine whether or not a receiver of a corporation may be appointed where a proper showing is made. All that is intended by the foregoing is that neither the allegations (on information and belief) of the complaint, nor the evidence adduced, warranted the conclusion by the trial court that a receiver should be appointed, either on an ex parte application for such an order, or on hearing after notice, because the corporation was in "imminent danger of insolvency."

It will be remembered that, strictly speaking, the motion before the court was that of vacating an ex parte order appointing a receiver, theretofore made, and not that of appointing a receiver on a notice given to the defendants, although it also appears in the record that such a notice had been given, and which had been set for hearing at a time two days later than the date on which the motion to vacate the ex parte order appointing the receiver came on for hearing. There are, however, statements by the attorneys representing the respective parties, contained in the transcript of the proceedings on the hearing of the motion, which would seem to indicate that by implied stipulation the entire matter was being considered—the judge of the court remarking:

"I will hear you upon this matter. You will take your consequences one way or the other."

The "consequences" were that A. G. Col, who theretofore had been appointed receiver of the defendant corporations on the ex parte application of the California Sweet Potato Corporation, and who was a large stockholder in such corporation, was discharged as such receiver, and J. P. Napoli, who likewise was a stockholder in the plaintiff corporation, was appointed in his stead.

Section 566 of the Code of Civil Procedure provides, in part:

That no "person interested in an action, * * * can be appointed receiver therein without the written consent of the parties, filed with the clerk."

An examination of the proceedings herein discloses that no written consent to the appointment of J. P. Napoli as receiver of the defendant corporations was ever filed with the clerk. However, there is contained in the order of the court, in which J. P. Napoli is appointed receiver, a recital that—

"All parties agreed and stipulated in open court that the order heretofore made appointing A. G. Col as receiver may be, and the same is hereby, vacated and set aside, and that Joseph P. Napoli, of San Jose, California, be and he is hereby appointed receiver pendente lite," etc.

Without considering the question of whether or not an oral agreement or oral stipulation in open court may become the lawful substitute for the statutory requirement of a written consent filed with the clerk, permitting the appointment as receiver of a person interested in the action, under the authorities heretofore cited (Van Hoosear v. Railroad Commission, 189 Cal. 228, 207 P. 903; Traffic Truck Sales Co. v. Justice's Court, 192 Cal. 377, 220 P. 306; Swim v. Superior Court, 193 Cal. 539, 226 P. 2, and Finn v. Butler [Cal. Sup.] 235 P. 992), this court is authorized to review the entire record, as on certiorari, and determine for itself just what situation was presented to the trial court, and to award such relief as may be proper in the premises. With respect, then, first to the facts as presented by the transcript of the proceedings, concerning whether or not there was actually any consent by the defendants to the appointment of Mr. Napoli as receiver in the suit: It appears that the attorney representing the defendants made many objections thereto, such, for example, as "I want to state that we do not consent to the appointment of a receiver. [The Court: I know you are not consenting to it.] * * * This is appointing an interested party as a receiver of that business. * * * I am making objection. * * * I have not consented to the receiver, but I will work with Napoli, but not under a receiver (which last statement was made by J. C. Jewett, manager of the defendant corporations). * * *" Also, the following by defendants' attorney: "Mr. Sheffey: Under the circumstances, your honor has no jurisdiction to appoint a receiver. They have not shown that this business is in imminent danger of insolvency, which is the only ground on which they proceed to ask for the appointment of a receiver."

The following also appears of record:

"The Court: If you raise the question of insufficiency, I want you to understand that I am not cutting off the other side from presenting their case, if they want time, I shall give them time.

"Mr. Sheffey: Before your honor should appoint a receiver to take our business out of our hands, there should be a sufficient showing of the necessity. * * *

"Mr. Sheffey: Why don't you do this: Set aside the order appointing the receiver, and continue this matter until both sides have had full opportunity to be heard on the question of whether or not a receiver is necessary * * *

"The Court: You will accept Mr. Napoli by consent at this time, or else the court will have, at this late hour, to continue this matter until tomorrow and hear the other side, and hear your side, too, to the final—to the final determination of this question of a receivership. If sufficient showing is made, the court will appoint a receiver; if you do not consent, and inasmuch as the court will appoint, make its own appointment whether Mr. Col or somebody else, I do not know—if your people make their showing legally—then the Court will deny the receivership—that is all there is to the case; it is just a question of proof or no proof, whether they are within the law or without the law. So unless there is a consent to this matter, I will continue the matter until tomorrow. * * *

"The Court: The court is going to determine whether it will appoint a receiver at all or not, and if it appoints a receiver it will be pendente lite. * * *

"Mr. Sheffey: I would rather have Mr. Napoli appointed, than to have the matter continued, in the situation it now is.

"Mr. Foley: That is all right.

"The Court: That settles it.

"Mr. Sheffey: The bond provides that he shall be liable for any damage caused by the appointment of a receiver improperly.

"Mr. Foley: He has been appointed by consent.

"Mr. Sheffey: We did not consent. * * *

"The Court: The court will make the appointment on those conditions, and the appointment of Mr. Col heretofore made is set aside and terminated. And Mr. Joseph Napoli is appointed receiver pendente lite; and his bond fixed at $10,000 surety bond."

From the foregoing, it is clear to this court that, if it can be said that the attorney representing the defendants consented at all, it was not a free and voluntary consent, but rather a manifestation on his part that, as a matter of preference, if the court insisted upon continuing the matter in its then status, with Mr. A. G. Col as receiver, it would be more agreeable to the defendants to have Mr. Napoli appointed receiver. Nowhere does it appear that the defendants waived their objections, or any of them, to the appointment of a receiver; but, to the contrary, the record contains frequent statements on the part of counsel representing the defendants that the court was without jurisdiction to appoint a receiver at all, and that the defendants especially objected to the appointment of any person interested in the action. As a final statement, in response to one by plaintiffs' attorney that Mr. Napoli was appointed by consent, we find that defendants' counsel said: "We did not consent"; and, although it appears from the answer filed herein by the respondents that the judge of the trial court did not hear either of the statements last referred to, there is no denial of the fact that either of the statements was made or that the court was in session at the time they were made. As tending to show that the defendants did not consent to the appointment of a receiver for said corporations, it may be noted that the petition herein was filed on July 6, 1925, which was within four days after the date of the filing of the order by

which J. P. Napoli was appointed as such receiver. It must therefore be taken as true that, as a conclusion of the entire matter, neither "the written consent of the parties, filed with the clerk," nor the oral consent of the defendants, was obtained.

But, even had the voluntary consent of the defendants appeared of record as disclosed by the reporter's transcript of the proceedings, it is nevertheless doubtful, considering the question from the standpoint of consent by a corporation to the appointment of a receiver for itself, rather than the appointment of some specified person to that official position, that the corporation had the power to thus divest itself of its corporate functions, and confer corporate rights and duties upon an individual.

In the case of Elliott v. Superior Court, 168 Cal. 727, 145 P. 101, where it appeared that a receiver of a corporation had been appointed by and with the consent of the corporation, it is said:

"The fact that the Gibraltar Company consented to the appointment of a receiver is immaterial. Such consent did not and could not confer jurisdiction upon the court to make the appointment."

And in Smith v. Superior Court, 97 Cal. 348, 32 P. 322, the language of the court is:

"Nor would the consent of defendant railroad to the appointment of the receiver at all affect the right of any creditor aggrieved thereby to have the order appointing such receiver annulled in a proceeding of this character."

See, also, Bank of Woodland v. Stephens, 144 Cal. 659, 79 P. 379.

[6] Concluding the entire matter of the legal propriety of the appointment of Mr. Napoli, as receiver of the corporation defendants, it may safely be said that in view of the fact that there was no compliance with the statutory provisions requiring the written consent of the defendants to his appointment to be filed with the clerk, nor any oral consent thereto by the defendants in open court (assuming, without deciding, that such course might have been pursued), the court was without jurisdiction to make the appointment.

[7] It is urged by respondents that prohibition is not the proper remedy, and that for any prejudicial error committed by the trial court as against the rights of the defendants, they were afforded an adequate remedy by appeal.

In the case of Davis v. Superior Court, 184 Cal. 691, 195 P. 390, which also was a proceeding for a writ of prohibition for the purpose of preventing the superior court from further proceeding in an action before it, it is said (page 696 [195 P. 392]):

"With regard to the remedy by appeal, the facts are that the order vacating the judgment of dismissal was made on January 2, 1920; that it was a special order made after final judgment and was appealable and that the right of appeal expired on March 2, 1920. Code Civ. Proc., § 963, subd. 2. On that day the present proceeding in prohibition was begun in the district court by the filing of the petition upon which that court issued an order to show cause. While the existence of the right of appeal at that time might have been a sufficient reason for that court to have then refused to entertain the petition (Glougie v. Superior Court, 169 Cal. 675, [147 P. 972]), yet, in view of the fact that the superior court was then, and ever since has been, without power or jurisdiction to proceed further in the action, as we have shown, but nevertheless proposes to do so, and that further proceedings of any kind, except to again dismiss the action, would be void, we are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

The case of Grinbaum v. Superior Court, 192 Cal. 528, 560, 221 P. 635, was an application for a writ of review, in which proceeding the same rule suggested by respondents herein ordinarily obtains. The proceeding was brought for the purpose of annulling an order appointing a guardian of an alleged insane person, on the ground of want of notice of the guardianship proceeding to such person; and it was held, following the case of Davis v. Superior Court, 184 Cal. 691, 195 P. 390, that the contention of respondent that the alleged incompetent had a plain, speedy, and adequate remedy other than by a writ of review could not be upheld, although it manifestly appeared that other remedies were available to the petitioner.

And so in the instant case, while it is true that petitioners had a remedy by appeal from the orders of which complaint is made, nevertheless, for obvious reasons, including the long delays and consequential damages incident thereto, to again quote the language used by the court in the Davis Case (supra):

"We are disposed to grant the writ, rather than put the parties to further vexation and useless expense by further attempts to prosecute it. The question is largely one of discretion, and we deem it the better policy to terminate the proceedings forthwith."

It becomes unnecessary to discuss the additional point suggested by petitioners, that the complaint in the suit of California Sweet Potato Corporation against L. E. Bontz et al. does not state a cause of action.

It is the order of the court that the order of the trial court, by which A. G. Col was appointed receiver on the ex parte application of the plaintiff in the suit to which reference has been had, as well as the later order therein appointing J. P. Napoli receiver on the hearing of the defendants' motion to vacate

the former order, be and they are, hereby vacated and annulled.

We concur: MYERS, C. J.; SEAWELL, J.; SHENK, J.; LAWLOR, J; RICHARDS, J.; LENNON, J.

---

196 Cal. 655

FOURCADE et al. v. CITY AND COUNTY OF SAN FRANCISCO et al. (S. F. 11365.)

(Supreme Court of California. Aug. 13, 1925.)

1. Municipal corporations ⟸589—Police power elastic.

Proper exercise of police power requires expansiveness to meet growth of municipality.

2. Municipal corporations ⟸601—Findings held not to show failure to consider suitability of district in adopting zoning ordinance.

Where it appeared from findings of referee, on application for writ of mandate, that, in adopting zoning ordinance, board of supervisors had in view character of various districts, their particular suitability for various uses, the conservation of property values therein, and direction of property development in accordance with a well-considered plan, other findings *held* not to show failure to consider suitability of residence district for milk-pasteurizing plant.

3. Municipal corporations ⟸625—Ordinance excluding milk-pasteurizing plant from residence district held not unreasonable.

Zoning ordinance excluding milk-pasteurizing plant from residence district *held* not unreasonable; it not appearing that milk could not be pasteurized and distributed from other districts with reasonable safety and convenience.

4. Municipal corporations ⟸601—Municipality may establish residential and quasi residential districts.

Municipality has power to establish residential and quasi residential districts and exclude therefrom all nonconforming uses.

5. Municipal corporations ⟸63(1)—Action of board of supervisors in excluding milk-pasteurizing plant from residential districts held binding on Supreme Court.

Determination of board of supervisors, in adopting zoning ordinance, that milk-pasteurizing plants should be excluded from residential districts, *held* binding on Supreme Court.

6. Mandamus ⟸172—Propositions not urged or referred to in briefs will not be considered.

Points urged in points and authorities accompanying petition for writ of mandate, but not urged or referred to in briefs, will not be considered.

In Bank.

Application by H. Fourcade and another for writ of mandate, directed to City and County of San Francisco and others to compel issuance of permit for construction of milk-pasteurizing plant. Writ denied.

Raymond D. Williamson, of San Francisco, for petitioners.

M. T. Dooling and J. F. Bluxome, both of San Francisco, for respondents.

LENNON, J. This is a proceeding in mandamus, instituted in this court, to compel the board of public works of the city and county of San Francisco to issue a permit for the construction of a milk pasteurizing, bottling, and distributing plant upon the property of petitioners. An alternative writ was issued, and, after the issues were joined, a referee, pursuant to the stipulation of all the parties, was appointed to take testimony and report his findings of fact to this court. The same have been filed. The sufficiency and correctness of these findings being conceded, they are approved and accepted by this court.

The petition for the writ challenges the validity of the zoning ordinance of the city and county of San Francisco, upon the ground that the restrictions imposed upon the property of petitioners, under and by virtue of the said ordinance, are unreasonable and arbitrary and therefore not a proper exercise of the police power.

The material findings of fact made by the referee, succinctly stated, are these:

The "zoning law" of the city and county of San Francisco is a comprehensive zoning ordinance, adopted by the board of supervisors of the said city and county. This ordinance was adopted after an extensive survey of the entire city and county by the planning commission of said city and county. Subsequent to a careful investigation of the facts thus secured and before the adoption of the ordinance, a tentative zone map of said city and county, dividing said city and county into six different classifications, was prepared. Thereafter numerous public hearings, to which all persons interested were urged to come and present their objections, if any, to the classification thus made, were held by the said commission. After considering the facts elicited by this survey and the objections made at said public hearings, the commission prepared a complete zoning ordinance, segregating the entire city and county of San Francisco into six classes. This proposed ordinance was then taken up by the board of supervisors, and further public hearings thereon were held by that board, at which all the residents of the city and county of San Francisco were invited to appear and present such objections as they might have to said proposed ordinance, either in whole or in part. Many residents of the said city and county did appear at said hearings, and the board of supervisors finally, on October 3, 1921, adopted the ordinance in question (No. 5464, New Series). In ultimately

adopting said ordinance said board took into consideration, not only the results of the preliminary survey and public hearings held by the city planning commission, but also suggestions made by citizens of the city and county of San Francisco at the public hearings held by said board. Said ordinance was adopted by the board of supervisors, having in view the character of the various districts, their peculiar suitability for particular uses, the conservation of property values, and the direction of property development in accord with a well-considered plan.

The ordinance in question is entitled, an ordinance "regulating and establishing the location of trades, industries and buildings, and the locations of buildings designed for specific uses, and establishing the boundaries for said purposes, and providing penalties for the violation of its provisions." It provides that—

"For the purpose of regulating and establishing the location of trades and industries, businesses, dwellings and the location of buildings designed for specific uses, the city and county of San Francisco is hereby divided into six classes of districts, (1) 'first residential district,' (2) 'second residential district,' (3) 'commercial district,' (4) 'light industrial district,' (5) 'heavy industrial district,' (6) 'unrestricted district.'"

In a second residential district, by the provisions of the ordinance, no building may be constructed or altered which shall be used or which shall be intended to be used for any purpose other than for a single family dwelling, flat, apartment house, tenement house, boarding or lodging house, hotel, library, public building, hospital or sanitarium, police station, fire station, philanthropic and eleemosynary institution, other than a correctional institution, community clubhouse, etc. It is, in brief, restricted to residential uses exclusively, and such uses as public necessity requires.

The petitioner Fourcade is the owner of a triangular block, bounded by Duncan street, Guerrero street, San Jose avenue, and the intersection of San Jose avenue and Guerrero street in the city and county of San Francisco. This property is situate in a district designated by the said zoning ordinance as a second residential district. The district in which the block of land is located is, and was at the time of the adoption of said ordinance, devoted almost exclusively to residence purposes. The zoning map shows this second residential district to be bounded by Army street, Dolores street, Twenty-Ninth street, Tiffany avenue, and Valencia street, in said city and county, and includes nine blocks, in which area the lot of land owned by petitioners is situated, and shows the uses to which the lots within the described district were devoted at the time said ordinance was adopted and also the new buildings which have been constructed since the adoption of said ordinance, and the uses to which said buildings are devoted. At the time the ordinance was adopted, there were in said nine blocks immediately surrounding the described area 236 buildings devoted exclusively to residence purposes and only 21 buildings devoted to uses other than residential. Several of the latter had small stores on the first floor with apartments or flats devoted exclusively to residential purposes on the floors above. Since the adoption of said ordinance there have been constructed in this district and fronting upon San Jose avenue, between Duncan street and the intersection of said San Jose avenue with Guerrero street, 8 buildings devoted exclusively to residence purposes at a total cost of $78,000. All of these buildings face directly upon the lot upon which petitioner La Brucherie seeks a permit to erect a milk-pasteurizing plant. There has been likewise constructed on Guerrero street, between Duncan street and the intersection of Guerrero street with San Jose avenue, one building devoted exclusively to residential uses, at a cost of $25,000. This building fronts upon the lot of petitioners. There is also located in this district St. Luke's Hospital. Subsequent to the passage of the ordinance in question, additions were made to this hospital, which institution is one of the permissible uses in a second residential district, at a total cost of $78,000. These additions were made in reliance upon the fact that said district was classified as residential in the zoning ordinance, and that no property in such a designated district would thereafter be devoted to other than residential purposes.

Subsequent to the adoption of the ordinance, petitioner Fourcade entered into an agreement with his copetitioner, La Brucherie, wherein the latter agreed to purchase from Fourcade a portion of said triangular block fronting on Guerrero street, San Jose avenue, and Duncan street, and upon which La Brucherie proposed to erect his pasteurizing plant. It was understood, however, that the consummation of said agreement would depend entirely upon obtaining a permit from the board of public works for the construction on said lot of said plant in accordance with certain plans and specifications. In compliance with the provisions of the zoning ordinance, petitioner La Brucherie applied on two different occasions to the board of supervisors for a change of zone so as to permit the construction on the described lot of a building for the purposes stated. These requests were referred to the city planning commission, as provided in the ordinance, and after hearing thereon, at which the petitioner La Brucherie appeared and was accorded a hearing, the commission recommended to the board of supervisors the same be denied. The said board accepted the recommendation of the city planning commission and adopted

resolutions denying the applications. Petitioner La Brucherie then filed his application for a permit with the board of public works of said city and county, which after due hearing was denied upon the ground and for the only reason that the erection of the building in question would be contrary to the provisions of the zoning ordinance.

Under the said zoning ordinance the only districts in the city and county of San Francisco in which a building may be erected for the pasteurization of milk and the bottling thereof are the following: Light industrial districts, heavy industrial districts, and unrestricted districts. These districts are less suited and less fitted for the stated purposes than a residential district, because, in the former, the plant is removed from the districts where the bulk of milk produced is daily consumed. In residential districts, furthermore, there is less possibility of contamination from smoke, dirt, dust, fumes, and odors which ordinarily are to be found in an industrial district.

Milk, finds the referee, is a food staple of great value to human beings. It is of a delicate character, and easily subject to contamination, and it is important, therefore, that such a plant as a milk pasteurizing, bottling, and distributing depot should be located as near as reasonable to the homes of the consumers thereof in order to insure its expeditious delivery and reduce the possibility of pollution.

The primary point presented for decision in this case is whether or not excluding of a milk pasteurizing, bottling, and distributing depot from a residential district is a reasonable exercise of the police power vested in a municipality by virtue of the constitutional grant of power to municipalities. Article 11, § 11, Const. of Cal.; Enabling Act of 1917, p. 1419.

[1] At the outset of a discussion of this point it may be stated that the elaborate survey of the police power, in relation to its exercise by municipalities in enacting zoning ordinances in the recent cases decided by this court (Miller v. Board of Public Works, 234 P. 381, and Zahn v. Board of Public Works, 234 P. 388), makes unnecessary a detailed discussion of this subject here and now. It is to be borne in mind, however, that we are dealing with one of the most necessary powers of government, and it may not be remiss to reiterate that it is not inflexible. Its proper exercise rather postulates an expansiveness and an elasticity that must meet the growth and expansion of a municipality. "In short, the police power, as such," as was stated in Miller v. Board of Public Works, supra, "is not confined within the narrow circumscription of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power."

It is now settled in this state, in so far as the general principle of comprehensive zoning is concerned, that the segregation of residences, industries, commercial and mercantile businesses of divers kinds, to particular localities, is a proper and legitimate exercise of the police power as bearing a rational relation to the health, safety, and general welfare of the community. Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, supra.

The procedure followed by the board of supervisors of the city and county of San Francisco, in adopting the zoning ordinance in question, brings that enactment precisely within the principle announced in the above-cited cases. We cannot say from the facts found that the districting of the particular area in question is an arbitrary and unreasonable exercise of the police power. It is contended in this behalf that the board of supervisors of the city and county of San Francisco, in adopting the said zoning ordinance, did so without giving reasonable consideration to the character of the particular district in question, wherein the property of petitioners is situate, and the suitability of this district for particular purposes. Petitioners' argument hinges upon the findings of the referee to the effect that milk is a food staple of great value; that it is delicate and easily exposed to contamination; that the districts in which the operation of pasteurization plants are now permitted under the zoning ordinance are less suited for such purposes than residential districts; that at present pasteurization plants, by virtue of said ordinance, are removed from residential districts where the bulk of milk is daily consumed; that the districts to which the said plants are now relegated are objectionable by reason of the dust, dirt, smoke, fumes, and odors which permeate such districts; and that it is of great importance to the consumers that pasteurization plants should be as near as possible to their homes, in order to insure and facilitate quick and economical delivery; and, consequently that it is for the best interests of the consumers that such plants should be located in residential districts. These findings indicate, petitioners contend, that the board of supervisors, in adopting the ordinance in question, did not know and keep in mind the particular character and suitability of the district for a milk pasteurizing, bottling, and distributing depot.

[2] This contention cannot be sustained. The evidence adduced before the referee shows without contradiction that milk pasteurization plants can be and are successfully operated in industrial districts. And the findings of the referee clearly show that, in adopting the ordinance here assailed, the board of supervisors had in view the character of the various districts, their peculiar suitability for particular uses, the conservation of property values therein, and the direction of property development in accordance with a well-considered plan. This finding negatives the contention that said board failed to take into consideration the suitability of the particular district for the proposed use.

[3] The importance of milk as an article of diet is readily conceded, but it cannot be said that milk must necessarily be pasteurized close to the consumers in order to lessen the possibility of contamination. Until it be found that milk cannot be pasteurized and distributed from districts other than residential with reasonable safety and convenience, it cannot be said that the relegating of pasteurizing plants to districts other than residential or commercial by the board of supervisors is an unreasonable and arbitrary provision of the ordinance in question.

It was held, in Miller v. Board of Public Works, supra, that as a part of a general comprehensive zoning plan strictly private residential districts may be established. The basis of the rule there announced is the reasonable and necessary protection of the general uniform home districts from the encroachment of foreign and discordant uses, which would ultimately destroy such districts. It is manifest that the introduction of any form of business or industrial use into strictly uniform home districts operates, in a measure at least, to lower the value and depreciate the desirability of surrounding property for residential purposes. A milk pasteurization plant, being indisputably an industrial use, clearly would be out of harmony in a residential district.

[4, 5] The power of a municipality to establish and maintain residential and quasi residential districts and to exclude therefrom all nonconforming and conflicting uses is now established in this state. Miller v. Board of Public Works, supra; Zahn v. Board of Public Works, supra. And when establishing such districts the legislative body of a municipality decides that it is feasible and essential to the general welfare of the community to exclude pasteurizing plants from the same, it is not within the province of this court to dispute the wisdom of their judgment. The board of supervisors having determined the question in favor of the exclusion of milk pasteurization plants from residential districts, that determination is final so far as this court is concerned.

"It is scarcely necessary to reiterate here the well-recognized principle that courts are loath to substitute their judgment as to the necessity for a particular enactment for the legislative judgment as to the need of such enactment with reference to the exercise of the police power. A large discretion is vested in the legislative branch of the government with reference to the exercise of the police power. * * * Every intendment is to be indulged by the courts in favor of the validity of its exercise and, unless the measure is clearly oppressive, it will be deemed to be within the purview of that power. * * * The courts may differ with the Legislature as to the wisdom and propriety of a particular enactment as a means of accomplishing a particular end, but as long as there are considerations of public health, safety, morals, or general welfare which the legislative body may have had in mind, which could have justified the regulation, it must be assumed by the court that the legislative body had those considerations in mind and that those considerations did justify the regulation. * * * In Ex parte Hadacheck, supra [165 Cal. 416, 132 P. 584, L. R. A. 1916B, 1248], the court held in effect that, when the necessity or propriety of an enactment was a question upon which reasonable minds might differ, the propriety and necessity of such enactment was a matter of legislative determination." Miller v. Board of Public Works, supra.

Inasmuch as it does not appear from the unquestioned and admitted facts of the instant case that the ordinance in question, in its application and its consequences, is inherently unreasonable, we are necessarily foreclosed from substituting our judgment for the legislative judgment to the effect that the enactment of the zoning ordinance of the city and county of San Francisco had reasonable relation to the promotion of the general welfare of the community.

[6] Petitioners' points and authorities, which accompanied the petition for the writ, presented, in addition to the points hereinbefore discussed and decided, several other points which were not urged nor in anywise referred to in the briefs which were finally filed in the case and upon which the case was submitted for decision. We take it, therefore, that the points last mentioned have been abandoned by petitioners. Indeed they may well have been abandoned, because they were decided adversely to the contention of petitioners in the recent cases of Miller v. Board of Public Works, supra, and Zahn v. Board of Public Works, supra, which were decided subsequent to the filing of the petition in this case. It will be unnecessary, therefore, to discuss and decide the remaining points which were originally urged in support of the petition for the writ.

A peremptory writ is denied, and the alternative writ is discharged.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.; HOUSER, J. pro tem.

196 Cal. 623

In re HENDERSON'S ESTATE. (Sec. 3769.)

(Supreme Court of California. Aug. 10, 1925.)

1. Wills ⟸130—Document held to constitute holographic will.

Document found among effects of deceased, consisting of a single sheet of paper, in the first part of which she made request that certain property be left to her daughter and husband, and in paragraph following signature made request that daughter send gift to testatrix's son, *held* to constitute in its entirety one holographic will.

2. Wills ⟸133—Subscription at close of paragraph following signature of testatrix held a sufficient subscription to constitute latter paragraph part of will.

Where holographic will was properly signed by mother at close of paragraph providing for certain bequests, subscription "Your loving mother" at end of paragraph following signature *held* a sufficient subscription to constitute latter paragraph part of will.

3. Wills ⟸320—Jury held properly excluded during proceedings involving preliminary proof of purported will.

In proceedings for probate and contest of will, jury *held* properly excluded during proceeding involving preliminary proof of purported will; evidence and issues of fact in proceedings of probate of will being solely for consideration and determination of the court.

4. Wills ⟸52(1)—Presumption that testator was of sound mind when making will is alone sufficient evidence on question of sanity to support judgment admitting will to probate.

Testator is presumed to have been sane when making will, and such presumption alone, in absence of contradictory evidence, is sufficient on question of sanity to support judgment admitting will to probate.

5. Wills ⟸344—Judgment admitting will to probate held not defective because failing to include express findings.

Judgment admitting will to probate *held* not defective because failing to include express finding that at time deceased executed will she was over 18 years of age and of sound and disposing mind; existence of jurisdictional facts and finding thereof being implied from matters which must be shown to have been ordered and adjudged, in view of Civ. Code, § 1270, and Code Civ. Proc. § 1704.

6. Wills ⟸354—Law requiring court to make certificate of facts found and attach to will apply only where there is contest of will.

Code of Civ. Proc. § 1317, requiring court to make certificate of facts found and cause them to be attached to will, does not apply in proceeding for probate of will, but only where there is a contest of its probate.

7. Executors and administrators ⟸14—Executor held properly appointed pursuant to desire expressed in holographic will.

Where holographic will provided for bequest of property to each of testatrix's children, and also to one F. C., husband of daughter, and contained clause, "and request that F. C. have charge of my affairs," *held* latter legatee was not, in view of Code Civ. Proc. §§ 1350a and 1365, improperly appointed executor.

In Bank.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Proceedings by Francis Cutting for the probate of the will of Hannah L. Henderson, deceased, contested by Orrin S. Henderson. From an order of the superior court admitting the document to probate, contestant appeals. Affirmed.

Perky & Scott and W. S. Scott, all of San Francisco, and A. H. Carpenter, of Stockton, for appellant.

Nutter, Hancock & Rutherford, and A. P. Hayne, all of Stockton, for respondent.

HART, Justice pro tem. The deceased, Hannah L. Henderson, died in the county of San Joaquin, her place of residence, on the 22d day of October, 1922, of the age of about 84 years, leaving surviving her a son and a daughter, to wit: The appellant herein, Orrin S. Henderson, and a daughter, Helena (also called Lena) Cutting, wife of the respondent herein, and also leaving an estate, situated in said county, consisting wholly of personal property, principally in the form of choses in action, of the value of $2,500. Also surviving the deceased were grandchildren (the number not made to appear in the record), issue of the marriage between the respondent herein and Lena Cutting, as stated, daughter of the deceased.

In the latter part of the month of November, 1922, about 5 or 6 weeks after the date of the death of the deceased, Mrs. Cutting, wife of the respondent, found, in a small tin box in the house of the Cuttings, the following instrument in writing:

"August 9 1922 Stockton, Calif

"My Dear Children.

"Frank and Lena.

"So the year's pass, I am reminded Day by Day, that I may soon hear the welcome summon, 'Child come Home.' I do not want to leave work undone. I want to make a request regarding what money's will be left, after I am gone and all expences paid.

"And request that Frank Cutting have charge of my affairs.

"I give to Frank Cutting $500 (five hundred)
to Lena Cutting $500 (five hundred)

"What moneys shall be left together with interest, shall be given to my Dear Grand Daughter Lorraine Cutting.

"Good and Faithful.

"God Bless her. Lovingly,
"Hannah L. Henderson."

"Dear Lena,

"Do not think it strange that I have changed my mind concerning my grand children They are doing well for themselves Today I am thinking of my Dear Son Orrin, so I ask you

as a mother, to think of me as his mother, if you can, to send him a little gift from me say $50, or a $100 as you can He may need it, His years are passing.

"God Bless and keep you both
"From A Loving Mother."

The above document was written on a single piece of paper, although physically divided into two parts. (The two parts, for convenience, will hereinafter be designated as the first and the second "paragraphs" or "writings.") The first, which is dated and signed by the testatrix, but which makes no mention of her son, Orrin S. Henderson, the appellent herein, was written on the first page; the paper upon which it was written being folded so as to make it consist of four pages. The second paragraph or writing, which bears no date and which is signed, "From a Loving Mother," was written on the fourth or last page of the paper.

On the 10th day of November, 1923, approximately a year from the time when found, said document was filed and presented by the respondent to the superior court in and for the county of San Joaquin upon a petition for the probate thereof as the olographic will and testament of the deceased. On December 3, 1923, the appellant filed and inaugurated a contest of the probate of said instrument upon the grounds: (1) That if, in fact, the deceased executed said instrument, she was, at the time of executing the same, "not of sound mind"; (2) that the execution of said instrument, "if the same was executed" by said Hannah L. Henderson at all, was executed through the undue influence of her daughter, said Helena Cutting, as follows: That the deceased had for a long period of time prior to the time of her death resided with her said daughter; that during all said time the deceased was both physically and mentally diseased, and by reason thereof required constant care and attention to the end that her wants should be administered properly or in a manner suitable to her weakened physical and mental condition; that she was during all said time so taken care of by said Helena Cutting, and entirely dependent upon the last named for the care and attention required by reason of her weakened condition of body and mind; that, due to the care and attention thus given deceased by said Helena Cutting, the latter acquired and maintained, and at the time of the execution of the said purported will, was able to and did exercise, an overruling influence over the mind and will of said deceased, and so "procured the said Hannah L. Henderson to execute said purported will."

The proponent answered the appellant's grounds of opposition to the probate of said document as the will of the deceased, denying specifically all the averments of the petition, and alleging affirmatively that, at the time she executed the purported will, the deceased was mentally sound and possessed of testamentary capacity.

A jury was called and impaneled to try the contest, but, by order of the court, the preceeding involving the preliminary proof of the purported will was, over objection by the contestant, conducted in the absence of the jury; the court stating that it would hear such proof and withhold making any order thereon, either admitting or refusing to admit the will to probate, until after the trial of the contest was had and determined by the jury. Thereupon the jury were excused pending the taking of testimony for the purpose just stated, and the respondent, Cutting, was called to the witness stand, and testified that, as stated above, his wife, Helena Cutting, in the latter part of November, 1922, found the instrument offered for probate as the will of deceased in a small tin box belonging to the deceased, and kept by her at the home of the witness while the former resided there, and in which she preserved other private papers, including promissory notes held by her against other parties; that Mrs. Cutting maintained possession of the instrument until it was filed for probate on November 10, 1923; that witness was familiar with and knew the handwriting of the deceased; and that the instrument proposed for probate as her will was, including the date and signature, entirely in the handwriting of the deceased. Cutting further testified that deceased was of the age of about 84 years, and that her only heirs at law were his wife, Helena Cutting, and the appellant herein. The direct examination of Cutting was, by leave of the court, conducted by the attorneys for the proponent of the will, and a cross-examination of said witness, also by leave of the court, was prosecuted by the attorneys for the contestant. The inquiry as so conducted was, of course, limited to the precise matter then before the court, to wit, whether the instrument in question was or was not, in law and in fact, the last will and testament of the deceased, and was duly executed, and was therefore entitled to be admitted to probate. Upon the conclusion of the taking of Cutting's testimony, counsel for proponent offered in evidence, as the last will and testament of deceased, the document filed and presented as such. To the offer and the reception of this evidence, counsel for contestant objected upon substantially the same grounds as those upon which they object to the order or decree admitting the will to probate, and hereinafter to be considered, but the court overruled the objection on all the grounds upon which it was founded, expressly refusing, however, to make an order in the premises until after the issues involved in the contest had been tried and disposed of. This preliminary proceeding having thus been concluded, the court thereupon ordered the jury to be returned into court and directed the

counsel for the contestant to proceed with the trial of the contest upon the issues as framed and tendered; whereupon said counsel declared that they did not desire or intend to proceed further, and the matter was thereupon submitted to the court upon the preliminary proceedings and the proof therein taken upon the petition to admit the document to probate as the last will and testament of the deceased. The court then rendered and entered its order or decree, finding and adjudging that "said document is the last will and testament of Hannah L. Henderson, deceased, and that the same was and is a holographic will, and that the same was entirely written, dated and signed by the hand of the said testatrix herself, on the 9th day of August, 1922, and that said document is a single continuous instrument, written on a single piece of paper, and is a harmonious, homogeneous, holographic will, and constituted and constitutes one instrument." The age, the place of residence, the value of the estate, the place of death, and "the sole and only heirs" of the deceased are likewise found, and upon all the findings the document in question was by the court ordered admitted to probate as the last will and testament of said Hannah L. Henderson, deceased. It was further ordered that "said Francis Cutting be and he is hereby appointed executor thereof, and that letters testamentary thereon issue to him as such executor upon his filing a bond" in a specified amount.

The contestant, Orrin S. Henderson, appeals from said order or judgment.

[1] That the document in question was written, dated, and signed by the deceased herself and is entirely in her own handwriting, is not questioned here. It is objected, however, that that portion of the decree finding and adjudging that "said document is a harmonious, homogeneous, holographic will, and constituted and constitutes one instrument," involves a construction of the instrument wholly without warrant either from the language of the second paragraph thereof, standing alone, or from said language viewed in connection or together with that of the first paragraph of the instrument; that the two paragraphs, upon their face, disclose no necessary relation to each other, nor, howsoever viewed, are reasonably susceptible of such a construction. We agree with the trial court's construction of the document as a whole as indicated by its findings and judgment.

But for the fact that dehors the document itself it was made to appear that one of the lawful heirs of the deceased was thereby pretermitted or not named therein, the first paragraph of the document, having been shown to have been written, dated and signed by the deceased herself, constituted in all respects a perfectly valid olographic testamentary disposal of her estate. And it will, of course, be conceded that, even though the first paragraph or writing be, pro tanto, invalid, because of the pretermission therefrom of a lawful heir of the deceased (Code Civ. Proc. § 1307), or even though wholly invalid, it is nevertheless perfectly clear therefrom that by said paragraph the deceased intended to make testamentary disposal of her estate. What, then, could the deceased have intended to accomplish by writing the second paragraph on the sheet of paper on which she had olographed her will, if, as appellant contends is true, she did not have in mind her will as so written and intend that the second writing should have relation to and probably have some important effect upon the will as she had written it in the first instance? That the second writing is in the form of a letter addressed to her daughter does not militate against the conclusion that the circumstance that the two writings were written on the same sheet of paper is indicative of an intention in the deceased that they together should constitute her will. Under the circumstances, nothing could be more natural than that a mother should have written the paragraph in the form of a letter and addressed the same to her daughter upon a subject which is always of vital concern to those who, having already spent the allotted time of mortal life, are engaged in preparations looking to the posthumous transmission of their earthly belongings to those whom they desire shall have, own, and enjoy the same. The daughter was a legatee under her will, and, having omitted to provide in her will for her only son, and, as we may well assume, urged by the maternal love and affection which in such ardent terms she expressed for him in the second writing, she thus appealed to her daughter as the one who would, in her opinion, the more likely comply with such a request, to present to that son—the only brother of that daughter—out of her (the daughter's) legacy a small sum of money as a gift from the deceased, indeed, as a memorial of the motherly love she then, and, as may well be inferred from the terms of maternal affection in which she referred to him, always had cherished for him. However, as before stated, it is reasonably clear that, had the deceased not intended the second writing to be in some way supplementary to her will, she would not have written it upon the sheet of paper upon which previously, as may be assumed, she had written her will. This conclusion is reinforced by the consideration that the language of the second writing is of a testamentary character—that is to say, it clearly appears to be so when viewed by the light of the tenor of the first writing, as thus it should be considered. Indeed, as so considered, it would be doing violence to plain language to hold to the contrary. The

very fact that deceased in said writing requested her daughter to "send him (her son) a little gift from me, say $50.00 or $100.00," cannot reasonably be construed otherwise than that deceased, when penning those words, had in mind the first writing and the fact that therein she failed to name or mention him. In other words, that language is clearly indicative of the fact that the deceased, after writing the first, came to realize that she had failed (doubtless deprecatingly) to express for him a mother's devotion in a document of peculiar sacredness—sacred because it was to contain the expression of the last thoughts of one for those nearest and dearest to her in life which would be the first to receive attention and the last to be forgotten after her voice had forever been silenced. Again, as in testimony of the testamentary character of the second writing, and that it was written in contemplation of the will she had previously executed, there is her reference to her grandchildren. She stated, in effect, that she had undergone a change of mind regarding her grandchildren. Immediately following this declaration are the words (singularly significant in connection with the present consideration): "They (referring to her granchildren) are doing well for themselves." When considered by the light of the fact that the second writing was executed on the sheet of paper on which she had written her will, and also in view of the fact that her venerable years, at the time both writings were executed, confronted her with the warning or admonition that her span of life, according to natural order, was near its termination, what other signification could reasonably be attached to that language or those words than that she then had in mind the posthumous disposition or settlement of her earthly affairs, and that what she wrote in said paragraph was by her intended to be testamentary, and, indeed, to form a part of the instrument previously executed on the same sheet of paper?

The opinion in the very recent case of Estate of Spitzer (Cal. Sup.) 237 P. 739, considered a situation which, in the general aspect thereof, is much like that presented here. Therein the court, speaking through Mr. Justice Seawell, held that the several writings offered for probate as the will of the deceased were of a testamentary character. Much of what is said by Justice Seawell in that case is pertinent to the circumstances of this case. It is sufficient, however, to quote therefrom the following excerpt adopted into the opinion in that case from Estate of Beffa, 54 Cal. App. 186, 201 P. 616:

"'It is well settled in this country and in England, first, that in determining whether the instrument propounded was intended to be testamentary, reference will be had to the surrounding circumstances, and the language will be construed in the light of these circumstances. Second, that if it shall appear under all the circumstances that the instrument was intended to be testamentary, the court will give effect to the intention, if it can be done consistently with the language of the instrument; and in such cases the particular form of the instrument is immaterial.' Clarke v. Ransom, 50 Cal. 600. 'A will may be informally drawn, and may consist of one or more papers. No particular words are necessary to show a testamentary intent. It must appear only that the maker intended by it to dispose of property after his death, and parol evidence as to the attending circumstances is admissible.' Mitchell v. Donohue, 100 Cal. 207, 34 P. 615, 38 Am. St. Rep. 279. 'It is undoubtedly the general rule enunciated by the leading case of Habergham v. Vincent, 2 Ves. Jr. 231, and oft repeated, that the true test of the character of an instrument is not the testator's realization that it is a will, but his intention to create a revocable disposition of his property to accrue and take effect only upon his death and passing no present interest.' Nichols v. Emery, 109 Cal. 329, 41 P. 1091, 50 Am. St. Rep. 43."

So far as the present consideration is concerned, it is not important to inquire what particular thought or purpose was in her mind when she wrote the statement in the second writing to the effect that she had changed her mind as to her testamentary plans regarding her grandchildren, or in what particular or particulars she had changed her mind; nor is it of consequence, in the determination of the present question, that the words with which the deceased expressed in the second writing her desire that her son should be given or receive something from her estate are of a precatory nature. It is sufficient to know that the deceased intended that both paragraphs were to be taken together as constituting her last will and testament.

The construction to which thus the document before us has been subjected rests upon reasons no less cogent or persuasive than those upon which this court, in cases hitherto decided, has sustained several separate documents as constituting together single olographic wills. Estate of Skerrett, 67 Cal. 585, 8 P. 181; Estate of Merryfield, 167 Cal. 729, 141 P. 259. Indeed, the case here, as to the facts from which the intention of the deceased is to be deduced, stands upon a footing somewhat stronger than that buttressing the cases just named, in that in the instant case the two writings are upon the same sheet of paper, while in the other cases the writings were on separate sheets.

In the Skerrett Case there were two separate writings, one of which was a copy of a deed of gift to the grantee therein named of certain real property, and written, dated, and signed entirely in the handwriting of the deceased, and the other a letter addressed to said grantee, and entirely in the handwriting of the deceased. The original deed was executed and acknowledged in the presence of witnesses, but was never delivered, and was therefore ineffective as a grant of

real property. The letter was not dated. A copy of the deed and the letter were found after the death of the deceased in an envelope in a tin box belonging to him. The court held that, while neither document, taken alone, would constitute an olographic will—the copy of the deed because not containing testamentary words, and the letter because, although containing testamentary words and stating that deceased intended that the grantee named in the deed should receive as a devise the real property therein described, it was undated—the two, taken together, as the deceased undoubtedly intended they should be considered, formed a complete olographic will.

In the Merryfield Case there were three separate writings on as many different sheets of paper. These sheets were found folded together in a locked drawer, and each entirely in the handwriting of the deceased. The language of each was testamentary in character, and all related to the same general subject-matter and the same parties whom deceased clearly intended to make the beneficiaries of her estate. The first writing was neither dated nor signed; the second was signed by the deceased, but imperfectly dated; the third was dated and signed by the deceased. The one mentioned certain heirs to whom the deceased expressed the intention of giving nothing. The third sheet, in the order in which they were folded together, and as above given, omitted to mention said heirs, but was itself otherwise complete as an olographic will. All three papers were presented together for probate as constituting the will of deceased. The claim was urged, in a contest to the admission of the will to probate, that the writing upon the third sheet alone constituted the will of the deceased. The trial court decided that the contents of the three sheets, taken together, constituted a single instrument, and that such instrument constituted the last will and testament of the deceased. On appeal this court sustained the decision of the trial court.

[2] The subscription to the second paragraph, "Your loving mother," if a material consideration here, is a sufficient signature. Ex parte Walker, 15 Quebec Probate Reports, also entitled "Rapport's de Practique de Quebec," 15; Estate of Kimmel, 278 Pa. 435, 123 A. 405, 31 A. L. R. 678; Wells v. Lewis, 190 Ky. 626, 228 S. W. 3; Page on Wills, § 170. But, in view of the conclusion that the two writings together constitute an olographic will, the contention that the subscription to said writing, "From your loving Mother," is not such a signature as the law requires shall be subscribed to a will is of no material importance, since the signature of the testatrix at the end of the first paragraph sufficiently measures up to the requirement as to the signatures to wills. Where a will has been signed by the testator, it is sufficient even though the signature is not in the place on the instrument where usually such a writing is signed, viz., at the end of the document. Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778. Of course, this statement is subject to the qualification that the signature of the testator, if not subscribed to the will—that is, if it is not at the end of the instrument, the usual place for the signature in such cases—then it must so appear from the document itself that the signature was thus placed "with the intent that it should there serve as a token of execution" as to afford "a positive and satisfactory inference" to that effect. Estate of Manchester, 174 Cal. 417, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227; Estate of Streeton, 183 Cal. 284, 191 P. 16. That the instant case fully exemplifies the test thus stated is a proposition too obvious to require further consideration.

[3] The contention that the action of the court in conducting the proceeding involving the matter of the admission of the will to probate in the absence of the jury was improper is opposed to the rule in that particular declared by our decisions. This court has a number of times held that the procedure followed in this case by the court below involves the only course to be pursued where the probate of a will is contested. See Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441; Estate of McDermott, 148 Cal. 43, 49, 82 P. 842; Estate of Cullberg, 169 Cal. 365, 146 P. 888; Estate of Relph, 192 Cal. 451, 458, 459, 221 P. 361. The last-named case contains the latest expression of this court upon the subject, and, though, as seen, the procedure in this class of cases is definitely settled in this state, it is conceived not to be supererogatory to give the importance of keeping the rule in mind in instances such as we have here further emphasis by quoting the following clear exposition of the rule in the Relph Case:

"When a will is contested before probate there are two separate and distinct proceedings pending before the court. One is the petition for the probate of the will; the other is the contest of the probate of the will. [Citing cases.] The petition for the probate of a will is distinctly a proceeding in rem. Estate of Baker, 170 Cal. 578, 585, 150 P. 989; Estate of Allen, 176 Cal. 632, 169 P. 364. * * * In the proceeding for the probate of the will, as distinguished from the proceedings upon the contest, the evidence and the issues of fact are solely for the consideration and determination of the court, even though a jury may have been demanded and impaneled for the trial of the issues upon the contest. * * * The contestants are not parties to this proceeding and have no right to appear therein, * * * but the trial court, having itself the right to cross-examine the witnesses produced therein, may, in the exercise of its discretion, permit counsel for contestants so to do. * * * But when such permission is granted it is as a matter of

grace and not in recognition of a right possessed by contestants."

[4, 5] There is no merit to the contention that the decree appealed from is unsupported because there was a failure to prove that the deceased, at the time she executed the testament, was mentally sound or possessed of testamentary capacity; nor is there any force in the further contention that the decree cannot stand because the court failed to find certain jurisdictional facts. To the proposition first stated, a ready answer is found in the rule, elementary in our system of jurisprudence, that a testator is to be presumed to have been sane when making his will, and that, in the case of a contest of the probate of a will, the proponent, when he opens the proceeding by preliminary proof of the due execution of the instrument, may rely on said presumption as constituting sufficient evidence of the testamentary competency of the testator until the same shall have been overthrown by countervailing proof. Estate of Johnson, 152 Cal. 778, 783, 784, 93 P. 1015; Estate of Cullberg, 169 Cal. 365, 146 P. 888. The contestant here having abandoned his contest and therefore offered no evidence to support any of the grounds thereof, the presumption referred to stands as the only evidence in the case as to the testamentary capacity of the deceased at the time she executed the will, and thus there is ample support to the decree or judgment in that particular. The proposition secondly stated involves a challenge of the legal integrity of the decree or judgment or order on the ground that there was a failure to make express findings that, at the time deceased executed the will, she was over the age of 18 years (Civ. Code, § 1270), and also that, as the petition for the probate of the will alleges, she was of sound and disposing mind and memory, "and not acting under duress, fraud, or undue influence of any person," etc. The validity of a judgment or an order admitting a will to probate is not dependent upon the recital therein of the existence of facts, or the performance of acts, upon which the jurisdiction of the court must rest. It is only necessary that the judgment or order shall contain, as does the decree in this case, the matters ordered or adjudged. Code Civ. Proc. § 1704. Of course, the jurisdictional facts must exist, but their existence and the finding thereof are to be implied from those matters which, under the law, must be by the judgment shown to be ordered and adjudged. Furthermore, there was no testimony disputing that of the witness Cutting that the deceased, on the 9th day of August, 1922, the date of her will, was of the age, approximately, of 84 years; nor, as seen, was the presumption of the mental soundness or testamentary competency of the deceased, or that she was not unduly influenced or otherwise wrongfully procured to make the will, contradicted or impeached, evidentially. A judgment, being in all other respects sufficiently supported, will stand immune from successful attack, notwithstanding that there has been a failure to find on an admitted or an uncontroverted vital fact or issue. In other words, if, as would be true here, the findings upon issues upon which findings have been pretermitted would necessarily have to be adverse to the appellant, the failure to find thereon would be without prejudice. See 2 Cal. Juris, § 614, p. 1032 et seq.

[6] It is further contended that the judgment or order is wanting in essential support because of the failure of the court to make a certificate of the facts found and cause the same to be attached to the will, as provided in section 1317 of the Code of Civil Procedure. That section, it is clear, not only from its language but from its position in the Code, was intended to and does apply exclusively to cases where there is a contest of the probate of the will. The section, which is under article 2 of chapter 2, and under the subhead "Contesting Probate of Wills," reads:

"If the court is satisfied, upon the proof taken, or from the facts found by the jury, that the will was duly executed, and that the testator at the time of its execution was of sound and disposing mind, and not acting under duress, menace, fraud, or undue influence, a certificate of the proof and the facts found, signed by the judge and attested by the seal of the court, must be attached to the will."

Here, as seen, there was no contest, and the judgment contains all the facts which are required to be set out therein where there is no contest. In such case, the Legislature, it seems, regarded the findings, together with the presumptions favorable to the order or judgment which the law wisely indulges, as being sufficient.

[7] Lastly, it is contended that the court transcended its authority or jurisdiction by appointing the legatee, Francis Cutting, as executor of the will. This contention is grounded upon the asserted fact that the will does not, eo nomine, nominate an executor; it being hence argued that it was the duty of the court to issue either to Orrin S. Henderson or to Mrs. Cutting, son and daughter of deceased and her only surviving heirs, letters of administration, with will annexed. Sections 1350a and 1365, Code Civ. Proc.; Estate of Crites, 155 Cal. 392, 101 P. 316, and cases therein named. As will be observed, the first of the two writings constituting the will of the deceased, contains the following words: "And request that Frank Cutting have charge of my affairs." This language means, as is naturally to be inferred from the connection in which it is used, that the deceased desired and intended that said Cutting, her son-in-law and a

legatee by the terms of her testament, should be appointed as the executor thereof. Indeed, it would be difficult reasonably to give that language any other interpretation. Where the intention of a testator that a certain person shall be named as executor to carry out the terms of his will is not expressed therein with directness, but is reasonably deducible from the language thereof, it is the duty of the court sitting in probate to respect that intention and so appoint such person as such executor. Civ. Code, § 1371; Morffew v. S. F. & S. R. R. R. Co., 107 Cal. 587, 40 P. 810; Estate of Ringot, 124 Cal. 45, 56 P. 781.

There are no other points requiring notice herein.

The order or judgment appealed from is affirmed.

We concur: HOUSER, Justice pro tem.; LAWLOR, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.

196 Cal. 639

In re PRESHO'S ESTATE.

PRESHO v. PRESHO et al.

(S. F. 11262.)

(Supreme Court of California. Aug. 13, 1925.)

1. Wills ⟹326—If evidence presented by contestant, viewed in its most favorable light upon motion for nonsuit, would not support verdict in her favor, refusal to grant motion is error.

If evidence presented by contestant, viewed in most favorable light upon motion for nonsuit, would not support verdict in her favor, refusal to grant motion is error.

2. Evidence ⟹597—When verdict deemed supported stated.

Verdict will be deemed supported if from all the evidence the verdict is based on material facts legally proved or on inferences which may be reasonably drawn from those facts, notwithstanding difference of opinion as to effect of the evidence.

3. Wills ⟹55(1)—Evidence held insufficient to show general testamentary incapacity when will was executed.

Evidence *held* insufficient to show general testamentary incapacity of deceased when he executed his will.

4. Wills ⟹31—Irritability and bad temper are not inconsistent with testamentary capacity.

Irritability and bad temper are not inconsistent with testamentary capacity.

5. Wills ⟹166(2)—Proof of confidential relationship between deceased and his brother is not in itself sufficient to establish undue influence.

Proof of confidential relationship between deceased and his brother is not in itself sufficient to establish undue influence.

6. Wills ⟹166(4)—That one occupying confidential relationship displayed activity in preparation of will to his undue profit must be shown, in addition to proof of relationship.

That one occupying confidential relationship displayed activity in preparation of will to his undue profit must be shown, in addition to proof of relationship.

7. Wills ⟹166(2)—Evidence held insufficient to show exercise of destructive undue influence by brother over deceased when will was executed.

Evidence *held* insufficient to show exercise of undue influence by brother over deceased when will was executed, so as to destroy the free agency of deceased and overcome his volition at that time.

8. Wills ⟹166(2)—Evidence held insufficient to show will was procured as result of fraud practiced on deceased by his brother.

Evidence *held* insufficient to show will was procured as result of fraud practiced on deceased by his brother.

9. Wills ⟹52(1)—Evidence establishing sufferance by deceased of momentary confusion held insufficient to overthrow presumption of sanity of testator during execution of codicil.

Evidence establishing sufferance by deceased of momentary confusion *held* insufficient to overthrow presumption of sanity of testator during execution of codicil.

10. Wills ⟹47—Infirmities of age and lapse of memory are not sufficient in themselves to establish lack of testamentary capacity.

Infirmities of age and lapse of memory are not sufficient in themselves to establish lack of testamentary capacity.

11. Wills ⟹166(2)—Evidence held insufficient to justify special finding codicil was product of fraud practiced upon deceased by his brother.

Evidence *held* insufficient to justify special finding codicil was product of fraud practiced upon deceased by his brother.

12. Wills ⟹166(2)—Evidence held to show that codicil was result of undue influence practiced upon deceased by his brother.

Evidence *held* to show that codicil was result of undue influence practiced uopn deceased by his brother.

13. Wills ⟹166(12)—Circumstantial evidence held sufficient to show practice of undue influence upon deceased in procurement of codicil.

Circumstantial evidence *held* sufficient to show practice of undue influence upon deceased in procurement of codicil.

In Bank.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Proceedings by Thomas H. Presho and another, to have admitted to probate a document purporting to be the last will, and the codicil thereto, of Matthew Presho, deceased,

contested by Laura C. Presho. From a judgment refusing to admit either instrument, proponents appeal. Judgment refusing to admit proposed will reversed, and judgment refusing to admit proposed codicil affirmed.

C. L. Witten, H. W. McComas, Ward Sullivan, and W. A. Beasly, all of San Jose, for appellants.

Owen D. Richardson, of San Jose, for respondent.

SHENK, J. This is an appeal from a judgment refusing to admit to probate a document purporting to be the will of Matthew Presho, deceased, and a codicil thereto. The judgment was entered pursuant to a verdict finding on six special issues in favor of the contestant, Laura C. Presho. Matthew Presho died in the county of Santa Clara on April 20, 1923, being about 73 years of age, and leaving an estate of approximately $40,000. The proposed will was signed on May 5, 1921, and the codicil on March 31, 1922. Surviving him are his widow, the contestant and respondent herein, and certain brothers and sisters. Thomas H. Presho, a brother, is the proponent and one of the appellants. The other appellant is Nellie Elizabeth Presho, an only daughter of Thomas, and one of the beneficiaries under the will. Matthew left no children. The provisions of the will devised and bequeathed to the contestant the home place consisting of a 50-vara lot at the corner of San Carlos and Third streets in the city of San Jose, together with the household goods. On the lot is a house in which Matthew and his wife made their home and a 13-room house which they rented. This property is variously appraised, but its fair valuation is about $21,500. A house and lot, also in San Jose, valued at approximately $7,000 was devised to the appellant niece. Thomas was left the residue, and was appointed executor without bonds. The proponent contends, and it is not denied, that the larger part of the estate was the separate property of the deceased, and that the contestant would receive under the terms of the original will fully one-half of the estate. The codicil reduced the contestant's share to a life estate in the 50-vara lot.

The grounds of opposition to the proposed will and to the codicil, separately stated as to each document, are (1) want of testamentary capacity, (2) undue influence on the part of Thomas Presho, and (3) fraud. The jury rendered its verdict in favor of the contestant as to both the will and codicil on each ground of contest. At the close of contestant's case a motion for a nonsuit was interposed as to the three issues affecting the proposed will, and was denied. Said motion was not directed to the three issues affecting the proposed codicil. After the entry of judgment, a motion for a new trial was made and denied.

[1, 2] The appellants contend that the motion for a nonsuit should have prevailed, that the evidence was insufficient to justify the verdict, and that the court committed certain prejudicial errors during the course of the trial. As to the motion for a nonsuit, if the evidence presented by the contestant, viewed in its most favorable light, would not support the verdict in her favor, the court should have granted the motion. See Estate of Chevallier, 159 Cal. 161, 113 P. 130. As to the sufficiency of the evidence, if from all the evidence the verdict is based on material facts legally proved, or on inferences which may be reasonably drawn from those facts, even though there be an honest difference of opinion as to the effect of the evidence, the verdict will be deemed supported. Field v. Shorb, 99 Cal. 661, 666, 34 P. 504; Ryder v. Bamberger, 172 Cal. 791, 158 P. 753; Hind, Rolph Co. v. Oriental Products Co. (Cal. Sup.) 235 P. 438; 2 Cal. Jur. 879, and cases cited.

Matthew and Laura C. Presho were married in October, 1905. Prior to that time Matthew had been in business in San Jose about 21 years, most of that time in partnership with his brother, Thomas, in the wood and coal business. The partnership continued until June 1, 1918, when it was dissolved. Matthew and his wife lived alone in their home on the property at the corner of San Carlos and Third streets until 1919. Thomas then went to live with them and remained with them until the death of Matthew. During the time the couple lived alone, their relations were amicable; the deceased attending to his business with regularity, and the wife attending to her household duties. In 1916 the deceased contracted a disease of the stomach which grew worse in later years and ultimately caused his death. From the time Thomas came into the household in 1919 there was dissension between him and the contestant. The trouble became aggravated as time went on; Thomas charging the contestant with improper and inefficient care of her husband, and the contestant contending that Thomas was usurping her place in the home and attempting to cause an estrangement between herself and her husband.

On the issue of want of testamentary capacity, the respondent relied on certain testimony, which will be noted, as sufficient to support the verdict. In response to a question as to whether she noticed any irrational conduct on the part of her husband from the time Thomas came to live with them until the date of the will and thereafter until the date of the codicil the contestant testified:

"A. The first thing of all he [the deceased] was of a very positive nature. He could not be ruled or controlled by anybody. He would have bad nights, couldn't sleep, and he would say, 'You poisoned me, you doped me; I can't stay in this house because, Laura, you are dop-

ing me'; and I would say, 'Why, Matthew dear, I wouldn't hurt a hair of your head'; and then he would say, 'I know you wouldn't'; and then he would kiss me and tell me how much he loved me, and then he would say, 'I wouldn't take anything from you, Laura, if I thought that'; and then that would come all over again every day, every morning. * * *

"Q. Can you state any other irrational acts that your husband did during the time and in the presence of Thomas Presho, during the time that Thomas Presho was at your house? A. He would say, 'Laura, you are no relation to me; you are a stranger; you go home to your mother and stay, or else I will pay your board at the Vendome'; and then in a few minutes after that he would be loving and kissing me, and telling me how much he loved me. And another time, I had some cushions—he had some cushions on the chair—and I am very short, and it made me up too high in the chair so I took the cushions out gently, and he was very easily angered, and without any provocation he began beating me over the head. He was so weak and feeble that I was surprised, and I got out of the chair, and I put my arms around him and said, 'God forgive you, Matthew, you know not what you do'; and I went upstairs and cried and cried. This was just before we went to the Home of Rest, and that was about January 1, 1922. * * * That codicil was drawn about 11 days after he came home from the Home of Rest. We came home March 20, 1922, and then another thing—I was getting my dinner one day, and he had been just as sweet and nice as possible, and all of a sudden he jumped up and said, 'You! You! You are trying to dope me; you are trying to poison me'; and he came toward me, looking as wild and angry as he could be. 'You are trying to dope me, Laura'; and he went like this (indicating by placing hands around her neck) trying to choke me. I don't remember when this was exactly; I think it was after he came home from the Home of Rest, a couple of days after. * * * But I said, 'Matthew, don't you know that if a person would do that, that is criminal; I would be taken to the penitentiary if I were to do anything like that. * * *

"Q. Do you think of any other irrational acts that your husband did? A. Well, he was very quick and irritable, without any cause, without any provocation. He was not able to eat during the last months of his illness; he practically starved to death—not that he didn't have enough to eat, but that it did not assimilate. * * * He did not eat any solid food at all during the last six months. In my opinion my husband was not of sound mind in the year 1921, and the year 1922.

"Q. Give us some of your reasons for saying he was not of sound mind? A. I have given you so many reasons. He was so easily influenced, and Tom Presho kept him in an antagonistic mental attitude against me, and kept him angry with me all the time, and when he was angry he lost his head completely, and I don't think he would have done the things he did if he was himself. Tom Presho kept him in an angry state against me. He hammered at him from morning until night against me, and I heard him. And I can give you another reason for thinking he was not of sound mind—just before Tom Presho took my husband away to the sanitarium, he got him out of bed in the Morris chair, and I went in there suddenly, and Tom Presho had written out a check, and he had his hand over my husband's hand, and was guiding him with the name, and I came in, and he jumped up and stepped aside, and Matthew did finish it out alone. At times my husband appreciated me highly, and again he did not seem to realize I was his wife, because he would tell me I was a perfect stranger to him, and he would say, 'You don't belong here, Laura; you are no relation to me.' He said that many times before and after the dates of the will and the codicil, May 5, 1921, and March 31, 1922. * * *

"Q. Did you know that Mr. Presho talked with different people who came in there, on the topics of the day, intelligently? A. When he was kept in a passive mood, or when Tom Presho was not there, he was all right; but, when Tom Presho kept him in an angry way, he completely lost his head. I never discussed his business affairs with him. I do not know whether or not he knew and understood and appreciated the nature and extent of his property. I can't tell you whether he knew and understood his bank account when he took off Tom's name and put my name on there.

"Q. Now, prior to the 5th day of May, 1921, will you state and describe all irrational acts or statements that you ever heard your husband make? A. Well, when he was at the woodyard he came home one day with a wire around his body, and I said, 'What is that for?" and he said, 'I am going to get well by having that on.' That struck me as very erratic. This was one strand of copper wire, and he wore it next to the flesh. He had it on his body when he came home. He must have put it on at the woodyard. No one was present when he exhibited it to me. When he came home that night the wire was on his body, and he wore it for quite a while. I don't recall whether he told me that any one had advised him to wear that to treat himself for sickness.

"Q. Now, give another irrational act or irrational statement prior to May 5, 1921? A. Well, he was very, very, very quick tempered, but he was over it in a flash, and then he was very penitent and very loving.

"Q. And you would call that one of the reasons, you say, for thinking he was of unsound mind? A. I didn't say that.

"Q. I am asking you now; I am trying to make it clear to you that I want you to detail any act, that in your opinion was irrational on the part of your husband, or to detail any statement made by him prior to May 5, 1921? A. Well, sometimes he was so poor, I thought that we wouldn't have enough to eat; then another time he would say he was worth from $80,000 to $100,000. To my mind that is not like a sound man, because sometimes it was pitiful, he was so poor. I think that was during war time. Matthew would say to me, 'Laura, we are making so much money, it is just like pouring down a chute, it makes me dizzy'; and I said, 'Let us have a player piano'; and then he was so poor, he didn't have 5 cents to his name. As a matter of fact business was very good during the war; he said it was coming in like a chute, it made him dizzy. I guess the fact is he didn't want to buy a player piano.

"Q. That is one of the things that your hus-

band did that leads you to conclude that he was of unsound mind? A. I think so, yes.

"Q. Now, give me another act or statement, prior to May 5, 1921, that to your mind was irrational? A. Without any cause whatever he would take dislikes to people. Sometimes he would be so friendly with them, and then again he would be positively rude to them, the same people. I think it was during his sickness, the beginning of his sickness. * * *

"Q. Can you recall now any other act, or any other statement made by your husband prior to the 5th day of May, 1921, that indicated he was irrational? A. Yes; I was always allowed to go in the automobile, and understood it belonged to him, belonged to the two of them; and then it got so I was not allowed to go in the automobile, and Matthew said one day, 'I want you to go in the automobile this morning'; and I said, 'What am I to understand, you have been riding around without me all the time, and you didn't miss me, and I guess I won't go to-day; you tell me one day it belongs to you, and the next day you say it is all Tom's.' At one time he would tell me the automobile belonged to him, and the next time he would tell me it was all Tom Presho's. This is one of the reasons I have for thinking my husband was of unsound mind. It was a partnership automobile, and I knew it was. He told me it belonged to him, and he told me it belonged to both of them. And another thing, he would tell me a thing one time, and then he would contradict what he said completely. I think it was this way—the reason I think he was of unsound mind is this way: One time Tom Presho was standing in front of the sink, and I came up and put my fingers, just touched him with my hand because he was in the way, and Tom abused me; called me [vile names]; and Matthew, that was one of the times he had a normal period and was himself, and saw the injustice of Tom's brutality, and Matthew said, 'Tom, you leave this house; I don't want you to stay here; don't you take another meal here'; and Tom didn't take any more meals there. And then again my husband would let Tom abuse me; so you see he was not rational, because one time he would let him abuse me, and another time he would stand up for me.

"Q. Was that one of the things that made you think he was irrational? A. No; that was one of his rare moments, when he was competent.

"Q. Give us * * * the most irrational statement that your husband ever made, or describe the most irrational act, to your mind, showing that he was of unsound mind prior to May 5, 1921? A. I can recall it very plainly. He was shaving up in the bedroom, about 1920, and without any cause, he used to get mad without a cause, because he was sick and irritable, and he said, 'I will take this razor, and I will put it across your neck'; and I said, 'Matthew, you wouldn't do that'; and in a few minutes after that he said, 'Laura, you would trust me, wouldn't you; you know that I wouldn't hurt you,' or something like that; but at the time I almost thought he would. No one was present but by husband and myself. * * * Another peculiar thing he did, when we slept together [prior to 1919] we had a great big bay window that we kept open, and we would leave that open, but we would always shut the door, and he would make me leave a marble block in the door to keep it open. * * * I don't know what for, for we had always kept it closed, but he wanted it open."

Dr. J. T. Blair, a physician and surgeon, who attended the deceased professionally in the latter part of 1919, was of the opinion that in that year the deceased was not of sound mind. Te testified:

"I knew the deceased, Matthew Presho. I had known him before 1919, and I had seen him occasionally before that, and I last saw him the latter part of 1919 at his home. Matthew Presho did not call me professionally, but his wife did. At that time she called me down to look him over, but that was the last time I saw him. I went over him pretty carefully, but I couldn't make anything out of him, and he said he didn't want any doctor, and I just let it go at that. His wife wanted me to look him over, and see what was the trouble with him, and I couldn't make anything much out of him, and he would not follow my instructions, so I thought it best to let the matter rest. This was in the latter part of 1919. At that time I formed an opinion as to the soundness of mind of the deceased. I don't think he was of sound mind. I formed that opinion at that time, and that was the only time I saw him.

"Q. What reason had you for that opinion? A. Well, I asked him several questions, and he couldn't give me any intelligent answers. I asked him about his general condition, how long he had been sick, and how he felt sick."

Sadie E. Jefferson testified she had known the deceased for the last 3 years of his life; that during those 3 years she had talked to him 6 or 8 times, and that she had noticed he was getting mentally weaker from and after the first time she saw him.

Dr. A. T. McGinty testified that he had attended the deceased professionally; that he had heard, either in the home or at his office, some intimation that contestant might have put something in the food of the deceased, but "it was not an accusation; it was no more than a suggestion that she might have put something in his food, and that was said by either Tom or the deceased, I don't remember which one. * * * Mr. Presho [the deceased] was always ready to know what was going on and asked me how things were and how business was, and how things were going around town."

Mrs. Belle Quinn testified that she had known Matthew Presho for about 15 years. The last time she saw him was in October, 1921. She saw him at her own home, and he was very feeble at that time. She again saw him in 1922, when he looked rather frail, the expression of his eyes looked very glassy, and his face was strained and drawn, and he spoke very little.

Mrs. Charles Herrmann testified that on a day she could not remember she called to see Mrs. Presho. She noticed the deceased at

the door and said to him, "I want to see Laura," and he did not recognize the witness. He simply said, "Walk in." Later on he came into the house and addressing the witness said, "Mrs. Herrmann, I did not know you for a moment when you were outside." That was all that was said. The only thing said or done by the deceased that indicated to this witness that the deceased was not rational was that "he allowed his brother to talk to his wife the way he did."

[3, 4] Considering the foregoing evidence and the other evidence in the record on behalf of the contestant in a light most favorable to contestant's contention, it cannot be said that it is sufficient to establish that on the 5th day of May, 1921, when the will was signed, the deceased was affected with general testamentary incapacity or was suffering from such insane delusions that he was not on that day familiar with the extent of his property, did not know those who would be the natural objects of his bounty, or that he did not know and understand the nature of the act in which he was then engaged. Estate of Dolbeer, 149 Cal. 227, 86 P. 695, 9 Ann. Cas. 795; Estate of Chevallier, supra; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Collins, 174 Cal. 663, 164 P. 1110; Estate of Casarotti, 184 Cal. 73, 192 P. 1085; Estate of Holloway (Cal. Sup.) 235 P. 1012. The statements of a physician who last saw him in 1919 that the deceased was of unsound mind, and of friends and acquaintances as to his weakened mental and physical condition, fall far short of the requirements upon which testamentary incapacity may properly be founded (Estate of Purcell, supra) and are not sufficient to avoid a nonsuit (Estate of Anderson, 185 Cal. 700, 714, 198 P. 407). As the evidence shows, the deceased frequently expressed his belief that his wife was doping and poisoning him, but he soon thereafter changed his attitude and said he knew she would not do such a thing. This belief was not irrational because it was not permanent, and it was not an insane delusion because it was based on statements made to him by Thomas, a person in whom the deceased unquestionably had confidence. Estate of Kendrick, 130 Cal. 360, 62 P. 605. The deceased stated to his wife that she was a stranger to him. This statement was made when he was in a condition of irritability, but as soon as the spell had passed he would recant and express his deep love for her. There can be no pretense that such a statement was made in the sense that he did not recognize his wife. Irritability and bad temper may result in unnatural actions, but they are not inconsistent with testamentary capacity. Estate of Riordan, 13 Cal. App. 313, 109 P. 629.

[5-7] As to the alleged undue influence affecting the execution of the will, the respondent relies on the foregoing evidence and in addition thereto the further testimony of the contestant that Thomas Presho began when he came into their home to tell decedent that contestant was "doping" him, was trying to kill him, was trying to railroad him to the asylum, and was keeping him sick; "that this was said every day, commencing from the time Tom came to the house, I think it was continuous." She testified that she did not "dope" her husband; that before the will was executed Thomas stated in the presence of the deceased that the respondent was not true to her marital obligations; that the will was made secretly so far as she was concerned, for she knew nothing of it until after the death of the deceased. But such evidence does not constitute proof of pressure brought to bear directly upon the testamentary act. In re McDevitt, 95 Cal. 17, 30 P. 101; Estate of Anderson, supra. Abundant proof, as respondent contends, of a confidential relationship between the brothers may be assumed, but such proof is not in itself sufficient to establish undue influence. There must in addition be proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit. Estate of Relph, 192 Cal. 457, 465, 221 P. 361; Estate of Lavinburg, 161 Cal. 536, 543, 119 P. 915; Estate of Ricks, 160 Cal. 450, 461, 117 P. 532; Estate of Morcel, 162 Cal. 188, 196, 121 P. 733. No such activity on the part of Thomas Presho as to the execution of the will is here shown. The evidence offered on behalf of the contestant was therefore wholly insufficient to support a finding that such undue influence was exercised by Thomas over the deceased at the time the will was executed on May 5, 1921, as to destroy the free agency of the deceased and overcome his volition at that time. Estate of Relph, supra; Estate of Kilborn, 162 Cal. 4, 120 P. 762; Estate of Baird, 176 Cal. 384, 168 P. 561.

[8] The respondent also relies on the foregoing evidence in support of her contention that the will was procured as a result of fraud practiced on the deceased by his brother, Thomas. It is insisted that Thomas continually charged the respondent with "doping" her husband; that this charge was repeatedly made in the presence of the deceased, was untrue, was known by Thomas to have been untrue, and believed by the deceased. But the will was not unfair to the respondent, and it cannot be said that the statements so credited to Thomas were reflected in the provisions of the will to her detriment. Estate of Shay (Cal. Sup.) 237 P. 1079. Excluding all consideration of the evidence in support of the proponents of the will, it must be concluded that the evidence on behalf of the contestant as to any of the grounds of contest concerning the proposed will was not inconsistent with the claim that the will was the spontaneous act of the de-

cedent. It was fair to the contestant, who concedes that under it she would receive "something in excess of the share that she would have received if the deceased had died intestate." Furthermore, it was not an unnatural will so far as Thomas Presho was concerned, taking into consideration the long and intimate business relationship and admitted affection between the brothers. The evidence adduced on behalf of the contestant, taken as a whole, was entirely insufficient to support the findings of the jury on those issues. The motion for a nonsuit should therefore have been granted.

[9] As to the special issues concerning the alleged invalidity of the codicil, the respondent, in support of her contention of want of mental capacity, testified:

"About the 23d or 24th of March, 1922, Thomas Presho took my husband on the street car, and I met them as they were coming home, on the home corner, where he had been associated with the surroundings for 35 years, and on the east side of his own home corner, and he stopped, and my husband said: 'Where are we? I don't know where we are. Where are we? We are on the wrong street, aren't we?' And he was looking at his own home at that time. This was about the 23d or 24th of March, 1922. If this codicil is dated March 31, 1922, it was about a week before the codicil was signed. And then I had always tasted his food; I would take two tablespoonfuls of all his food to get him over that notion that he was being poisoned, and to show Mr. Tom Presho that the food was all right, and for his protection too, and I would always take it, part of it, and taste it, but then Matthew had no memory, and he would not remember, and the next day it would be the same thing all over again, that I had doped him. This condition of forgetfulness got constantly worse."

[10-13] This incident, when considered with other evidence in the case, merely establishes that the deceased was suffering momentary confusion. Such a condition may be accounted for by his age and general physical debility, and is entirely insufficient to overthrow the presumption of sanity existing in favor of the testator at the time of the execution of the codicil. The infirmities of age and lapse of memory are not sufficient in themselves to establish lack of testamentary capacity. Estate of Dolbeer, supra; Estate of Purcell, supra; Estate of Maccrellish, 167 Cal. 711, 141 P. 257, L. R. A. 1915A, 443. Nor was the evidence sufficient to justify the special finding of the jury that the codicil was the product of fraud practiced upon the deceased by Thomas Presho. But on the special issue of undue influence as to the codicil there was evidence from which reasonable inferences might be drawn that the execution thereof was the result of influence in its procurement directly brought to bear upon the deceased by Thomas Presho. This evidence is found in part in the testimony of the contestant as to what took place on the day the codicil was signed by the deceased, and is as follows:

"Q. I call your attention to March 31, 1922, the date of this codicil, and I will ask you what happened on that day between Thomas Presho, your husband, Matthew, and yourself. A. The back porch of my home has a sunny exposure, and I had been doing my work, and they (my husband and Tom Presho) did not know I was anywhere around. Tom and my husband were sitting on the back porch, and I heard Tom Presho say to Matthew: 'It is all right, Matthew; it is all right, Matthew. Remember, Matthew, remember, Matthew, I am your brother. Judge Gosbey will believe me, but he won't believe her,' and he emphasized 'her.' So I knew there was something wrong. This was in the morning. So then I don't remember just when it was, but following that I saw my husband with some papers—I think it was the same day, and following that I went out and got in the automobile, the automobile was out in front of the house, and I got in the automobile and Tom Presho spoke up and said, 'Get out of this automobile'; and I just sat there, because I made up my mind I was going to see where they were going and what they were going to do, and so, when I did not get out, Tom Presho said, 'Well, I will railroad her down to the jail.' My husband had got out of the automobile, so I thought my husband had gone into the house, and I got out to look for him, and anyway they gave me the slip and went off together. They left in the automobile. I don't remember whether it was in the morning or afternoon, but I think it was in the afternoon. I heard that statement about Judge Gosbey in the morning, very plainly, when they were on the porch, and I was doing my work around the adjoining part of the house. My husband and Thomas went away in the machine, and they returned about 4 or 5 o'clock in the afternoon. My husband came in and Tom had made him so angry with me, as he always did when he had him alone, and he said, 'You were well fixed, Laura, but now you will have enough to eat as long as I live.' And Tom said, 'Well, there will be weeping of tears and gnashing of teeth, but it's right, it's right.' My husband was present when that was said. Tom repeated, 'It's right, it's right.' My husband was kept in that angry state. He was sick, and he was kept in that angry state all the time by Tom Presho. Neither my husband nor Tom Presho said what they referred to when they made these statements. I first knew of the existence of this codicil after my husband passed away. I had never seen it before that time. I was never told by my husband that it was in existence."

The foregoing evidence was undoubtedly believed by the jury to be true. From such evidence it may fairly be said that the jury might properly and reasonably infer that on the occasion referred to Thomas had in mind a proposed codicil; that he was importuning the deceased to make the same; that if such codicil were offered for probate the evidence of himself (Thomas) would be believed and that of the wife would be disregarded; that Thomas, in accordance with his plan to pro-

cure a change in the will to his advantage and to the prejudice of the wife, concealed from the latter his purpose, and so dominated the will of the deceased as to make the codicil a product of his own desires and not the free and voluntary act of the deceased. Evidence that pressure was on that day brought to bear on the testamentary act need not be direct. Circumstantial evidence is sufficient. In re McDevitt, supra; Estate of Anderson, supra. In addition to the testimony of the contestant, Thomas Presho testified that on the day the codicil was signed there was a conversation between Matthew and himself concerning a change in the will; that he took Matthew to an attorney's office and was present when the codicil was dictated, at which time Matthew told the attorney that he desired to change the provisions of his will regarding his wife from a direct devise to a life estate. The testimony of the contestant as to what had taken place at the home on the day of and prior to the signing of the codicil and the testimony of Thomas as to what took place immediately thereafter were sufficient upon which to base the conclusion that the subject-matter in the minds of Matthew and Thomas during the controversy related by the wife was a change in the will, and that the activity of Thomas on that day had the direct result of a modification in the will to his advantage.

Numerous objections to rulings of the trial court on the admission of evidence have been noted. In view of the conclusions above expressed, none of them is of sufficient importance to require discussion.

The judgment refusing to admit to probate the proposed will of May 5, 1921, is reversed, and the judgment refusing to admit to probate the proposed codicil of March 31, 1922, is affirmed.

We concur: MYERS, C. J.; LENNON, J.; LAWLOR, J.; RICHARDS, J.; SEAWELL, J.

---

73 Cal. App. 412

TOMSKY et al. v. CLARK et al. (Civ. 4920.)

(District Court of Appeal, First District, Division 1, California. June 29, 1925. Hearing Denied by Supreme Court Aug. 27, 1925.)

1. Trade-marks and trade-names and unfair competition ⟸67—What must be established to prove "unfair competition" in use of similar corporate name stated.

To establish a complete case of unfair competition against defendants using a corporate name similar to the firm name of plaintiffs, plaintiffs were required to establish that by care, attention, skill, and strict adherence to business they had built up an extensive, valuable, and profitable business, and that defendants, by fraudulent use of such corporate name, and by unfair and fraudulent practices, were deceiving and misleading the public, and thereby seeking to deprive plaintiffs of their customers and trade.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unfair Competition.]

2. Trade-marks and trade-names and unfair competition ⟸73(3)—Filing of certificate of copartnership by plaintiffs under family name of another held to give them no right to perpetual use thereof to exclusion of real owner.

That plaintiffs filed a certificate of copartnership to operate a business under the family name of another gave them no perpetual right to use of such name to exclusion of real owner thereof, so as to deprive him from ever afterwards engaging in same kind of business in his own name or through medium of a corporation bearing his name; it being immaterial that there was some one connected with plaintiffs' firm by such name.

3. Trade-marks and trade-names and unfair competition ⟸73(1)—Family name is incapable of exclusive appropriation.

Right to do business under one's own name is one of the sacred rights known to law, and a family name is incapable of exclusive appropriation, and cannot be thus monopolized.

4. Trade-marks and trade-names and unfair competition ⟸73(1)—Every man has absolute right to use his own name in his own business, though interfering with business of another bearing same name.

Every man has absolute right to use his own name in his own business, even though he may interfere with and injure business of another bearing same name, provided he does not resort to any artifice or do any act calculated to mislead the public as to identity of establishments, or to produce injury to other beyond that which results from similarity of names.

5. Trade-marks and trade-names and unfair competition ⟸73(1)—Will not allow person to resort to artifice in use of his name to deceive the public.

Equity will not allow a person to resort to artifice or contrivance in use of his name to deceive the public as to his business or products.

6. Trade-marks and trade-names and unfair competition ⟸73(3)—Plaintiffs might be enjoined from use of defendant's name in their business, where it deceived public and was injurious to defendant's business and reputation.

Where plaintiffs operating collection agency adopted defendant's name as a part of their firm name without his consent, seeking to take advantage of his former business reputation as a collector, and thereby leading public to believe that he was personally connected with their firm, and defendant being lawfully engaged in same character of business, and operation of plaintiffs' business under such fictitious name not only deceiving public as to identity of business, but manner in which plaintiffs operated

it being injurious to defendant's business and reputation, *held* that plaintiffs might be enjoined from use of defendant's name.

7. Trade-marks and trade-names and unfair competition ⊂=92—Cross-complaint might be filed in suit to enjoin use of name by another.

In suit to enjoin defendants from using name adopted by plaintiffs, defendants might properly file a cross-complaint, in view of Code Civ. Proc. § 442.

8. Trade-marks and trade-names and unfair competition ⊂=86—Defendant held not estopped by laches from seeking affirmative relief in suit to restrain use of his name.

In suit to enjoin defendant from using his name in his business after it had been adopted by plaintiffs in their business, defendant *held* not estopped by laches from seeking affirmative relief, where his attention was not called to fact that plaintiffs were using his name in their business, and he did not learn of it until after suit was brought.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Suit by Samuel C. Tomsky and another, copartners doing business under the name and style of the Rauer Collection Company, against Roy E. Clark, J. J. Rauer, and others, with cross-complaint by second named defendant. Judgment for defendants, and plaintiffs appeal. Affirmed.

Hearing denied by the Supreme Court; Knight, Justice pro tem., not participating.

Jacob S. Meyer and James Walter Scott, both of San Francisco (John Prosek, of San Francisco, of counsel), for appellants.

H. M. Anthony and Gus C. Ringole, both of San Francisco, for respondents.

KNIGHT, J. Plaintiffs, Samuel C. Tomsky and Leo Andrew Cole, as copartners doing business under the firm name of the Rauer Collection Company, and the corporate defendant, Rauer's Law & Collection Company, Inc., of which the individual defendants Roy E. Clark, J. J. Rauer, and H. S. Smith are officers and stockholders, are engaged in the same kind of business in the city and county of San Francisco, that of collecting debts. Plaintiffs commenced this action to enjoin said defendants from using the name "Rauer's Law & Collection Company, Inc.," in connection with said corporate defendant's business. All defendants, excepting Rauer, joined in an answer denying certain allegations of the complaint and interposing two special defenses. The defendant Rauer answered separately, and, besides denying material allegations of the complaint, added a cross-complaint asking that plaintiffs be restrained from using the name "Rauer" in connection with plaintiffs' business. The trial court found generally in favor of the defendants, and gave judgment denying the relief prayed for in plaintiffs' complaint, and enjoining plaintiffs from using the name of Rauer in connection with their business. Plaintiffs have appealed. The evidence in the case is not before us, the appeal having been taken upon the judgment roll alone; therefore the main question presented is whether the findings are legally sufficient to support the judgment.

The findings establish the following facts: For 25 years preceding 1913 defendant J. J. Rauer was engaged in the business of collecting debts in San Francisco, and during the latter portion of that time operated said business under the corporate name, Rauer's Law & Collection Company, a corporation organized by Rauer with himself as the owner of the entire capital stock. In 1913 Rauer sold his stock to his nephew, R. J. Graf, who continued the business under the said corporate name until his death in October, 1917. Subsequently the ownership of the stock passed through W. L. Claiborne to William and S. C. Tomsky. After the death of Graf, the business of said corporation did not prosper. William Tomsky died, but said corporation continued to function under the direction of Samuel C. Tomsky until March, 1921, when it was abandoned, and its powers were suspended for nonpayment of taxes. Its corporate existence was never thereafter revived. After the death of William Tomsky, and before the abandonment and suspension of said corporation, plaintiffs, Tomsky and Cole, desiring to avail themselves of the benefits of the Rauer name, formed a partnership under the fictitious name of "Rauer Collection Company," and on March 18, 1919, duly filed a certificate of partnership to that effect. Thereafter, and until the time of the abandonment of said corporation, the affairs of said partnership and said corporation were transacted in the same office.

The findings further show that prior to the abandonment of said corporation the said S. C. Tomsky collected, in some instances, and in others renewed, various judgments standing in favor of said corporation by assigning the same to himself and to said copartnership, and bringing suits in his own name; that said corporation during the latter part of its existence, failed to remit its collections, and had many judgments rendered against it; "that the plaintiffs above named told people on occasions that they had no connection with said defunct corporation, but at the same time said plaintiffs continued to collect old judgments obtained in the name of Rauer's Law & Collection Company." The court further found that neither at the time of the formation of said partnership nor at any other time, was there any one named Rauer interested in or associated with said partnership; nor did defendant Rauer ever give to either of said plaintiffs

or to any one else permission to use that name in connection with a collection agency; nor was there any person by the name of Rauer, in said city of San Francisco, who had been engaged in or connected with the law and collection business other than the defendant Rauer; and that the fictitious name, "Rauer Collection Company," has been used by plaintiffs, at all times, for the purpose of deceiving the public. The present corporation, Rauer's Law & Collection Company, Inc., was organized by the defendants Rauer, Clark, and Smith on May 10, 1922, and has since been actively engaged in the collection business. Defendant Clark is the president and general manager thereof, and defendant Rauer is the secretary treasurer, and owns a substantial interest therein. The court further found that on account of Rauer's ability as a collector prior to 1919 he enjoyed public confidence, and built up a large and lucrative business, that because of certain loose and unbusinesslike methods employed by plaintiffs in the operation of their copartnership business, in relation to the matter of accounting to clients for collections, said copartnership has not been held in good repute, and that "aspersions have been cast upon his [Rauer's] name," which has subjected him to humiliation and embarrassment. It was further found that the development of plaintiffs' business has been due to the deception of the public in the use of the name "Rauer," and that the use of said name by plaintiffs is unfair to Rauer. In reference to the new corporation, the court found that, in organizing the same, and in conducting the business thereunder, said defendants have not deluded or deceived the public as to the identity of said corporation nor as to the persons connected therewith, and that any confusion which may have arisen by the adoption of said corporate name has not been due to unfair practices on the part of defendants. Additional findings were made by the trial court, but the above constitute the principal findings, and will suffice for all purposes, we think, in considering the legal problems presented by the appeal.

[1] Appellants contend that they are entitled to relief against respondents upon the ground of unfair competition. They make no claim of ownership to the use of said name through privity of interest with Rauer, nor as a result of their previous relationship with this defunct corporation; their contention being based solely upon the proposition that there is no inhibition in this state against the adoption of the family name of another in connection with a business enterprise, and that, as copartners, having adopted the name "Rauer Collection Company," and having duly filed a certificate of copartnership to this effect, they were first in the field doing business under such name and that therefore equity will, in the interest of fair, commercial dealing, protect them in the use of said name. In order to prove a complete case of unfair competition against respondents, however, it was necessary for appellants to establish, as alleged in their complaint, two essential elements: First, "that by care, attention, skill, and strict adherence to business" they had built up an "extensive, valuable, and profitable" business; and, secondly, that respondents, by the fraudulent use of said corporate name and by unfair and fraudulent practices, were deceiving and misleading the public, and were thereby seeking to deprive appellants of their customers and trade. Yellow Cab Co. v. Sachs, 191 Cal. 238, 216 P. 33, 28 A. L. R. 105. Appellants did not prove either of those issues. In reference to the first one the trial court found that the firm name of Rauer Collection Company was being used by appellants—

"so as to deceive the public, that they have no right to the name of Rauer, and that their business, whatever the same may be, has been built upon the deceptive and fictitious use of the name of Rauer, and their strength in business is in the use of said defendant's name and not in the use of any one of their own names."

And upon the second issue, after finding adversely upon certain alleged specific acts of unfair and fraudulent practices, the court concluded with the finding:

"That nothing has been done by defendants or any of them, tending to deceive the public or to divert to defendants, or any of them, business intended for plaintiffs' firm. * * *"

[2, 3] The mere fact that appellants filed a certificate of copartnership to operate a business under the family name of another gave them no perpetual right to the use of such name to the exclusion of the real owner thereof, so as to deprive him from ever afterwards engaging in the same kind of business in his own name or through the medium of a corporation bearing his name. And it would have made no difference, even if there had been some one connected with appellants' firm by the name of Rauer. Morton v. Morton, 148 Cal. 142, 82 P. 664, 1 L. R. A. (N. S.) 660. The right to do business under one's own name is one of the sacred rights known to the law; and a family name is incapable of exclusive appropriation, and cannot be thus monopolized. Nims on Unfair Competition and Trade Marks (2d Ed.) § 67.

[4, 5] Every man has the absolute right to use his own name in his own business, even though he may interfere with and injure the business of another bearing the same name, provided he does not resort to any artifice or do any act calculated to mislead the public as to the identity of the establishments or to produce injury to the other beyond that which results from the similarity of names. Meneely v. Meneely, 62 N. Y. 427, 20 Am. Rep. 489; Howe Scale Co. v. Wyckoff, Seamans, etc., 198 U. S. 118,

25 S. Ct. 609, 49 L. Ed. 972; Hilton v. Hilton, 89 N. J. Eq. 182, 104 A. 375, L. R. A. 1918F, 1174; Rogers & Rogers Bros. v. Rogers, 53 Conn. 156, 1 A. 807, 5 A. 675, 55 Am. Rep. 78; McLean v. Fleming, 96 U. S. 252, 24 L. Ed. 828; Marshall v. Pinkham, 52 Wis. 585, 9 N. W. 615, 38 Am. Rep. 756. As just stated, equity will not allow a person to resort to artifice or contrivance in the use of his name as a result of which the public is deceived as to his business or products. But in such case it is not the use of a man's own name that is condemned; it is the dishonesty practiced in the use of it. Morton v. Morton, supra; Weinstock v. Marks, 109 Cal. 529, 42 P. 142, 30 L. R. A. 182, 50 Am. St. Rep. 57; Dodge Stationery Co. v. Dodge, 145 Cal. 380, 78 P. 879; Howe Scale Co. v. Wyckoff, supra; Burns v. Wm. J. Burns Det. Agency, 235 Mass. 553, 127 N. E. 334; Thompson L. Co. v. Thompson Yds., 144 Minn. 298, 175 N. W. 550. Where it appears, however, as it does here, that the party sought to be enjoined has a right to use his own name, and he does so reasonably and honestly, he is not obliged to abandon the use thereof or to unreasonably restrict it, whether used in a firm or corporation, merely because some confusion may have arisen from similarity of names. Howe Scale Co. v. Wyckoff, supra. Appellants' complaint against respondents is far less meritorious than any of those considered in the cases above cited, for the reason that here there never has been any person connected with appellants' firm who bore the name they are seeking to monopolize.

We do not find any of the cases cited by appellants upon the question of unfair competition in point, for the reason that they either do not involve family names, or else do involve facts showing privity of interest between the parties, or fraudulent and dishonest practices committed by the party sought to be enjoined. As already pointed out, neither of those latter elements is present in the instant case.

[6] We are also of the opinion that the findings are sufficient to sustain the judgment rendered upon the cross-complaint. Without repeating the specific findings bearing upon this branch of the case, it may be said generally that they show that appellants adopted Rauer's name as a part of their firm name without his consent, seeking to take advantage of his former business reputation as a collector, and thereby leading the public to believe that he was personally connected with their firm, that Rauer is now lawfully engaged in the same character of business, and that the operation of appellants' business under said fictitious name is not only deceiving the public as to the identity of the business, but the manner in which appellants have operated it has been injurious to Rauer's business and reputation. Under such circumstances we believe the case has been brought clearly within the rule of the following cases: Edison v. Edison Polyform & Mfg. Co., 73 N. J. Eq. 136, 67 A. 392; Edison v. Continental Chemical Co. (D. C.) 220 F. 398; C. H. Batchelder & Co., Inc., v. Batchelder, 220 Mass. 42, 107 N. E. 455; Scheer v. American Ice Co., 32 Misc. Rep. 351, 66 N. Y. S. 3; Sage Foundation Home Co. v. Sage-Forest Hill Associates, 119 Misc. Rep. 669, 197 N. Y. S. 877. Under the conditions above stated, appellants' business, if allowed to continue under its present name, would be unfair, in the legal sense, both to the respondents and to the public, and may therefore be enjoined. Sage Foundation Home Co. v. Sage Forest Hill Associates, supra; Fisher v. Star Co., 231 N. Y. 414, 132 N. E. 133, 19 A. L. R. 937; Material Men's Ass'n v. New York Material Men's Mercantile Ass'n, Inc., 169 App. Div. 843, 155 N. Y. S. 706. The form of action was one in which it was proper to file a cross-complaint. Code Civ. Proc. § 442; Fite v. Dorman (Tenn.) 57 S. W. 129; Batchelder & Co. v. Batchelder, supra.

[7, 8] The contention made by appellants that respondent Rauer is estopped from seeking affirmative relief by reason of his laches is disposed of by the findings "that, after plaintiffs became partners, as aforesaid, said Raer occasionally visited the office in which plaintiffs' business and the business of said corporation, Rauer's Law & Collection Company, was carried on together, but the attention of said Rauer was not called to the fact that plaintiffs were doing business under said fictitious partnership name of Rauer Collection Company, nor did he know of the adoption of said name at the time of the filing of the certificate thereof with the county clerk, nor until after some lapse of time, when said Rauer learned of the bringing of suits under the name of "Rauer Collection Company," and that "the defendant has acted with reasonable diligence in the premises, and is not guilty of laches."

We find nothing inconsistent in the findings; they are supported by the pleadings, and in our opinion sustain the judgment.

The judgment is therefore affirmed.

We concur: TYLER, P. J.; CASHIN, J.

RYSTROM v. SUTTER BUTTE CANAL CO.*
(Civ. 2874.)

(District Court of Appeal, Third District, California. May 6, 1925. Rehearing Denied, with Modifications, June 5, 1925. Hearing Denied by Supreme Court Aug. 3, 1925.)

1. Trial ⟸260(5) — Refusal of instruction covered by instructions given not error.

In action to recover damages for loss of crops due to failure to furnish water for irrigation, refusal of instruction, substance of which was covered by instructions given, did not constitute error.

2. Damages ⟸112—Measure of damages for loss of crops due to failure to furnish water for irrigation stated.

Measure of damages for loss of crops from failure to furnish water for irrigation is market value of probable yield of land if water had been furnished as agreed, less reasonable cost of production, and marketing crop, and net market value of crop actually produced.

3. Appeal and error ⟸1170(9)—Error in instructing jury, not prejudicial to complaining party, held not cause for reversal.

Under Const. art. 6, § 4½, prohibiting setting aside judgment or granting new trial for misdirection of jury, unless error complained of resulted in miscarriage of justice, where, in action for loss of crops from failure to furnish water for irrigation, jury did not follow erroneous rule of damages laid down by court, and returned verdict less in amount than it might have found if it had followed rule setting forth true measure of damages, defendant cannot secure reversal of judgment.

Appeal from Superior Court, Butte County; H. D. Gregory, Judge.

Action by Henry R. Rystrom against the Sutter Butte Canal Company for damages for loss of crops. From a judgment for plaintiff, defendant appeals. Affirmed.

Henry Ingram, of Gridley, and W. H. Carlin, of Marysville, for appellant.

George F. Jones, of Oroville, for respondent.

PLUMMER, J. Action by plaintiff to recover damages for loss of crops due to the alleged failure of defendant to furnish water for irrigation purposes during the years 1921 and 1922. Plaintiff had judgment, and, the defendant's motion for a new trial being denied, the defendant appeals from the order and judgment entered in said action. It appears from the transcript that the defendant was under contract to furnish the plaintiff for irrigation purposes during the years mentioned 1.33 cubic feet per second of water for the use of plaintiff in the growing of rice. The plaintiff alleges that the defendant failed to furnish the water as contracted, and that by reason of such failure the plaintiff's crops of rice did not fill and mature as they would have had the quantity of water called for in the contract been furnished by the defendant to the plaintiff during the period of time when the rice on the plaintiff's lands was being cultivated and grown; that as a result of the defendant's failure to furnish water, the plaintiff suffered damages in the total sum of $3,329.58. The cause was tried before a jury, and a verdict returned in the sum of $2,500. This sum was thereafter reduced by the court by striking therefrom the sum of $500 to cover 17 acres of the rice lands belonging to the plaintiff not harvested on account of rains, and, consequently, any losses suffered thereby could not be attributed to the defendant.

There is no real question presented as to the sufficiency of the testimony to sustain the verdict for the plaintiff. The argument addressed to us upon this point is based upon the alleged ground that the court misdirected the jury, as to the proper method for calculating or estimating damages, and that because of such misdirection a new trial should be ordered. One of the questions presented is rather unusual in this, that the instruction, as given by the court, tended to restrict rather than enlarge the amount of damages which the jury would be authorized to award the plaintiff in the event that the jury found that the plaintiff was entitled to a verdict.

[1] The first assignment of error is that the court failed to give the following instruction:

"I instruct you that under the contract between plaintiff and defendant the latter was not required in the year 1921 or in the year 1922 to furnish to plaintiff all the water which he might desire to receive or use; it was only required to furnish to him through its gate in its canal on his lands water to the amount of 1.33 cubic feet per second; and, if it did furnish that amount at said place for either of said years, your verdict must be in favor of defendant for said year; and if defendant did furnish water at said place for both of said years, 1921 and 1922, your verdict must be in favor of defendant for both of said years."

The reason assigned for the refusal of the court to give this instruction was that the substance of the instruction was given elsewhere. It is insisted that such is not the case. In this insistence the appellant must have overlooked two instructions given at the request of the defendant. They are Nos. 3 and 4. No. 3 reads:

"I instruct you that under the contract existing between plaintiff and the defendant, Sutter Butte Canal Company, plaintiff (defendant), was required in the year 1921, and also in the year 1922, to furnish water to plaintiff through a gate at its canal in the amount of only 1.33 cubic feet per second flow, and, if defendant did so furnish said water during each and both of said years, plaintiff cannot recover, and your verdict must be in favor of defendant."

*Republished with rehearing opinion 249 P. 53.

No. 4 reads:

"Under the contract between plaintiff and defendant, the latter was not required to furnish water during the irrigating season, even at the rate of 1.33 cubic feet per second continuous flow, unless such continuous flow in such amount would be reasonably necessary to plaintiff for the growing of the rice crop on his land."

[2] The defendant requested no instruction upon the measure of damages. The court, however, at the request of the plaintiff, gave the following:

"You are instructed that, in determining the amount of damage in this case, if you find from a preponderance of the evidence that any damage has been caused to the crop growing upon the land of the plaintiff in 1921 and 1922, or in either of said years, by reason of the failure of the defendant to supply water as agreed under the terms of the contract entered into between the parties in this case, if you find from the evidence that it failed to deliver water as agreed in either or both of said years, you are first to determine from the evidence the market value of the probable yield of rice from the land in each year if the water had been furnished as agreed, and you should then deduct therefrom the reasonable cost of producing and marketing such crop; together with the reasonable market value of the crop actually produced."

It is earnestly insisted by the appellant that this instruction is not a full and correct statement of the law for ascertaining damages when applied to the instant case. With this contention we agree. The latter portion of the instruction should have read:

And you should then deduct therefrom the reasonable cost of producing and marketing such crop, and also deduct therefrom the net market value of the crop actually produced.

As the instruction was given the jury was authorized to deduct from the reasonable market value of the crop that should have been produced the cost of producing and marketing the same, and also the total income received from the crop that was actually produced. It is evident that if the rule announced by the court were strictly followed the jury would twice deduct from the damages allowed, the cost of production. It is apparent that the court and counsel, in the preparation and giving of the instruction under consideration, endeavored to follow the rule laid down in the case of Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L. R. A. (N. S.) 267, 12 Ann. Cas. 779, where it is held that the measure of damages for the total destruction of a growing crop is the value of the crop in the condition it was at the time and place of destruction, less the cost of production, marketing, etc., and that, to determine the same, evidence is admissible of the probable yield and market value, and that when the probable yield and market value are ascertained, the cost of production being deducted therefrom, the remainder would indicate the damages to be awarded by the jury. In applying this rule the court erred, after instructing the jury to deduct the cost of production of the whole crop, to again deduct the total value of the crop actually produced. In doing so, it lost sight of the fact that the value of the crop produced was not the net value, but out of the returns of the crop produced the plaintiff was entitled to pay the costs thereof. To show that this is the true rule, we will take the figures as presented by the appellant for the first year, which also show that the giving of the instruction, as worded by the court, was in favor of the defendant, and, therefore, there is no just ground for complaint. In inserting the calculations about to be set forth, we have accepted the figures presented by the appellant. The result differs only because the appellant has not, to our minds, exhibited complete accuracy as a mathematician.

The total area of the rice crop involved included 71 acres. The testimony, which we are accepting, shows for the year 1921 a yield of 35 sacks per acre, or a total yield of 2,485 sacks. The accepted value of this rice for that year, by both parties is the sum of $2.75 per sack, which gives the total value of the rice that would have been produced for the year 1921 of $6,833.75. The testimony set forth by the appellant in its calculations fixes the cost of production at $35 per acre, which gives a total cost for the year 1921 of $2,485. This sum, deducted from what should have been the value of the total yield, leaves $4,348.75 as the net value of the crop that should have been harvested by the plaintiff during the year 1921, had sufficient water been furnished by the defendant to permit of the rice field yielding a full crop. During the year 1921 the plaintiff actually harvested 1,795 sacks of rice and marketed the same at the above price of $2.75 per sack, receiving the total sum of $4,936.25, out of which, however, he had to pay the total cost of production, which, we have seen, amounted to the sum of $2,485, leaving a net profit of $2,451.25. This sum, deducted from the $4,348.75 which should have been his net profit, leaves $1,897.50 as the net loss for the year 1921. A like process of reasoning and figuring shows the loss on the 54 acres for the year 1922 at about the sum of $1,100. For the year 1922, however, different figures are accepted, as presented by the appellant, as follows: Cost of production per acre $35, yield per acre 25 sacks, market value per sack $2.10. It thus appears that, had the rule been correctly stated as to the deductions to be made by the jury, the testimony presented by the appellant's own figures would have justified a verdict against the defendant in the sum of about $3,000, assuming, as we must, from the verdict of the jury that the shortage of the crop

was due to defendant's failure to furnish water according to its contract.

[3] Notwithstanding this situation, the defendant strongly insists that, even though the jury did not follow the erroneous rule laid down by the court, and arrived at a verdict less in amount than it might have found, under the testimony had it followed the rule setting forth the true measure of damages a new trial should be granted, irrespective of the fact that the erroneous instruction was favorable to the defendant. That this was once declared to be the law appears in one or two of the earlier California cases but the decisions so declaring have long since been discredited. A number of cases might be cited, but the following quotation from Tousley v. Pac. Elec. Ry. Co., 166 Cal. 457, 137 P. 31, is sufficient to show the rule now followed, and the one which should be followed in all such cases:

"It is claimed that the verdict and special verdict are against the law simply because they are in violation of two certain instructions given to the jury on the question of contributory negligence. It is manifest from a reading of these instructions that they could in no degree have prejudiced defendant's cause. An objection of this character assumes that an instruction relied on is not correct as matter of law, but that under it the party objecting was nevertheless entitled to a verdict, and that for the failure of the the jury to observe it, he is entitled to a reversal. This was the rule declared by this court in Emerson v. County of Santa Clara, 40 Cal. 543, and one or two subsequent cases. This rule has been entirely discredited and overruled in later cases. The rule now is 'that while the jury should conform to the instructions of the court upon matters of law, if it appears to the appellate tribunal that an instruction was erroneous, it will not disregard a verdict contrary to such erroneous instruction.' See O'Neill v. Thomas Day Co., 152 Cal. 357, 14 Ann. Cas. 970, 92 P. 856. 'The fact that the court erroneously instructed the jury to the contrary does not make the verdict against law.' O'Neill v. Law Union, etc., Co., 166 Cal. 318, 135 P. 1124." Irrespective of the decisions of the Supreme Court just referred to, we think that section 4½ of article 6 of the Constitution applies to this case, in that it directs that:

"No judgment shall be set aside, or new trial granted, in any case, on the ground of misdirection of the jury, * * * unless, after an examination of the entire cause [etc.], the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

It is apparent from what we have said that the error complained of in this case did not and could not have produced a miscarriage of justice.

It is hereby ordered that the judgment of the trial court be and the same is hereby affirmed, and that the respondent recover his costs on appeal herein.

We concur: FINCH, P. J.; HART, J.

196 Cal. 497

UNION MUT. LIFE INS. CO. v. BRODERICK et al.

BRODERICK v. BRODERICK.

(S. F. 11215.)

(Supreme Court of California. July 29, 1925. Rehearing Denied Aug. 27, 1925.)

1. Jury ⟸13(19)—Suit in interpleader involving rights to proceeds of life insurance is equitable proceeding, and right to jury trial does not exist.

Suit in interpleader, involving right of rival claimants to proceeds of life insurance policy is equitable proceeding, in which rights of parties as between themselves are governed by principles of equity, and right to trial by jury does not exist.

2. Appeal and error ⟸1009(3)—Finding on conflicting evidence that delivery of life insurance policy by husband to wife was not gift held controlling on appeal.

In suit between interpleaded claimants of proceeds of life insurance policy, on conflicting evidence as to whether insured in delivering policy to wife, one of claimants, intended it as gift, finding of trial court that such delivery was not gift is controlling on appeal.

3. Gifts ⟸18(2)—Unless donor intends to divest himself completely of control over property, gift is ineffectual.

Unless donor intends to divest himself completely of control and dominion over property, gift is incomplete and ineffectual.

4. Appeal and error ⟸1009(3)—Intention of husband in delivering life insurance policy to wife held question of fact for trial court.

In deciding conflicting claims to proceeds of life insurance policy, on conflicting evidence as to intention of insured in giving policy to wife, what such intention was is question of fact to be decided by trial court upon all evidence in case.

5. Appeal and error ⟸1009(1)—Conclusion of trial court that insured reserved right to change beneficiary of life policy after alleged delivery as gift held controlling on appeal.

In interpleader, where conflicting claims to proceeds of life policy were in issue, and policy provided that insured could change beneficiary until designation of any person as absolute beneficiary, or assignment of policy, in absence of designation of absolute beneficiary, assuming alleged gift of policy by insured to wife to be true, conclusion of trial court that insured did not intend delivery of policy as absolute gift, but that he reserved right to afterward change beneficiary, was controlling on appeal.

6. Husband and wife ⟸265—Delivery of duplicate life policy after change of beneficiary while insured was indebted to donee held to constitute transfer of proceeds of policy.

Although wife of insured paid premiums on life policy for 5 years from community funds, under law as it then stood, giving husband power to make valid transfer of community property for valuable consideration without written consent of wife, where he while indebted to his sister for advances of money had duplicate policy issued, after substitution of name of sister as beneficiary, and such policy was delivered to her, there was an effectual transfer of proceeds of policy to her.

7. Insurance ⟸587—Evidence held sufficient to support finding of assignment of policy.

In interpleader in which issue was conflicting, claims of insured's wife and his sister to proceeds of life insurance policy, evidence that insured, for advances of money by his sister, had duplicate policy issued, in which her name was substituted as beneficiary, and that it was delivered to her, was sufficient to support finding of assignment of policy to her, transfer in writing not being essential under Civ. Code, § 1052.

8. Insurance ⟸587—Change of beneficiary held not invalid for failure to surrender original policy.

Where insured's wife had possession of insurance policy, change of beneficiary by issuing duplicate policy in which his sister was substituted as beneficiary was not invalid for fail-

ure to surrender original policy as required by its provisions, in view of impossibility of surrendering it.

9. Insurance ⊂=587—Payment of premiums on policy by wife, beneficiary of policy on life of husband, held not to prevent change of beneficiary.

Fact that wife, beneficiary of policy of insurance on life of husband, paid some of premiums did not prevent his substituting sister, who had lent assured money, as beneficiary, in view of provision in policy reserving to assured right to change beneficiary, and of absence of satisfactory evidence of contract inuring to benefit of assured and wife.

10. Husband and wife ⊂=265—That policy of life insurance on husband's life is community asset held not to prevent change of beneficiary for valuable consideration.

Although, where premiums on insurance policy on life of husband after coverture are paid entirely from community funds, policy is community asset, and in view of Civ. Code, § 172, husband cannot make valid gift thereof without written consent of wife, and where he names third party as beneficiary, transaction as to wife's share is subject to her right of revocation, such principle does not apply where designation of third person as beneficiary was made by assured for valuable consideration.

11. Husband and wife ⊂=265—Two loans of $1,000, with other transactions, held sufficient to support implied finding of valuable consideration for substitution of sister for wife of insured as beneficiary of life insurance policy.

Two loans of $1,000, together with other transactions and relations existing between insured and his sister, were sufficient as valuable consideration to satisfy requirements of Civ. Code, § 172, prohibiting husband making gift of community property without written consent of wife, in his substituting name of sister for that of wife as beneficiary in policy of life insurance, although part of premiums were paid out of community property.

In Bank.

Appeal from Superior Court, City and County of San Francisco; T. I. Fitzpatrick, Judge.

Interpleader by the Union Mutual Life Insurance Company against Adelaide J. Broderick and Anita C. Broderick, to determine title to money due under a policy of life insurance. From a judgment for defendant Anita C. Broderick, defendant Adelaide J. Broderick appeals. Affirmed.

George D. Collins, Jr., of San Francisco, for appellant.

J. J. Lerman and G. K. Burgren, both of San Francisco, for respondent.

SEAWELL, J. The appeal in this case was taken in the first instance to the District Court of Appeal, First District, Division 1. Inasmuch as it was a case in equity, that court, not being vested with appellate jurisdiction in such cases, ordered it transferred to this court for hearing and decision. On the same day an order was made by this court, under the provisions of section 4, article 6, of the Constitution, and section 52a, subdivision 4, of the Code of Civil Procedure, transferring said cause to the District Court of Appeal for hearing and decision. It is now here for decision after an order made granting a petition for hearing. Two points were earnestly urged by petitioner which seemed to us to require the consideration of this court. The first was whether the plaintiff was entitled to have certain issues framed by the pleadings submitted to a jury as a matter of right, and the second point was whether the appellant had established such a vested right in the policy of insurance which forms the basis of the action as to have taken away the right of the husband to change the original beneficiary named in said policy of insurance. Upon further examination into those questions, however, we are satisfied with the soundness of the reasoning of the District Court of Appeal; and with its conclusion in disposing of them, as well as all other questions raised by the petition. We therefore adopt the opinion of the District Court of Appeal, written by Mr. Justice Knight, as a full and fair disquisition of the questions raised by the appeal. We will later advert, by way of emphasis, briefly to the two questions specifically referred to. The opinion follows:

"The defendant Adelaide J. Broderick appeals from a judgment entered against her in a suit in interpleader brought by the Union Mutual Life Insurance Company to determine title to money due under a policy of life insurance. Adelaide J. Broderick is the widow, and Anita C. Broderick is the sister of the insured, and are rival claimants for said money. The following facts are not disputed:

"On October 27, 1908, the plaintiff issued its policy of life insurance to Herbert D. Broderick in the principal sum of $1,500, payable to him on October 27, 1928, if living, or in the event of his death before that time, to his wife, Adelaide J. Broderick, or to such other beneficiary as may be designated by the insured. During the month of November, 1913, Broderick filed with said company a sworn certificate, dated September 15, 1913, to the effect that said policy had been misplaced and after diligent search could not be found. A duplicate policy was thereupon issued, dated November 19, 1913, and on the same date, upon written request of Broderick, dated May 13, 1913, said company changed the name of the beneficiary, so that Broderick's sister, Anita, became the beneficiary, and said duplicate policy was indorsed to that effect under date of November 19, 1913. Said duplicate policy was afterwards delivered by said company to said Anita C. Broderick, and she retained possession of the same until the death of the insured. She also paid the premium on said policy for the year 1913, amounting to $74.36. Thereafter no premiums were paid by any one,

but under the terms of said policy the contract of insurance continued in force until the death of the insured, which occurred on October 20, 1920. After Broderick's death his widow produced the original policy, and made demand for the money due thereunder. Said company then filed this suit in interpleader, and in accordance with the terms of an interlocutory decree entered in that behalf paid the sum of $1,532.82, due under its contract of insurance, into court, and the rival claimants were directed to litigate their claims thereto.

"The claims of the parties are set forth in their cross-complaints and answers. Adelaide J. Broderick, the widow, besides denying that the insured had requested a change of beneficiaries, alleged that she had been dependent upon her husband for support; that the latter 'never had any insurable interest in the life' of said insured, and was not dependent upon him for support, and that said insured had never 'been under any legal obligations to her for the payment of money or respecting property or services of which his death or illness might delay or prevent performance'; that said policy had never been mislaid, lost or destroyed, assigned or hypothecated; that said insured had never requested a change of beneficiary; that no indorsement to that effect had ever been made; that no beneficiary was named therein other than herself. Said Adelaide J. Broderick further alleged 'that said Herbert D. Broderick prior to November 1, 1913, delivered said policy to her * * * as a gift, and she ever since has been and now is the owner and in the possession of said policy,' and that as the owner of said policy and as the beneficiary named therein she was and is entitled to said insurance.

"The cross-complaint filed by Anita C. Broderick consisted chiefly of allegations of the undisputed facts hereinbefore stated relating to the issuance of the duplicate policy on November 19, 1913, the request by the insured for the change in the name of the beneficiary, the indorsement of such change upon the policy, and the delivery of said policy to her. She also pleaded her own right to said insurance money, and negatived the asserted right of Adelaide J. Broderick. Answering the cross-complaint of her adversary, the said Anita C. Broderick denied the material allegations thereof, including the allegation therein made to the effect that the said Adelaide J. Broderick was dependent upon said insured for support; she also denied the allegation that she, the said Anita C. Broderick, had no insurable interest in the life of said deceased.

"Appellant requested a jury trial, which was refused upon the ground that said proceeding was an equitable one. The cause was thereupon tried by the court, and findings were made in favor of respondent upon all contested issues. The judgment was that said appellant, Adelaide J. Broderick, had no interest in said insurance money and that respondent, Anita C. Broderick, as the beneficiary named in said contract of insurance, was entitled to the full amount due thereunder.

[1] "The first point made by appellant on appeal is that the trial court erred in denying a trial by jury. It has been held in this state, however, that a suit in interpleader, such as this one, and involving like issues, is an equitable proceeding, in which the rights of the parties as between themselves are governed by principles of equity (Jory v. Supreme Council, 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17; Adams v. Grand Lodge, 105 Cal. 321, 38 P. 914, 45 Am. St. Rep. 45), and there are numerous authorities from other jurisdictions holding directly that in such cases the right to a trial by jury does not exist (Clark v. Mosher, 107 N. Y. 118, 14 N. E. 96, 1 Am. St. Rep. 798; Grand Lodge v. Elsner, 26 Mo. App. 108; Bush v. Kansas City L. Ins. Co. [Mo. Sup.] 214 S. W. 175; Missoula Trust & Sav. Bank v. Murphy, 50 Mont. 355, 146 P. 941; Robertson v. Ridenour-Baker Co., 100 Kan. 133, 163 P. 655; St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N. W. 500, L. R. A. 1917D, 741). Therefore there was no error committed in denying a jury.

[2] "Appellant contends next that the evidence without conflict proves that prior to the attempted change of beneficiaries the insured made a gift of the policy to her. This contention is based upon the testimony given by appellant to the effect that in 1908, the year following her marriage, Broderick handed said policy to her and said: 'Here is a little present for you;' that she took the policy, afterwards placed it in a safe deposit box to which she and her husband had joint access, and that she continued thereafter to retain possession of said policy. Her testimony, however, was not the only evidence in the case upon this point. The record discloses that respondent offered proof of Broderick's declarations, and also circumstances bearing upon his conduct in subsequently dealing with said policy, which were inconsistent with the theory of a previous gift, and tended to show that no such gift was made or intended to be made. It would therefore seem that a conflict of evidence is presented on that point, and therefore the finding of the trial court is controlling.

[3-5] Furthermore, in determining the question of the validity of a gift, the matter of the intent with which the delivery is made is always an important and essential element to be considered. Unless the donor intends to divest himself completely of control and dominion over the property given, the gift is incomplete and ineffectual. What that intention was is a question of fact to be decided by the trial court, upon all of the evidence in the case. Estate of Hall, 154 Cal. 527, 98 P. 269. The policy of insurance here provided that the insured had the right to change the beneficiary from time to time, but 'that in case the insured shall at any time designate any person as absolute beneficiary hereof or assigns this policy, said right to change the beneficiary shall thereupon cease. * * *' Appellant was not designated as 'absolute beneficiary.' Assuming, therefore, that her testimony concerning the alleged gift be taken as true, there was still the question of fact for the trial court to determine as to whether Broderick intended the delivery of the policy as an absolute gift, or whether he reserved, as stated in the policy, the right to afterwards change the beneficiary. The conclusion of the trial court upon that point is also controlling.

[6] "It was also found that there had been an assignment of the duplicate policy by the decedent to his sister Anita. Appellant attacks that finding upon two grounds: First, that the proceeds of said policy constituted community property, and that therefore decedent did not

have legal authority to assign said policy, without appellant's consent; and secondly, that the evidence is insufficient in any event to establish an assignment. The fact that appellant paid the premiums on said policy each year from 1908 to 1912, inclusive, presumably from community funds, apparently sustains appellant's contention that she had a community interest in said policy. New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61. But the law of this state as it stood at the time this transaction occurred gave the husband power to make a valid transfer of the community property for a valuable consideration, without the written consent of the wife. We are of the opinion that the evidence here is sufficient to justify the conclusion that the transfer and assignment of the policy in question were made to respondent in consideration of money previously borrowed by the decedent from her, and which remained unpaid at the time the transfer and assignment of said policy was made. The evidence in this regard shows that Broderick was a marine engineer and spent much of his time upon the seas. His sister, the respondent, was engaged in business in San Francisco, but lived in Berkeley with her mother, whom she supported. After Broderick's marriage, his wife, with his consent and co-operation, engaged in the apartment or rooming house business in San Francisco. They were financially assisted in these enterprises by respondent. The latter testified that when the change of the beneficiary took place in 1913, her brother was 'then' indebted to her in the sum of 1,000, which he paid, and that afterwards he borrowed another $1,000, which he did not repay; that when he died he was still indebted to her in the sum of $1,000. In the early part of the year in which the name of the beneficiary was changed, and prior thereto, Broderick was stricken with illness, taken to a hospital, and operated upon. During the month of May of the same year and before he had entirely recovered from the effects of the operation, he left the hospital and went first to his wife's apartment in San Francisco for a day or two and then to his sister's home in Berkeley. About that time he and his wife had a disagreement. When he went to his sister's home in Berkeley he was sick, despondent, and penniless, being required to borrow sufficient money from his sister to pay his car fare from San Francisco to Berkeley. Later in 1915, Broderick, in explaining to his brother why he was obliged to borrow money from his sister at all, said that he had kept his money in a safe deposit box in a bank, and that 'when he left Adelaide he went to the safe deposit box, and it was cleaned out; that even his insurance policy was missing.' On the evening of the day he arrived at his sister's home he told his sister that he intended to go away, and he did not know when, if ever, he would return; that he wanted to make over his life insurance to her. He remained at his sister's home until May 26, 1913, when he accepted a position aboard ship and sailed for Seattle, thence to the Atlantic coast, and he did not return to California until the following January.

"After his departure for Seattle, respondent received from said insurance company the necessary papers for her brother to sign in order to consummate the transfer of the policy to her, and she forwarded these papers to her brother at Seattle. Later she received from the home office of said insurance company said duplicate policy, duly issued with the change of beneficiary regularly indorsed thereon, and upon the return of her brother to California the following January she informed him of that fact. While, as appellant claims, there is no direct evidence that the transfer of said policy was made to respondent in consideration of said unpaid loan, nevertheless it is manifest from the circumstances narrated that such was the fact. We think the argument made by appellant to the effect 'that the transfer to respondent was made as a gift or voluntary disposition for the benefit of the mother of the insured' is unsound, for the reason that if such were his purpose, there was apparently no reason why he could not have made the transfer to his mother. The statements made by the decedent at the time he declared his intention of transferring said policy to his sister can be readily accounted for upon the theory that he realized that it was an injustice for his sister to be charged with the entire support of his mother, and that he was morally obligated to square his financial indebtedness with his sister as far as his ability would allow, in order that her burden in the matter of the support of his mother might be lessened to that extent.

[7] "The evidence is also sufficient to support the finding of an assignment of said policy to respondent. Appellant concedes that, under the circumstances, a transfer in writing was not essential. Civ. Code, § 1052. When the name of the beneficiary was changed and the policy was delivered to respondent, the relationship of the assignor and assignee was that of debtor and creditor; a delivery of the policy, under such circumstances, constituted an effectual transfer of the proceeds of the policy. Nixon v. Malone (Tex. Civ. App.) 95 S. W. 577.

[8] "The final contention of appellant is that the change of beneficiary was invalid because the original policy was not surrendered as required by the provisions of said policy. The contention is answered by the decision in Jory v. Supreme Council, A. L. H. supra, wherein it is held that where the surrender of a certificate is made impossible by the refusal of the beneficiary to surrender it, equity will treat the surrender as duly made, and in legal effect the certificate is deemed as lost."

In order to accentuate the principles of law announced by the District Court of Appeal, we feel justified in making reference to a few of the decisions of this state, and quoting briefly from the text of some of the cases which appear to be conclusive on the main questions pressed in the petition for a hearing. We are quite well satisfied, however, that the appellant was not entitled to a jury trial. In Adams v. Grand Lodge, A. O. U. W., 105 Cal. 325, 38 P. 915, 45 Am. St. Rep. 45, this court stated in passing upon a similar question:

"But the conditions facing us are simply these: two litigants, standing upon a common level, *submit to a court of equity their respective claims of ownership to a special fund of money*, and ask that court to do justice, in the light, and under the guidance, of those equitable principles which form the glory of that forum."

(Italics ours.) Jory v. Supreme Council, 105 Cal. 20, 38 P. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17.

"An intervention merely adds new parties for the purpose of determining all conflicting claims to the matter in controversy and does not affect the nature of the action, so that the plaintiff in an action at law is not deprived of his right to a jury trial by an intervention praying for equitable relief; while on the other hand, * * * a bill in the nature of a bill of interpleader the proceedings are purely equitable and neither party is entitled to a jury as a matter of right; and an action at law becomes by interpleader proceedings an equitable action in which neither party can demand a jury trial." 24 Cyc. 114.

See, also, 33 C. J. 463, § 54.

[9] The policy of insurance in this case reserved to the assured the right to change the beneficiary. The rule in such cases is well stated in New York Life Ins. Co. v. Bank of Italy, 60 Cal. App. 602, 214 P. 61, wherein it is said:

"It is true that under a policy reserving to the assured the right to change the beneficiary the interest of the designated person prior to the death of the insured is a mere expectancy in an inchoate or incompleted gift, which is subject to revocation at the will of the insured, and that the power of revocation which would defeat it might be exercised up to the moment of his death. When, therefore, the deceased substituted the different enumerated persons in the place of his estate as beneficiaries he initiated a gift which, in the case of appellant, became complete by the death of the insured without revocation. And this is so notwithstanding that the premiums were paid from community funds. McEwen v. New York Life Ins. Co., 23 Cal. App. 694, 139 P. 242; Shoudy v. Shoudy, 55 Cal. App. 447, 203 P. 437."

In the instant case, it evidently appeared to the trial court that there was no satisfactory evidence of a contract inuring to the benefit of the assured and the appellant, but there is evidence of an obligation owed by the assured to the respondent. "In the absence of a contract of some character inuring to the benefit of a beneficiary, the mere fact of payment of assessments by such a one is not sufficient to create equities in his favor, for the courts of the land say such payments [of assessments] are to be treated as gifts." Jory v. Supreme Council, supra.

[10] It is no doubt the settled law of this state that where the premiums on an insurance policy issued on the life of the husband after coverture are paid entirely from community funds, the policy is a community asset, and, in view of the provisions of section 172, Civil Code, the husband cannot make a valid gift thereof without the written consent of the wife; and that where the husband attempts to do so by naming a third party as beneficiary, the transaction as to the wife's share is voidable and subject to her right of revocation. This principle, however, has no application to the facts of the instant case, inasmuch as there is evidence in the record tending to support the implied finding of the trial court that the designation of the respondent as beneficiary of the proceeds of the policy was made by the assured for a valuable consideration.

[11] Whether the loan of $1,000, made upon the two occasions adverted to by the District Court of Appeal, would alone be sufficient to satisfy the requirements of section 172, Civil Code, as to a valuable consideration, nevertheless, in the light of the brother's situation and the transactions and relations that existed between him and his sister, they are not without weight taken in connection with the care, support, maintenance, and nursing which the brother received from mother and sister while ill, and also other accommodations thereafter furnished him upon his subsequent return to their home—matters doubtless within the contemplation of the brother at the time he conceived the purpose of substituting the sister for the wife—and may be sufficient to support the implied finding that there existed a valuable consideration for the substitution of the sister for the wife in the policy.

We are of the opinion that sufficient consideration has heretofore been given to all the questions raised upon the appeal.

The judgment appealed from is affirmed.

We concur: RICHARDS, J.; WASTE, J.; LAWLOR, J.; LENNON, J.; SHENK, J.

---

196 Cal. 709

TAYLOR v. SPEAR et al. (S. F. 11416.)

(Supreme Court of California. Aug. 20, 1925. Rehearing Denied Sept. 14, 1925.)

1. Estoppel ⟸62(2) — Building improvements on space rented from harbor commission held not to estop commission from revoking tenure.

Where plaintiff rented space, under Pol. Code, § 2524, from the state board of harbor commissioners, appointed under Pol. Code, pt. 3, art. 9, tit. 6, c. 1, which was terminable on 30 days' notice at pleasure of commission, building of improvements, with or without knowledge of commission, did not create estoppel against commission, so as to enlarge plaintiff's tenure, since no action of commission can enlarge its powers beyond express limitations of the Code.

2. Navigable waters ⟸14(2)—Decision of harbor commissioners terminating tenancy will not be reversed in absence of fraud or abuse.

The decision of a board of harbor commissioners terminating a tenancy, under Pol. Code, § 2524, which prohibits them from granting a tenancy other than that terminable on 30 days' notice, will not be disturbed, though erroneous and working a hardship, unless it is the result of fraud, improper motives, or violation of law.

3. Navigable waters ⊜14(1) — Statute construed to give harbor commissioners right to revoke lease "at pleasure."

Where a statute prohibited a board of harbor commissioners from leasing premises other than that terminable on 30 days, and space was expressly granted "during pleasure" of board, it had unlimited discretion to give such notice; the right to remove "at pleasure" being different than the right to remove for cause.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, At Pleasure.]

4. Navigable waters ⊜14(1)—Good conduct of business held no ground for extension of tenure.

In a suit against harbor commissioners to enjoin termination of tenancy which, under Pol. Code, § 2524, was terminable on 30 days' notice, the plaintiff cannot base right to extension of tenure on fact that he had conducted his business in a careful and reputable manner, and such findings by the trial court cannot be made the basis of an injunction.

5. Navigable waters ⊜14(1) — Improvements and proper conduct of business not sufficient to show bad faith in revoking lease.

In a suit against harbor commissioners to enjoin termination of tenancy, terminable under Pol. Code, § 2524, on 30 days' notice, the fact that plaintiff made improvements on the premises and conducted his business properly is not sufficient on which to predicate a charge of bad faith of board.

6. Navigable waters ⊜14(1)—Assignment of space in public building held to be exclusively within discretion of harbor commissioners.

The assignment of space to a particular individual in a public building by the board of harbor commissioners, under Pol. Code, § 2524, is exclusively within discretion of board and not a matter of public concern, and a finding of trial court, that revocation of a particular license was against public interest, was unwarranted.

7. Navigable waters ⊜14(1) — Statement of commissioner held not to warrant finding board of harbor commissioners acted from improper motives.

In a suit to enjoin board of harbor commissioners from terminating space in building, under Pol. Code, § 2524, a statement by a commissioner to plaintiff that he got his space through politics and was losing it through politics *held* not such a showing of improper motives as to warrant court in overruling decision of board exercised within terms of the Code.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by John H. Taylor against Charles H. Spear and others, constituting the State Board of Harbor Commissioners. From a judgment in favor of the plaintiff, defendants appeal. Reversed.

W. T. Plunkett, of San Francisco, for appellants.

Edward D. Mabson, of San Francisco, for respondent.

RICHARDS, J. The plaintiff commenced this action against the defendants, who, at the time of the commencement thereof, constituted the board of state harbor commissioners, having control of the harbor of San Francisco, whereby he sought an injunction preventing the said board from terminating his occupancy of certain space or premises within the Ferry building, a state structure upon the water front of the city and county of San Francisco, under the control of said board, and from leasing, letting, or setting apart said space or premises to any other person or from interfering with the said plaintiff's occupancy of the same. He alleged in substance that for more than four years last past he had been the owner of a bootblack stand and business located upon such space or premises in said building as a tenant of the state of California, paying a certain amount of money each month as rent for the use and occupation of said space or premises occupied by his said bootblack stand and business; that he had operated and conducted his said business upon said premises during the period of his tenacy thereof in an efficient and businesslike manner and without complaint of any kind being made to the said board of state harbor commissioners as to the manner in which his said business had been conducted; and that during the period of his four-year tenancy thereof he had built up a large and profitable bootblack business; that during the year 1922 he had, with the permission of the said board, caused to be erected upon said space or premises a small building at a cost of more than $2,000, within which to operate and conduct his said bootblack stand and business, and that he had ever since conducted and was now conducting his said stand and business therein; that on or about the 1st day of November, 1923, the said state board of Harbor Commissioners made and served or caused to be served upon plaintiff a notice terminating his said tenancy and ordering him thereby to vacate within 30 days thereafter the said space and premises theretofore used and occupied by plaintiff's said bootblack stand and business. The plaintiff then proceeds to make certain averments with relation to the state of the laws of California requiring the letting or setting apart of buildings erected on property subject to the control of said board of harbor commissioners by competitive bidding, but since such is not the law affecting the space or premises occupied by said plaintiff, these averments need not be considered.

The plaintiff further alleges that certain other persons, whose names are unknown to plaintiff, have made application to said board to have said space or premises now occupied by him set apart, leased, or let to them, to

the exclusion of plaintiff, and that said board has agreed with such persons to so do in order to satisfy certain political obligations incurred by them in a political campaign and to recompense said persons for political services, and that, unless restrained by the court, the said board threatens to and will oust said plaintiff from said space and premises, and thereby ruin and destroy his said bootblack business and will issue a permit to said other persons to enter upon and occupy said space and premises to the exclusion of said plaintiff, to his irreparable injury and damage, for which he has no plain, speedy or adequate remedy at law. Wherefore he seeks an injunction to prevent said defendants in their said official capacity from doing the aforesaid acts. To this complaint the defendants presented a general and also a special demurrer upon a number of specified grounds, which the trial court overruled; whereupon the defendants answered, denying for the most part specifically the averments of the plaintiff's complaint, except that they admit the occupancy by the plaintiff of the space or premises in question, and in that regard aver that the plaintiff's sole right to occupy the same was that acquired by him under and by virtue of the provisions of section 2524 of the Political Code, and which was terminable thereunder upon 30 days' notice at the pleasure of said board, and which was terminated by the giving of said notice by said board in accordance with said section of the Political Code.

The cause proceeded to trial upon the issues as thus framed and was submitted to the trial court for decision. Thereafter the court made and filed its findings of fact, which were generally in the plaintiff's favor. The court found that the plaintiff had entered into the possession and occupancy of the space or premises designated in his complaint about four years prior to the inception of the action under a permission or license received from the said board of harbor commissioners in the form of that set forth in the defendants' answer, and had since continued in the use and occupancy thereof thereunder; that he had made the improvements in his structure thereon at the time and cost and with the permission and consent of said board as detailed in his said complaint; that he had at all times conducted his bootblack stand and business in a clean, orderly, efficient, and businesslike manner and without complaint, and that he was a fit and proper person to have the use and occupancy of said premises and to conduct said business; and that he had built up a good and profitable bootblack business thereon, and had at all said times served and was still serving the public in a satisfactory manner; that on or about November 1, 1923, the said board had served upon said plaintiff a notice terminating his occupancy of said premises and directing him to vacate the same within 30 days thereafter, which said notice to vacate was in the form set forth in the defendants' answer to said complaint; that neither said board nor any of its members gave plaintiff any reason for terminating his occupancy of said space or premises except that one of their number stated verbally to said plaintiff:

"Well, Taylor, you ought to know the reason; you got it through politics and you are losing it through politics."

In that connection the court finds:

"That the said board of harbor commissioners have not agreed, in satisfaction of political obligations, to assign the space or premises occupied by plaintiff's building, bootblack stand, and bootblack business to other persons to the exclusion of plaintiff, and to permit other persons to enter into possession of said space occupied by plaintiff's building, bootblack stand, and bootblack business and exclude the plaintiff therefrom. The court infers and finds from the evidence, however, that the said notice given to the plaintiff was for the purpose and with the intent of having plaintiff's said location vacated by him in order that some other person favored by defendants might be permitted by them to establish in plaintiff's present location or in approximately the same location, a bootblack stand in the place and stead of plaintiff, and there conduct a bootblacking business to the exclusion of plaintiff."

The court further proceeds to find that said board, in seeking to remove said plaintiff from his occupancy of said premises, has not acted in the manner provided by law or in good faith, but that the action of said defendants in the premises was and is unreasonable and arbitrary and not in execution or furtherance of their public trust, nor for the benefit of the public at all, and that no public interest will be served, aided, advanced, or benefited by removal of plaintiff or his said stand or business from said location, or by the establishment by any other person of the bootblackening stand or business in plaintiff's present location or approximately in said location. The court makes certain other findings in denial of the truth of certain of the averments of the defendants' answer which need not here be noted. As conclusions of law from the said findings of fact, the court finds:

"That discretion of the state board of harbor commissioners in terminating plaintiff's occupancy of space was and is not exercised in good faith, or on reasonable grounds, or in furtherance of the purpose for which the trust administered by them exists, but on the contrary the action of said board in the premises was and is arbitrary and unreasonable; that by reason of the unrecouped expenditures made by plaintiff in erecting his said building or structure with the knowledge, permission, and consent of said board of harbor commissioners, said board was not, and is not, justified in removing plaintiff from his said location, and under the existing circumstances as hereinbefore found is estopped from removing plaintiff from his said location;

that plaintiff is entitled to judgment enjoining defendants from enforcing the notice of termination of his use and occupancy of the space in question at the northerly end of the Ferry building, or from terminating plaintiff's occupancy of said space by reason of any matters or things occurring up to the time of commencement of this action."

The judgment of injunction follows in form the aforesaid conclusions of law, and from said judgment the defendants prosecute this appeal.

[1] The state board of harbor commissioners is one of the state agencies of the state of California and is invested with control of the harbor of San Francisco under the provisions of article 9, part 3, title 6, chapter 1, of the Political Code. The portion of the bay of San Francisco and the properties, improvements, rights, privileges, easements, and appurtenances connected therewith or appertaining thereto over which the said board of harbor commissioners has been given jurisdiction, possession, and control are generally set forth in section 2524 of said Code. With relation to the powers and limitations of said board in respect to the occupation and use by others of space or premises within or upon any portion of the property with which said board is thus vested with possession and control, said section provides that:

"The commissioners shall not have the right to renew any lease, or to lease any premises under their control for any purpose whatever, except as otherwise specially provided, but they may permit any property under their control to be used by any corporation, firm, association, person, or company, but in no case shall any corporation, firm, association, person, or company enjoy the use of any of the property under the commissioners' charge, except such use as shall be terminated as herein provided."

By a later clause in said section it is provided that:

"Any use permitted of the property by the commissioners may be terminated at any time by them, on thirty days' previous notice to the party or parties so using the same."

On January 2, 1919, the board of harbor commissioners adopted a resolution assigning to the plaintiff herein that certain space at the north end of the Ferry building designated in his complaint herein, for use by him as a bootblack stand, such use of said space to continue during the pleasure of the said board of harbor commissioners, at a fixed rental of $75 per month, payable in advance. On January 3, 1919, the said plaintiff was given formal notice in writing of said resolution and of the assignment thereby of said space to him, wherein it was expressly stated that said assignment was "to continue during the pleasure of the commission"; and on the same date the said plaintiff, pursuant to said assignment, and to said notice thereof, and of the terms thereof, entered into the use and occupation of said space in said building thus assigned to him. In so doing he did so with actual knowledge of the limitations imposed upon his tenure of said premises by the terms of said resolution and notice, and also with actual or imputed knowledge of the terms of said section of the Political Code above quoted, limiting the power of said commissioners to permit the use and occupation of any portion of the properties under their control for a greater tenure than that terminable upon 30 days' notice.

Whatever improvements or appliances the plaintiff might have placed upon the space or premises thus allotted to him at the time of said assignment in order to facilitate the doing of his particular business thereon, and whatever improvements, appliances, or structures he may have subsequently placed thereon, at whatever cost, and whether with or without the permission of said board of harbor commissioners, were so placed and used with knowledge on his part at all times of the uncertainties of his tenure of said premises both by the terms of his assignment and by the provisions of the Code section, and hence no additional right to a greater permanency of tenure could be predicated thereon; and this would be true even though the plaintiff might have been led to expect from the circumstances attending the making of any such improvements or from the terms of the permission accorded him so to do by a complaisant board that his tenure had been made more certain, since by no action or nonaction or permission or express or implied extension on the part of said board could plaintiff's tenure of said premises be changed or enlarged beyond that of a tenure terminable upon 30 days' notice at the pleasure of the board; and this for the reason that the provisions of the Political Code above quoted expressly define the measure of the powers of the board in respect to the use and occupancy of such property and expressly limit the mode of the exercise of their powers in that regard. What the commissioners could not do directly they could not do indirectly, because of these express limitations upon their powers. They could not, therefore, create an estoppel which would have the effect of enlarging the plaintiff's tenure beyond that embraced within the express limitations of the Code section. Zottman v. City and County of San Francisco, 20 Cal. 96, 81 Am. Dec. 96; San Diego W. Co. v. City of San Diego, 59 Cal. 517; Sutro v. Pettit, 74 Cal. 332, 337, 16 P. 7, 5 Am. St. Rep. 442; Santa Cruz R. P. Co. v. Broderick, 113 Cal. 628, 45 P. 863; Dillon, Mun. Corp. (5th Ed.) § 791; Simons Brick Co. v. City of Los Angeles, 182 Cal. 230, 187 P. 1066, and cases cited.

The cases referred to by the respondent in support of his contention that such estoppel might arise from the conduct of public offi-

cials with regard to the occupancy of public property are found upon examination to be in each instance a case wherein the estoppel permitted by the courts was such as lay as to its extent within the scope of the original powers of the board or official acquiescing in the extended use or term of occupation. This is well illustrated by the case of Gushee v. City of New York, 42 App. Div. 37, 58 N. Y. S. 967, upon which the respondent herein strongly relies, and wherein the park commissioners of said city had power to grant privileges for selling refreshments within the parks thereof for the period of five years, and having granted such a privilege and having permitted the grantee to make certain expenditures for repairs and improvements upon the premises, were held to be estopped from withdrawing the granted privilege within such term.

[2] We are cited to no case wherein officials in charge of the administration of public property, with limited powers as to the extent of their right to permit the occupation and use thereof by private persons, could by any agreement or acquiescence or act or conduct upon their part enlarge such use or occupation to an extent exceeding the express limitations upon their original power to permit such occupation and use. It is, however, contended by the respondent herein that notwithstanding the express limitations upon his tenure of the premises in question expressed in the terms of his assignment to the effect that "said assignment was to continue during the pleasure of the commission"; and notwithstanding the express provision in the Code section that "any use permitted of the property by the commissioners may be terminated at any time by them, on thirty days' previous notice to the party or parties so using the same," he is entitled to enjoin the attempted exercise of these powers on the part of the commissioners, because, as he contends, the action of said commissioners was not undertaken in the public interest or in good faith. The general subject of the powers of this particular board of harbor commissioners with respect to their control of the use and occupation of the properties committed to their custody and management as an agency of the state was exhaustively considered by this court in the case of Union Transportation Co. v. Bassett, 118 Cal. 604, 50 P. 754. That was a case wherein the plaintiff, as the owner of a steamboat plying between the cities of San Francisco and Stockton, and assigned to docking space at the Clay street wharf in the former city, objected to the action of the board of harbor commissioners in making an order changing the place of landing to another location, and undertook to obtain an injunction preventing such action upon the ground that the same was unreasonable, arbitrary, oppressive, and would have the effect of ruining the business of the plaintiff in that action. The trial court granted such injunction. In reversing its judgment in that regard, this court had under consideration the provisions of sections 2522 and 2524 of the Political Code defining the powers of the board of harbor commissioners; and while the particular portions of the latter section of the Code involved on this appeal were not therein considered, other portions thereof investing the board with similar powers and with a like discretion in their exercise were under review.

This court held that the large discretion with which the board of harbor commissioners was invested under section 2524 of the Political Code was a discretion with which, if it be honestly exercised, a court of equity will not feel itself at liberty to interfere, or to substitute its judgment for that of the board, even if the conclusion of the latter should be erroneous and work hardship upon the individual. The court quoted approvingly the language of the Supreme Court of Connecticut in the case of Dailey v. New Haven, 60 Conn. 314, 22 A. 945, 14 L. R. A. 69, to the effect that whenever bodies or boards of the character of this one are acting within the limits of powers conferred on them and in due form of law the right of courts to supervise, review, or restrain is exceedingly limited; and that with the exercise of discretionary powers courts rarely, and only for grave reasons, interfere. Those grave reasons are found only where fraud, corruption, improper motives, or influences, plain disregard of duty, gross abuse of power, or violation of law enter into or characterize the result; and this court proceeds to say:

"But, while courts of equity will not refuse to interfere in proper cases, the showing to justify their interference must be clear. The mere difference of opinion between the chancellor upon the one hand, and the board upon the other, will not suffice. It is not to be expected that power will always be exercised with the highest discretion, and even in those cases where upon the showing the court would without hesitation declare that, occupying the position of the board, it would not have made the order or passed the ordinance in question, still this reason will not be considered sufficient to justify the substitution by the court of its judgment for that of the tribunal in which the law has seen fit to lodge the power. White v. Kent, 11 Ohio St. 553; Wiley v. Allegany County Com'rs, 51 Md. 404; St. Louis v. Weber, 44 Mo. 550; Knoxville v. Bird, 12 Lea. [Tenn.] 121, 47 Am. Rep. 326."

[3] It is to be noted that the provisions of section 2524 under review in the instant case, and having special reference to the occupancy and use of property under the control of the board of harbor commissioners, give to said board in one direction a narrower and in another a broader range of power than was given to said board under the provisions in said section interpreted in the foregoing case. With respect to the grant of privileges, such

as that given to the plaintiff herein, the commissioners are expressly forbidden to grant any lease of any portion of the premises under their control, or any use or occupation thereof other than that terminable by them upon 30 days' notice. This provision commits to the commissioners the power to give or withhold such notice at their pleasure, and invests them with an unlimited discretion in the exercise of such power in so far as the language of the section is concerned; and when to the broad language of the statute there is added the express limitation embraced in the plaintiff's assignment of the space or premises in question, to the effect that his use of the same was to continue "during the pleasure of the commission," an even stronger case is presented for the noninterference of the courts with the acts of the commissioners within the scope of their powers than that presented to the court in the above-cited case. Where subordinate boards or officials have been invested with the power of removal of their appointees "at the pleasure" of the appointing power, the courts have held that "these words have a well-defined legal meaning." The right to remove "at pleasure is an entirely different thing from the right to remove for cause. To hold that the statute only authorizes the council to remove for cause would be to deny the words used by the legislature their ordinary meaning. This cannot be done." London v. City of Franklin, 118 Ky. 105, 80 S. W. 514. In the case of Stebbins v. Police Com'rs, 196 Mass. 365, 82 N. E. 42, where the city charter of Springfield provided that the administration of the police department should be vested in the mayor and aldermen, who should have full and exclusive power to appoint a constable and assistants and all other police officers, and to remove the same at pleasure, the Supreme Court of Massachusetts held that, under such a provision, the mayor and aldermen had an absolute power to remove such appointive officers without any notice or hearing.

[4] But even if it were to be conceded that the broad powers with which the board of harbor commissioners are thus invested, when exercised apparently within the scope and terms of the aforesaid provisions of the Political Code, are nevertheless subject to be reviewed by the courts and their exercise enjoined upon a showing of fraud, corruption, and the like, it seems apparent to us from the record before us that no such showing has been made in this case as would have sufficed to justify the action of the trial court in the rendition of the judgment here under review. As we have already seen, the plaintiff could predicate no right to an extension of his tenure of the space or premises in question upon the fact that he had made certain expenditures thereon with or without the acquiescence of said board. Neither, it is plain, could the plaintiff gain a right to a longer or less terminable period of enjoyment and use of said premises predicated upon the fact that he had conducted his business thereon carefully, reputably and without cause for complaint; since, if that course of conduct were to be considered as a sufficient ground for invoking the restraints of equity against his removal, every other holder of an assignment of space or premises within the Ferry building or the other buildings or properties under the control of the board of harbor commissioners, would be entitled, upon a like showing, to an indefinite and interminable right to retain their holdings therein during good behavior, notwithstanding the express limitations of the statute in that regard.

[5] And if this plaintiff can predicate no such right upon such a showing, it would seem irresistibly to follow that he cannot, upon a like showing, predicate a charge of fraud or corruption or bad faith or improper motives, or disregard of duty, or abuse of power, or violation of law against the board of harbor commissioners for doing that which it lay within their discretion to do under the express language and limitations of the statute, notwithstanding plaintiff's unimpeachable conduct of his business upon the premises in question; and it further follows that, whatever findings the trial court may have made as to the plaintiff's conduct of his business upon the space or premises in question, or whatever conclusions of law it may have predicated thereon, furnish no sufficient ground for interference by way of injunction with the discretion of the board of harbor commissioners in the exercise of their statutory powers.

[6] A like conclusion must be arrived at with respect to the findings and conclusions of the trial court to the effect that the best interests of the public would not be subserved by the action of the board of harbor commissioners in revoking the assignment of the plaintiff to the space or premises occupied by him in the Ferry building. The public, as such, have no interest in the occupancy of any portion of the Ferry building by any particular individual, and hence the continued occupancy or use of the space or premises in said building, heretofore occupied and used by this particular plaintiff, is a matter of no such public concern as would justify the interposition of a court of equity on his application. Neither is it a matter of public concern of which the courts can take cognizance as to whether a bootblack stand, or a tobacco stand, or a fruit stand, or a newspaper and magazine counter, or a confectionery stand, or in fact any other particular concession, shall or shall not be accorded space, and especially shall or shall not be assigned to any particular or designated space in said building or in any other of the buildings or structures under the control of the board of harbor commissioners. These are matters which are committed entirely and exclusive-

ly to the judgment and discretion of the commissioners and over which the courts can exercise no control. It follows that the findings and conclusions of law and judgment of the trial court in respect to these matters constitute an unwarranted interference with the discretionary powers with which the board of harbor commissioners is invested by the provisions of the Political Code above referred to, which this court finds itself unable and unwilling to approve.

[7] We are thus brought to the final contention upon which the respondent seeks to sustain the judgment herein. It is that the board of harbor commissioners was moved by improper motives in its attempted termination of the plaintiff's occupation and use of the space and premises affected by its said order. An examination of the record herein shows it to be entirely wanting in any evidence, with one exception, to be presently noted, sufficient to sustain either the plaintiff's averments or the findings of the trial court in that regard. The single exception is that testified to by the plaintiff and referred to in the findings of the court, and which consists in the following remark, alleged and found to have been made by one of the commissioners to the plaintiff:

"Well, Taylor, you ought to know the reason; you got it through politics and you are losing it through politics."

It should require no argument to show that an apparently flippant remark of this character, made by one of the commissioners, could have no binding effect upon a board of commissioners, the powers of which and the mode and method of their exercise are strictly limited and defined by the statute under which such board is functioning.

It follows from the foregoing considerations that the findings and judgment of the trial court have no sufficient support in the evidence in this case or in the law applicable thereto.

The judgment is reversed.

We concur: MYERS, C. J.; SEAWELL, J.; LENNON, J.; LAWLOR, J.; WASTE, J.

---

73 Cal. App. 485

Ex parte WILLIAMS. (Cr. 1252.)

(District Court of Appeal, Second District, Division 1, California. July 3, 1925.)

1. Licenses ⟸42(7)—Imprisonment sentence for violation of Corporate Securities Act proper; "individual."

In prosecution for selling interest in certain gas contracts without a permit, in violation of Corporate Securities Act, imprisonment sentence *held* proper, as provided under section 14, notwithstanding section 13, and section 2, subd. 3, punishing a company by fine, and defining an "individual" as one included within a company, the offense having been committed by the seller as an individual and not as a company.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Individual.]

2. Habeas corpus ⟸30(2)—Defects of information for violating Corporate Securities Act not reviewable on habeas corpus.

Although petition charging violation of Corporate Securities Act may have been defective in failing to show all facts necessary to constitute offense, and was therefore demurrable, *held*, that defects of petition could not be reviewed, after conviction and commitment, on application for habeas corpus.

Application by T. S. Williams for a writ of habeas corpus to be directed to the Sheriff of Los Angeles County to secure release of petitioner from custody, pursuant to a plea of guilty to a violation of the Corporate Securities Act.

Writ discharged, and petitioner remanded

Mulligan & Ryzek, of Los Angeles, for petitioner.

Asa Keyes, Dist. Atty., and Tracy Chatfield Becker, Deputy Dist. Atty., both of Los Angeles, for respondent.

CONREY, P. J. The return to the writ shows that the sheriff of the county of Los Angeles holds the petitioner in custody by virtue of a commitment out of the superior court of Los Angeles county in an action of the People v. T. S. Williams. The judgment in that action, as shown by the commitment, recites that, in an information filed in said court, the defendant was charged with the crime of "violation Corporate Securities Act, a felony," and that he pleaded guilty as charged in said information. Thereupon the court adjudged that the defendant be punished by imprisonment in the state prison of the state of California, at San Quentin for the term prescribed by law, and remanded him to the custody of the sheriff, to be by him delivered into the custody of the warden of said prison.

Petitioner contends that his detention by the sheriff is illegal in this, that the statutory provisions under which he was informed against and sentenced and imprisoned are unconstitutional and void; that the superior court has no jurisdiction of his person or of the subject-matter of the charge; that the information does not charge a public offense; that the sentence and judgment is void; that the court had no jurisdiction or right or authority to impose a prison sentence or a sentence of any kind upon the defendant.

The information accused the defendant "of the crime of violation Corporate Securities Act, a felony, committed as follows: That the said W. M. Williams and T. S. Williams

on or about the 21st day of May, 1924, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously sell to Anna S. Aldahl a 1/125 undivided interest in certain gas contracts, plans, etc., situated in the Torrance-Lomita oil fields, without having obtained from the state corporation commissioner a permit so to do."

The case thus presented requires an examination and consideration of the terms of the Corporate Securities Act. Deering's Gen. Laws, 1923 Ed., Act 3814. This act was adopted in the year 1917, and was amended in 1919, 1921, and 1923. Section 14 reads, in part, as follows:

"Penalty for officers, etc. Every officer, agent, or employee of any company, and *every other person, who* knowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or *sells*, or causes or assists in causing to be issued, executed, or sold, *any security*, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or *contrary to the provisions of this act*, or of the constitution of this state, * * * or who, in any other respect willfully violates or fails to comply with any of the provisions of this act, or who, in any other respect, willfully violates or fails, omits, or neglects to obey, observe, or comply with any order, permit, decision, demand, or requirement, or any part or provision thereof, of the commissioner under the provisions of this act, *is guilty of a public offense* and shall be punished by imprisonment in the state prison not exceeding five years, or in a county jail not exceeding two years, or by a fine not exceeding five thousand dollars, or by both such fine and imprisonment."

We have emphasized the words most definitely applying to the information against petitioner.

Section 2 undertakes to define some of the words used in the act. Among other things, it says:

"The following words have in this act the signification attached to them in this section, unless otherwise apparent from the context: * * * 3. The word 'company' includes all domestic and foreign private corporations, associations, joint stock companies, and partnerships, of every kind, trustees, as hereinafter defined, and also individuals as hereinafter defined; excepting therefrom: * * *" (The exceptions are not pertinent to any question here presented.)

Subdivision 5a of said section reads as follows:

"The word 'individual' in so far as it is included in the definition of a 'company,' includes only persons selling, offering for sale, negotiating for the sale of or taking subscriptions for any security as hereinafter defined in subdivision 6a of this section, of their own issue."

Subdivision 6a of section 2 reads as follows:

"The word 'security,' in so far as it applies to 'individuals,' includes: (a) Any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof; (b) All bonds, debentures and evidence of indebtedness offered to the public by an 'individual.'"

Subdivision 9 of said section 2 reads in part as follows:

"The word 'broker,' as used in this act, includes every person or company, other than an agent, who shall, in this state, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any 'security' or 'securities' issued by others, or of underwriting any issue of 'securities,' or of purchasing such 'securities' with the purpose of reselling them, or of offering them for sale to the public. The word 'securities,' as used in this paragraph, includes the following 'securities' issued by 'individuals':

"Any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof;

"All bonds, debentures and evidence of indebtedness offered to the public by an 'individual.'

"The following are excepted from the provisos of this paragraph:

"(a) Any owner of any security who is not the issuer or an underwriter thereof, who sells or exchanges the same for his own account; provided, that such sale or exchange is not made in the course of repeated and successive transactions of like or similar character by him. * * *"

The word "agent," in subdivision 9, refers to an agent of a company or broker, as defined by subdivision 8.

Section 3 provides, among other things, that no company shall sell any security of its own issue until it shall have first obtained from the corporation commissioner a permit so to do. Section 5 provides that—

"No person or company shall act as an agent or broker until such person or company shall have first applied for and secured from the commissioner a certificate, then in effect, authorizing such person or company so to do. * * *"

[1] Under his proposition that the court had no jurisdiction to impose upon him a prison sentence, it is the contention of petitioner that the information attempts to charge him with commission of the alleged felonious act, not as an individual in the ordinary sense of the word, but as a corporation or "company" under those provisions of the act, which under stated circumstances, define the word "individual" as one included within the word "company," as defined in subdivision 3 of section 2. He therefore, as we understand the argument to be, contends that

the judgment purports to be based upon conviction of an act done by him as a "company," and that therefore he could not in any event be punished by imprisonment, since the only punishment for a "company" violating the act is by a fine, as provided by section 13 thereof. It is a sufficient reply to this argument that said section 13 provides penalties which cover illegal issuance of securities. That section does not apply to the act or business of selling securities after they have been issued. Petitioner was not charged with the doing of any act prohibited by section 13. The charge was that he sold the described property, contrary to the provisions of the act. Such selling, by any person, is declared to be subject to punishment as provided by section 14. Therefore we shall consider the present matter further solely upon the theory that the purported offense, to which petitioner pleaded guilty as charged in the information, related to something done by him as a natural person and not to something done by an "individual" acting as a "company" within the definition of those terms in the statute.

Petitioner also contends that the alleged acts set forth in the information would be denounced by the statute as a crime only if the instrument was offered to the public, and only if the instrument represented a right to share in gas "as yet undeveloped;" and that the act of selling the security would not be a crime unless the sale was made in the course of successive transactions of similar character by the defendant. Based upon this construction of the statute, petitioner claims that, assuming that the statute is in all respects valid, the information failed to charge him with the commission of a crime even under the terms of the statute, because it does not charge that the gas contracts covered undeveloped property, and because it does not charge that the security was offered to the public, and because it does not charge that the alleged sale was made in the course of repeated and successive transactions of like or similar character.

[2] But on the assumption that none of the provisions of the statute under which the defendant was prosecuted are unconstitutional, we find that the information attempts to charge a crime, in that the defendant violated the Corporate Securities Act by selling the described property without having obtained from the state corporation commissioner a permit so to do. While the fact that the information may be defective in the particulars above suggested might have required a ruling in defendant's favor on demurrer to the complaint, and while upon appeal from the judgment he might have raised these questions for appropriate consideration by this court, nevertheless, we are of the opinion that such supposed defects in the information cannot be recognized as a ground for relief of the defendant in a habeas corpus proceeding directed against a judgment of the superior court. "We think the true rule is that where an indictment purports or attempts to state an offense of a kind of which the court assuming to proceed has jurisdiction, the question whether the facts charged are sufficient to constitute an offense of that kind will not be examined into on habeas corpus." Matter of Ruef, 150 Cal. 666, 89 P. 605. While this rule is not applied to courts of inferior as distinguished from courts of general jurisdiction, it does apply to the superior courts. Ex parte Greenall, 153 Cal. 767, 770, 96 P. 804; Matter of Kavanaugh, 180 Cal. 181, 180 P. 533.

Disclaiming any intention to suggest or contend that the Corporate Securities Act as a whole is unconstitutional, petitioner does contend that subdivisions 3 and 5a and 6a of section 2 are unconstitutional and void. The argument is, that by the limits which they place upon the right of an individual person to sell or exchange a certain described kind of his own property, these provisions of the statute deprive one of his property without due process of law; are an unreasonable restraint upon the right of contract; are an unreasonable restraint upon trade and commerce; destroy the right of acquiring, possessing, protecting and alienating property; deny the equal protection of the laws as guaranteed under the fourteenth amendment of the federal Constitution and under article 1 of section 13 of the Constitution of California. And so it is contended that, because the sale made by the defendant as charged in the information was by the charge limited to a particular kind of property, the free and uncontrolled sale of which (when sold by the owner) is lawful except as the above-mentioned portions of the statute attempt to make such sale unlawful, and because said provisions of the statute are void, a question is presented which may properly be considered in this proceeding. It remains true, however, that if the defendant in selling the said property was acting as a broker, and did not have a broker's license, then he would be guilty of violation of the act. The information may have been defective in failing to show all of these things; but it was an attempt to charge the commission of an offense, in the selling of property, in violation of the Corporate Securities Act. We therefore conclude that, as settled by the decisions to which we have referred, the remedy by habeas corpus is not available to petitioner.

The writ is discharged, and the petitioner is remanded to custody.

We concur: HOUSER, J.; CURTIS, J.

73 Cal. App. 577

BARKER v. MORRELL. (Civ. 5071.)

(District Court of Appeal, First District, Division 2, California. July 13, 1925.)

Brokers ⟸86(1)—Evidence held sufficient to support findings that plaintiff and defendant participated as real estate brokers in an exchange.

In action by one broker against another for commissions arising from transactions wherein defendant had brought plaintiff a customer under agreement for equal division of commissions, and exchange of properties had been effected with assistance of other brokers, evidence *held* to support finding that plaintiff and defendant participated as real estate brokers in effecting exchange.

Appeal from Superior Court, Santa Clara County; J. R. Welch, Judge.

Action by Myrtle F. Barker against Eva D. Morrell. From a judgment for plaintiff, defendant appeals. Affirmed.

Owen D. Richardson, of San Jose, for appellant.

Rea & Caldwell, of San Jose, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to obtain a judgment for moneys alleged to be due and owing. The defendant answered and the action was tried before the court sitting without a jury. Judgment went for the plaintiff, and the defendant has appealed under section 953a of the Code of Civil Procedure.

Shortly prior to the 8th day of June, 1921, M. J. Mahoney and W. Sicotti were real estate brokers occupying the same office in San Jose. At the same time Myrtle F. Barker was a real estate broker and had an office at Los Gatos. At the same time the defendant, Mrs. Morrell, was a real estate broker and had an office in San Jose. Among other properties, the plaintiff had listed the property of W. H. Crawford and wife. Shortly before the date last mentioned, Mrs. Morrell called at the office of the plaintiff and stated that she would like some properties in that neighborhood, and that all deals consummated between the plaintiff and the defendant should be shared equally fifty-fifty on the commission. A few days later the defendant again called and brought with her Ambrose Taylor, who owned some properties in San Jose. The plaintiff entered the automobile which the defendant was driving and together all three went to the property so owned by Mr. Crawford. Thereafter Mr. Mahoney entered into the transaction and took some part in the negotiations. Mr. Sicotti did the same thing. Still later such negotiations were had that an exchange was agreed upon as between Mr. Crawford and Mr. Taylor. At that time a dispute arose as to how the commissions should be disbursed. The amount of the commissions was not at all in dispute, but the question arose as to what individuals were entitled to share in the payments. Mahoney and Sicotti maintained that they were entitled to the whole; Mrs. Morrell claimed that she was entitled to one-half; this plaintiff claimed that she was entitled to one-half. A conference was held between the owners of the properties and the real estate brokers and the disbursement of the commissions was gone over. At that time the plaintiff was not present; however, as a result of the conference, a writing was executed as follows.

"San Jose, June 8, 1921.

"We, the undersigned, do hereby agree to accept one-third each of any and all commissions coming from the sale or exchange of the properties owned by Ambrose Taylor and his wife, Amelia, and W. H. Crawford and his wife, Maude. Provided: That Mrs. E. Morrell is to settle with Mrs. Barker of Barker & Barker, real estate dealers of Los Gatos for any claim that she may have against the above commissions. We agree to accept our money as it is paid in taking notes from Mr. and Mrs. Taylor for their portion of the commissions.

"[Signed] M. J. Mahoney, W. Sicotti, E. Morrell.

"Witnesses: Maude Crawford, W. H. Crawford."

After that paper was executed, the commissions were paid in accordance with the terms thereof and when the plaintiff heard that the payment had been made to Mrs. Morrell she demanded that she be paid one-half of the payment so made to Mrs. Morrell, and when the demand was refused she commenced this action.

The trial court made findings which are full and complete, and which are in favor of the plaintiff. The appellant contends that the finding to the effect that the plaintiff and defendant participated as real estate brokers in effecting the exchange is not supported by the evidence. In this behalf, appellant quotes the plaintiff's language, wherein she stated that the oral contract was that the plaintiff and defendant agreed "that all deals consummated between us should be shared equally." Then appellant cites evidence to the effect that the deal was consummated by Mahoney and Sicotti, and therefore the evidence did not show that the plaintiff had brought herself within the terms of the oral contract as she stated its terms. The appellant also contends that the original contract was abandoned, and that the exchange which was made was made pursuant to another and different contract.

The latter point is predicated on the testimony of the defendant. After she had had her conversation with the plaintiff, and after she had taken Mr. Taylor to see the Crawford property, she met and had a conversation

with Mahoney. In that conversation Mahoney claimed that the business in hand was wholly his business. The defendant testified thereupon she said:

"Well, if it is your deal then I will give it up and have nothing more to do with it."

Conceding that the defendant by that statement attempted to abandon the contract, the utmost that can be said as to the legal effect is that she was attempting, so far as she was concerned, to abandon it. However, her act would not constitute a contract of abandonment which would be binding on the plaintiff. The appellant shows no portion of the record in which the plaintiff ever agreed to an abandonment. As to the first point regarding the consummation of sales or exchanges, we understand the appellant to contend that the oral contract as stated by the plaintiff would not apply to any case, unless the business should be transacted wholly by the plaintiff and the defendant. The evidence does not support the contention. The plaintiff alleged that all four of the brokers effected the exchange. The trial court found that all four of the brokers "performed services as real estate brokers, all being duly authorized under the laws of the state of California to act as brokers in real estate transactions, and took part in the exchange. * * *" The exact value of the factor as to the amount of labor and the effectiveness of the labor of each of the brokers is a question on which the evidence is distinctly conflicting. However, there is an abundance of evidence to support the finding as made by the trial court, and this court is not at liberty to disturb that finding.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

---

73 Cal. App. 511

HANSEN v. CARR, County Auditor, et al. (Civ. 5220.)

(District Court of Appeal, First District, Division 2, California. July 7, 1925.)

1. Counties ⟸196(4)—Taxpayer cannot bring action for recovery of public moneys, before making demand of district attorney.

In an action by taxpayer against county treasurer, to enjoin payment of certain claims, for an accounting of claims paid, and for recovery of claims paid, amended complaint not showing any demand or refusal upon district attorney, demurrer was properly sustained, under Pol. Code, § 4005b, providing the method for such actions, since taxpayer has adequate remedy by complaint to district attorney.

2. Evidence ⟸83(1)—Until contrary alleged public officer presumed to have done duty.

A public officer is presumed to have done his duty, until facts are alleged to the contrary.

3. Action ⟸48(1)—Cause of action, involving three separate claims, held misjoinder by statute.

In an action by taxpayer against county treasurer, causes of action covering employment of person on tax board, employment of assistant district attorney, and hiring of special counsel, by county commissioners, *held* misjoinder, under Code Civ. Proc. § 427, providing for joinder of causes of action.

4. Parties ⟸29 — "Necessary parties defendant" are those whose rights are affected by action.

Necessary parties to an action in capacity of defendants are those who are interested in resisting demands of plaintiff immediately or consequently, and whose rights will be affected thereby, in accordance with Code Civ. Proc. § 382.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Necessary Parties.]

5. Pleading ⟸52(2)—Several causes of action in same complaint must be separately stated.

Where a complaint contains three causes of action, each containing a suit for injunction, suit for accounting and suit to recover funds, *held*, that the causes of action joined therein must be separately stated as provided by Code Civ. Proc. § 427.

6. Pleading ⟸14—Complaint for accounting against county treasurer held demurrable, as failing to state cause of action.

In an action by taxpayer against county treasurer, a complaint for accounting on claims illegally paid, alleging that payments were made by warrants, approved by county auditor, *held* subject to demurrer because of insufficient facts to state cause of action, since the records were public, and plaintiff could easily have ascertained the amounts.

7. Appeal and error ⟸959(1)—Pleading ⟸225(2)—Leave to amend after demurrer sustained discretionary with trial court, and ruling not reviewable save for abuse.

The granting of leave to amend, after a demurrer has been sustained, is discretionary with trial court, and, in absence of showing of abuse, will not be disturbed on appeal.

8. Appeal and error ⟸918(1)—Where record fails to show request and denial of leave to amend after demurrer, assumed no offer was made.

Where the record fails to show that leave to amend was requested after demurrer was sustained, and application denied, court assumes that no offer of amendment was made.

Appeal from Superior Court, Humboldt County; Denver Sevier, Judge.

Action by Frederick W. Hansen against Thomas K. Carr, Auditor of Humboldt County, and others, in which J. F. Quinn intervenes. From a judgment for defendants and intervener, plaintiff appeals. Affirmed.

J. Logan Beamer, of Eureka (Henry L. Ford, of Eureka, of counsel), for appellant.

Arthur W. Hill, Dist. Atty., and J. J. Cairns, Asst. Dist. Atty., both of Eureka, for respondent Carr.

H. C. Nelson, of Eureka, for respondent Quinn.

NOURSE, J. Plaintiff brought this action as a citizen and taxpayer of the county of Humboldt against the county auditor, the county treasurer, and six members of the board of supervisors of the county, one of whom had succeeded another during the time over which the controversy extended. The complaint was framed upon the theory that certain illegal claims against the county had been authorized by the board of supervisors, audited by the county auditor, and paid by the county treasurer. The purpose of the action was threefold: To restrain the allowance, auditing, and payment of similar claims against the county; to have an accounting of the moneys paid by virtue of the claims so allowed, audited, and paid, and to recover for the benefit of the county the moneys so found to have been illegally paid. The case comes to us on the amended complaint, to which the demurrers were sustained, and upon which judgment was entered in favor of the defendants and the intervener, J. F. Quinn, who came into the proceeding for the purpose of defending against plaintiff's third alleged cause of action.

This amended complaint contains three distinct and separate causes of action. The first cause involves the claims of three persons who are alleged to have been appointed or employed by the board of supervisors of the county for the purpose of advising and assisting the board in the matter of equalizing and revising property values for the purpose of taxation in the county. The second cause of action involves the legality of the employment of an assistant district attorney. The third cause of action involves the legality of the employment, under a resolution of the board of supervisors, of legal counsel to assist the district attorney in defending certain applications which had been made for the diversion of the water of Trinity river, the middle fork of the Eel river and Thatcher and Elk creeks to places outside of the county of Humboldt, which diversions, it was claimed, would seriously injure the public interests of the county. These three separate and distinct causes of action were all joined in the one complaint, and in each of the three causes of action three distinct grounds for relief were stated: An action for an injunction, an action for an accounting, and an action for the specific recovery of money.

[1, 2] The demurrer of the defendants who were joined in the amended complaint was both general and special. Among the grounds specified in the special demurrer are the want of legal capacity on the part of the plaintiff to maintain the action and the improper union of several causes of action as heretofore pointed out. Upon the grounds assigned in the general demurrer, the action of the trial court in sustaining the demurrer was proper, and the failure of the plaintiff to ask leave to amend in this respect justified the entry of judgment in favor of the defendants. In this connection we refer to the absence of any allegation of demand upon or refusal of the district attorney, as a duly constituted legal officer of the county, to maintain the action for the recovery of the moneys alleged to have been illegally expended and for the prevention of further illegal expenditures. Section 4005b of the Political Code provides that:

"Whenever any board of supervisors shall, without authority of law, order any money paid as salary, fees, or for any other purposes, and such money shall have been actually paid; * * * the district attorney of such county is hereby empowered, and it is hereby made his imperative duty, to institute suit, in the name of the county * * * to recover the money so paid, * * * and no order of the board of supervisors therefor shall be necessary to maintain such suit."

The same section authorizes similar proceedings on the part of the district attorney to restrain the payment of such moneys. In Burr v. Board of Supervisors, 96 Cal. 210, 213, 31 P. 38, 39, our Supreme Court affirmed an order of the superior court sustaining a general demurrer to the petition of a taxpayer seeking to review an order of the board of supervisors allowing a certain claim against the county which was alleged to be illegal. The rule of that case is that by virtue of the provisions of section 8 of the County Government Act of 1897 (section 4005b, Pol. Code, as quoted above) a plain, speedy, and adequate remedy was available to the petitioner by complaint to the district attorney, and that the petition failed to state facts sufficient to constitute a cause of action in that it did not show that any information of an alleged wrong had been laid before the district attorney, or that he had failed to perform his statutory duty. In this connection the Supreme Court said:

"To say the least, the interest which a mere taxpayer has in the matter does not entitle him to bring suit in his own name until after the district attorney has refused to perform the duty enjoined upon him."

In Keith v. Hammel, 29 Cal. App. 131, 133, 154 P. 871, 872, in an action in mandamus to compel the sheriff of the county of Los Angeles to pay into the county treasury certain fees which the petition alleged had been illegally retained by the sheriff, the District Court of Appeal of the Second District, following the rule in Burr v. Board of Supervisors, supra, held that the petition failed to state a cause of action, because it was not al-

leged therein that demand had been made upon the proper county officers to commence and prosecute the proceeding, and that they had refused to do so. In the Keith Case the appellate court referred to section 526a of the Code of Civil Procedure, which authorizes a taxpayer's action against public officers to obtain a judgment restraining and preventing certain described illegal expenditures. The court pointed out the proviso in section 526a to the effect that its provisions did not affect any right of action in favor of a county, city, or public officer. It was then said that:

"From the many decisions of the courts of this and other states dealing with this subject, we derive the principle that in the conduct of the ordinary business of a county or city, where the care and protection of the rights of the corporation have been committed to public officers, the primary right goes with the duty belonging to those officers to control the ordinary business of the corporation without the interference of private citizens, even though they be taxpayers."

It was further said that it was not necessary for the court to determine whether the officers of the county were exercising wise discretion by refusing to commence the action, because there was no intimation in the petition that they had refused or neglected to do so. The same may be said as to the amended complaint in the case before us. There is no intimation that the district attorney had refused to institute the action for the recovery of the alleged illegal expenditures, and it is not sufficient to say that a demand upon him would have been unavailing because of interest which he may have had in the second and third alleged causes of action. We are not permitted to assume that because he did not commence a similar action he thereby neglected to perform a duty which the statute imposes upon him as the official legal officer of the county. On the other hand, we are required to presume that he has performed his official duty, until the plaintiff alleges facts to the contrary. For these reasons, the amended complaint fails to state a cause of action, and this defect goes to each of the three alleged causes of action.

[3] In addition to this, the demurrer was properly sustained upon the special ground of misjoinder of actions. Though the main reliance of the defendants is placed upon the specifications in their special demurrer, the plaintiff has been content to argue the general question of the constitutionality of certain statutes and acts of the board of supervisors as arising under the general question of the sufficiency or legality of the claims which are under attack. He has not answered any of the arguments raised by the defendants in their special demurrer; he has failed to file any brief in reply to respondent's brief, and did not appear at the oral argument to support his appeal. For these reasons, we are compelled to make our own assumptions as to what position the plaintiff might take in response to the attack upon his complaint by the special demurrer. The causes which may be united are specified in section 427, Code of Civil Procedure. We assume that it would not be contended that plaintiff's causes of action come under any of the first seven subdivisions of this section, but that they come under the provisions of subdivision 8, which reads:

"Claims arising out of the same transaction, or transactions connected with the same subject of action, are not included within one of the foregoing subdivisions of this section."

[4] Turning to the amended complaint, it appears that the first alleged cause of action relates to the employment of three named individuals as assistants to the board of supervisors in the matter of the equalization and revision of property valuations for the purpose of the assessment and levying of taxes; the second alleged cause of action relates to the employment of a deputy district attorney; the third cause of action relates to the employment of special counsel for a special proceeding pending before the state water commission. No two of the claims involved in the three alleged causes of action arise out of the same transaction, nor are they connected with the same subject-matter of the action. In addition to this, section 427 provides that all the causes of action so united "must affect all the parties to the action." It must be apparent that if the plaintiff had complied with the mandatory provision of section 382, Code of Civil Procedure, to the effect that "of the parties to the action, those who are united in interest must be joined as plaintiffs or defendants," he would have joined as parties defendant to the first cause of action the three persons whom he names in his complaint as having been illegally employed by the board of supervisors, and would have joined as a party defendant to the second cause of action the person whom he names therein as having been illegally employed as deputy district attorney, and would have joined in the third cause of action the person whom he names therein as having been illegally employed as special counsel to assist the district attorney. If a demurrer had been interposed by the defendants for the nonjoinder of these persons, it must have been sustained under the well-settled rule stated in Rowland v. Horst, 188 Cal. 772, 778, 207 P. 373, 375.

"Necessary parties to an action in the capacity of defendants are those who are interested in resisting the demands of the plaintiff either immediately or consequently and whose rights would be prejudicially affected by the controversy."

Though the demurrer did not raise the ground of nonjoinder of parties defendant,

we refer to this fact as illustrating the complete distinction between the three alleged causes of action, and the inapplicability of the code sections authorizing the joinder of several causes of action in the same complaint.

[5] In addition to this, several causes of action are joined in the same complaint and have not been separately stated as required by section 427, Code of Civil Procedure. We have in each of the three counts, or causes of action, a suit for injunction to restrain the payment of claims alleged to be illegal, a suit for an accounting to determine the amount of money which is claimed to have been paid, and a suit to recover on behalf of the county moneys which are alleged to have been illegally expended. Plaintiff's suit for an injunction is one which is properly brought by the taxpayer in his own right within the provisions of section 526a, Code of Civil Procedure. The suit to recover the moneys, alleged to have been illegally expended, is a suit brought by the taxpayer on behalf of the county, the taxpayer standing in the relation of a minor stockholder of a corporation. He does not sue in his own right, so to speak, but sues for the county to recover moneys which he alleges have been illegally diverted from the county funds. This right of action is recognized in the decisions of our Supreme Court, though not specially granted by statute. Osburn v. Stone, 170 Cal. 480, 482, 150 P. 367; Mock v. City of Santa Rosa, 126 Cal. 330, 349, 58 P. 826.

[6] In so far as the complaint seeks an accounting of the moneys paid out on the claims alleged to have been illegally paid, there is a failure to state facts sufficient to constitute a cause of action, because it is alleged that these payments were all made by the county treasurer upon warrants approved by the county auditor, and these, being matters of public record, were available to the plaintiff. It would have been an easy matter for him to have examined these records and to have pleaded the amounts claimed to have been illegally paid, rather than to place this burden upon the trial court under the guise of a suit for an accounting.

[7, 8] The appellant insists that, not withstanding the defects in his complaint (and from his failure to defend it we may assume that he concedes that these defects are present), he should have been permitted to amend, and that the trial court abused its discretion in entering judgment for the defendants without giving such leave to the plaintiff. The difficulty confronting the plaintiff on this point is that the record does not disclose that he asked leave to amend, or that permission was denied him by the trial court. The granting of leave to amend after a demurrer is sustained is, of course, a matter resting primarily in the discretion of the trial court. The refusal to grant such permission will not be disturbed upon appeal in the absence of a showing of abuse of that discretion. Kleinclaus v. Dutard, 147 Cal. 245, 252, 81 P. 516; Stewart v. Douglass, 148 Cal. 511, 512, 83 P. 699. Where, therefore, the record fails to disclose that leave to amend was requested, and that the application was denied by the trial court, we must assume that no offer of an amendment was made, for otherwise we would be asked to hold that there was an abuse of discretion on the part of the trial court in denying something that was never sought until after the appeal was taken. Mullarky v. Young, 9 Cal. App. 686, 690, 100 P. 709; Simons v. Pacific Gas & Electric Co., 64 Cal. App. 74, 78, 220 P. 425; Whyte v. City of Sacramento, 65 Cal. App. 534, 224 P. 1008.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

73 Cal. App. 492

PEOPLE v. RUSSELL. (Cr. 856.)

(District Court of Appeal, Third District, California. July 6, 1925. Rehearing Denied Aug. 5, 1925. Hearing Denied by Supreme Court Aug. 31, 1925.)

Bastards ⊂⊃17½ — Truth of conflicting testimony concerning fatherhood of child exclusively for jury.

In prosecution for failure to support a minor child, where defendant's evidence, if true, would make it impossible for him to be the father of the child, and if evidence of prosecution be true the reasonable conclusion would be otherwise, the question as to which evidence to believe was exclusively for the jury, and its finding will not be disturbed.

Appeal from Superior Court, Sacramento County; J. F. Pullen, Judge.

Lowell Russell was convicted of failure to provide for a minor child, and he appeals. Affirmed.

John R. Connelly, of Sacramento, for appellant.

U. S. Webb, Atty. Gen., and J. Charles Jones, Deputy Atty. Gen., for the People.

PLUMMER, J. Appellant was tried and convicted of the crime of failing, without lawful excuse, to furnish necessary support for his minor child, and sentenced to serve 180 days in the county jail of the county of Sacramento. Defendant's motion for a new trial being denied, he appeals to this court therefrom and from the judgment of conviction above named. The only question assigned for reversal is that the judgment is contrary to the evidence. It appears from the transcript that during the year 1923 the

defendant took the prosecuting witness, Mrs. Russell, then an unmarried woman, out for an automobile ride, and during the course of this automobile ride an act of illicit intercourse took place, which resulted in her pregnancy. During the month of February following the prosecuting witness and the appellant intermarried. The appellant made the defense that he was not the father of the child.

The testimony on the part of the prosecution is to the effect that the automobile ride just mentioned took place some time between the 1st and 16th days of July, 1923; that the child was born the 10th day of May, 1924. The testimony is all to the effect that only one act of sexual intercourse took place prior to the marriage. The prosecuting witness testified particularly as to the occurrences, as to the automobile ride, as to the dates, and as to the fact of the appellant being the father of the child. The prosecution also introduced the testimony of five additional witnesses, who all testified that the appellant had said to them at different times that the child was his. The testimony also shows that the father visited the mother at the hospital a few days after the child was born, that he participated in naming the child, and did some other acts indicating acknowledgment of parentage. On the part of the prosecution there was further additional testimony to the effect that the automobile ride in question was taken in a roadster.

On the part of the defendant and appellant, testimony was introduced to the effect that the illicit act took place on the 19th or 20th day of May, 1923; that the roadster referred to in the testimony of the prosecuting witness was in the town of San Mateo from the 1st to the 23d day of July, 1923; that the ride was taken in a Page roadster on the evening of the 19th or 20th day of May before stated, and that the same Page roadster was not in the city of Sacramento at any time during the month of July, 1923. Witnesses, other than the defendant, testified to circumstances and matters indicating that the act of intercourse did not take place during the period of time claimed by the prosecution; that it took place at the earlier date, and at such an earlier date that the parentage of the child cannot be attributed to the defendant. If the matters testified to by the witnesses for the defendant were absolutely true, then the conclusion should have been drawn therefrom that the defendant was not the father of the child for the nonsupport of which he was being prosecuted. On the other hand, if the facts and circumstances testified to by the mother of the child and the wife of the defendant, and other witnesses introduced on behalf of the prosecution, be true, then, and in that case, the reasonable conclusion would be the defendant is the father of the child. Such being the case, the questions presented to us upon this appeal are matters only within the exclusive province of the jury. It was the province of the jury to determine whether the testimony introduced by the prosecution should be accepted, or whether the testimony introduced on the part of the appellant should be believed and acted upon. The mere fact that the testimony on behalf of a defendant is directly contrary to the testimony introduced on the part of the prosecution does not furnish any grounds upon which this court can order a reversal, and this is true irrespective of whether or not the greater number of witnesses testify on one side or the other, unless the testimony introduced is inherently improbable. The jury having accepted the version given by the mother of the child and of the other witnesses supporting the theory of the prosecution, and such testimony, if believed, being sufficient to support the verdict, there remains nothing further for this court to do except to affirm the order and judgment of the trial court; and it is so ordered.

We concur: FINCH, P. J.; THOMPSON, Justice pro tem.

73 Cal. App. 519

BERMAN v. INDUSTRIAL ACC. COMMISSION OF CALIFORNIA et al.
(Civ. 5089.)

(District Court of Appeal, Second District, Division 1, California. July 7, 1925.)

1. Master and servant ⟸405(4) — Evidence held to support finding that employee's disability was not due to injury.

Evidence *held* sufficient to support findings of Industrial Accident Commission that disability of employee, overcome by carbon monoxide gas, was result of disease and not of injury.

2. Master and servant ⟸417(7)—Finding of Industrial Accident Commission on evidence conclusive.

The finding of Industrial Accident Commission in matters of award stands on the same footing as the finding of a judge, or verdict of a jury, and will not be set aside, if there is any substantial evidence upon which it may rest.

Certiorari to Industrial Accident Commission.

Application for certiorari by Harry Berman against the Industrial Accident Commission, the Thomas H. Ince Studios, and the Ocean Accident & Guarantee Company, to review an order of the Industrial Accident Commission, refusing compensation for injuries. Order affirmed.

D. B. Maxell, of Venice, Cal., for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

HOUSER, J. From the petition of the applicant herein for a writ of review it appears that, while acting in the course of his employment, he suffered an injury in that he was overcome by carbon monoxide gas. For a period covering several months after he sustained the injury, petitioner suffered from some sort of illness, and the ultimate question submitted to the respondent Industrial Accident Commission was whether or not such illness was proximately caused by the injury of which petitioner complained.

The findings by the Commission regarding the matter were that:

"The disability from which the employee was found to be suffering after the expiration of seven days from the date of said injury was caused by a disease or condition, and not to any injury or injuries arising out of said employment, nor proximately caused by said employment."

The only question which this court may decide in this proceeding is whether or not there was sufficient evidence to support such finding. Pruitt v. Industrial Accident Commission, 189 Cal. 459, 209 P. 31; Walker v. Industrial Accident Commission, 177 Cal. 737, 171 P. 954, L. R. A. 1918F, 212; Roebling's Sons Co. v. Industrial Accident Commission, 36 Cal. App. 10, 171 P. 987.

[1] At the hearing before the commission, two doctors expressed the opinion, in substance, that the illness of petitioner was directly traceable to the injury so received by him. In rebuttal thereof, one physician filed his report with the commission to the effect that he saw no relationship between the carbon monoxide poisoning and the major symptoms exhibited by the petitioner. The conclusion reached by a second medical expert was that the gas poisoning to which petitioner had been subjected had little or nothing to do with the illness from which he was suffering at the time the examination was made by said doctor; and from a report to the commission made by a third doctor, who had been appointed by the commission for the express purpose of making a special examination and report on petitioner's condition of health, it appears, that, in his opinion, at the time his report was made there were "no present manifestations of the original injury; * * * no per cent. of disability in relation to the original injury; no disability with reference to work in which the applicant was engaged when injured as far as the original injury was concerned; no permanent disability."

[2] It is therefore clear that the evidence was sufficient to support the findings. As is said in the case of Pruitt v. Industrial Accident Commission, 189 Cal. 459, 466, 209 P. 31, 34:

"The finding of the commission in such matters stands upon the same footing as the finding of a judge, or the verdict of a jury, and is not to be set aside if there is any substantial evidence upon which it can rest"—citing cases.

The award of the commission is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 604

PADDON v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5368.)

(District Court of Appeal, First District, Division 1, California. July 14, 1925.)

Contempt ⟸63(4)—Judgment of contempt not void for failure to recite facts constituting contempt.

A judgment of contempt, not reciting facts constituting contempt, was not void when the judgment of commitment contained a full résumé of the facts therein.

Certiorari to Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Certiorari by W. L. Paddon to review an order of the Superior Court of the City and County of San Francisco and the Judge thereof, committing petitioner for contempt of court. Writ denied.

See, also, 65 Cal. App. 34, 223 P. 91; 65 Cal. App. 790, 223 P. 93.

J. L. Smith, of San Francisco, for petitioner.

C. A. Linn, of San Francisco, for respondents.

PER CURIAM. It appears from the petition that William Locke Paddon was, on the 5th day of September, 1924, adjudged guilty of contempt of court for having failed and neglected to obey a certain subpœna, issued out of the superior court, in and for the city and county of San Francisco, state of California. See William Locke Paddon v. Superior Court, 65 Cal. App. 34, 223 P. 91.

The petition herein further recites that no penalty was imposed for such contempt until the 10th day of July, 1925, when the superior court ordered petitioner to be imprisoned in the county jail for a period of five days. It is here claimed that the judgment of contempt is void on its face, as it does not state or recite the facts constituting the contempt.

The judgment of commitment, however, which is not made a part of the record, contains a full résumé of the facts, and recites that petitioner was adjudged guilty of a contempt of said court committed in its immediate presence on the 21st day of May, 1923, and that the matter was, with the consent of petitioner, duly continued from time to time until the 10th day of July, 1925, for the pur-

pose of sentence, at which time petitioner was ordered imprisoned, by reason of his duly adjudged contempt of court, in the county jail of the city and county of SanFrancisco for a period of five days.

Under these circumstances it cannot be said that the judgment and commitment are void.

The writ is denied.

---

73 Cal. App. 622

GAFFNEY et al. v. GRAF et ux. (Civ. 5173.)

(District Court of Appeal, First District, Division 2, California. July 16, 1925.)

1. Fraud ⟸13(2)—False statement of fact without knowledge actionable.

Where seller makes a misstatement of fact, not knowing it to be true, to induce sale, and sale is made as result of buyer's reliance on representations, seller is answerable to buyer to same extent as if he had actually known that his representations were false.

2. Appeal and error ⟸766—On appeal on typewritten transcript, adverse judgment on cross-complaint affirmed, where no part of record relating to cross-action appears in brief.

Where appellant appealing on typewritten transcript under Code Civ. Proc. § 953a from adverse judgment on his cross-complaint prints no part of the record pertaining to his cause of action in his brief, the judgment will be affirmed.

3. Fraud ⟸25—Damage essential element.

In an action for fraud in the exchange of automobiles, both parties having misrepresented the facts, where evidence showed that cross-complainant had suffered no damage by reason of the misrepresentations, no recovery could be had, since an essential element in an action for fraud is the occurrence of both fraud and damage.

Appeal from Superior Court, Los Angeles County; J. R. Welch, Judge.

Action by J. Wyman Gaffney and others, copartners doing business under the firm name and style of the Gaffney Motor Sales Company, against F. C. Graf and wife, in which defendants filed a cross-complaint. From a judgment denying recovery to either party, defendants appeal. Affirmed.

Wm. C. Jensen, of Los Angeles, for appellants.

Dave F. Smith, Walter T. Casey, and Andreani & Haines, by M. L. Haines and Martin L. Haines, all of Los Angeles, for respondents.

NOURSE, J. Plaintiffs sued the defendants for damages for fraud growing out of the exchange of two automobiles. The defendants' cross-complaint against the appellants also charges fraud in the same transaction. The trial court found that both parties were guilty of concealment of facts material to the exchange, and denied recovery to both. The defendants appealed from that part of the judgment "wherein and whereby it is and was decreed that defendants and cross-complainants take nothing in said action." The appeal is based upon a record prepared under section 953a, Code of Civil Procedure.

The facts of the case are that on May 27, 1921, the plaintiffs sold a new Owen Magnetic automobile to defendants for the sum of $7,750, which was covered by a payment of $4,000 in cash and the delivery of a secondhand Daniels automobile, which was taken in the transaction at a valuation of $3,750. This Daniels car was represented to the plaintiffs as being a 1920 model, whereas in truth and fact it was a 1919 model. The allegations of the complaint are that if the Daniels car had been as represented it would have been of the value of $3,750, but that being a 1919 model it was not worth more than the sum of $1,750. The plaintiffs were automobile dealers, and soon after the delivery to them of the Daniels car they made a sale of it, but the purchaser thereof returned the car to the plaintiffs soon thereafter when he discovered that it was a 1919 model. The plaintiffs canceled their sale with this customer, and thereafter sold it as a 1919 model for the sum of $1,500, which it was shown was a fair value for the car at that time.

The fraud on which the defendants relied in their cross-complaint was the concealment on the part of plaintiffs' agent of the fact that the Owen Magnetic car was manufactured by a factory which was at that time in the hands of a receiver The defendant F. C. Graf testified that if he had known that fact he would not have accepted the Owen Magnetic car in the trade. However, it appears from his own testimony, and this is not disputed in any way, that he used the car for a period of five or six months after he had learned that the parent company was in the hands of a receiver, and that he then traded this car with $500 in cash for a second Owen Magnetic car manufactured by the same company, which was still in the hands of a receiver, and which was taken in at a valuation of $9,300. It also appears from his testimony that, while he was using the car the plaintiffs traded to him, he expended about $700 in alterations and repairs. Allowing this in the second trade, it appears that in addition to six months' use of the car which the plaintiffs traded to them, the defendants made a clear cash profit when they traded for a second car of the same make.

On this appeal the appellants frankly con-

cede that they told respondents that the car was a 1920 model, and that in truth and in fact it was a 1919 model. They also concede the well-settled proposition that, when parties are in pari delicto, neither one should recover as against the other, and that this rule is not modified or altered by reason of the fact that one party sustained more damage than the other. The sole ground of appeal urged by the appellants is that the facts do not justify the finding of the trial court that the allegations of fraud and false misrepresentations made in the complaint were true. They insist that it was incumbent upon the respondents to show that the appellants knew that the statements were false, or that they made the statements with reckless disregard as to the truth or falsity of them, and that they made them with intent to deceive. The plain answer to the appellants is that they had every opportunity to know the truth of the matter contained in their representations as to the model of the car, and that they knew that the year of the car was an inducing feature to the sale.

[1] When a party makes a positive statement of a fact which he does not know to be true, but which he intends to influence the purchaser to a sale, and these representations are relied upon by the purchaser, and the sale is thereby effected, the party is answerable to the purchaser to the same extent as if he had actually known that his representations were false. In other words, a person may not take it upon himself to state as a fact that of which he is wholly ignorant, and escape legal responsibility such as would follow if he had known the falsity of the representations.

Here it is conceded that the representations as to the model of the car were made by the appellants and that they were false. The proof is without dispute that the appellants either knew them to be untrue or had every opportunity to know the true facts, and thus that they were recklessly made. The essential elements are present in the proof—that the representations were made for the purpose of inducing the respondents to make the change, and that the respondents relied upon them and were induced to make the exchange thereby to their injury.

[2] In addition to this, as this appeal is taken from that portion of the judgment which decreed that the cross-complainants should take nothing, all the issues in the cross-complaint must be open to us for review. The appellants have wholly failed to comply with the provisions of section 953a, Code of Civil Procedure, in that no portion of the record relating to the cause of action appearing in their cross-complaint has been printed in the brief. The only attempt which the appellants have made to comply with the provisions of that section is the printing of a portion of the testimony of one of the defendants which related to the matter of the purchase and registration of the Daniels car, and was confined to the cause of action raised by the original complaint. As the record presented by the appellants does not meet the demands of the statute, the judgment should be affirmed under the rule of Estate of Berry (Cal. Sup.) 233 P. 330.

[3] But an examination of the typewritten transcript discloses a state of facts under which any recovery by the appellants on their cross-complaint must be denied. It is axiomatic that deceit or misrepresentation without damage does not give a cause of action; that the essential element of an action of deceit or fraud is the concurrence of both fraud and damage. It has been put in another way, that neither fraud without damage or damage without fraud is sufficient to support an action. 12 R. C. L. § 10. The evidence in the typewritten transcript shows without dispute that the misrepresentations or fraud upon which the appellants relied in their cross-complaint was without damage to them because they lost nothing by it. It was their claim that the concealment by the respondents of the fact that the parent company of the Owen Magnetic car was in the hands of a receiver was the concealment of a fact which, if it had been known to them, would have impelled them to refuse to accept the car. Notwithstanding this, however, and long after they learned that the company was in the hands of a receiver, they continued to operate the car and traded it in for another car of the same make, and at a time when the parent company was still in the hands of a receiver. In this trade they made a clear cash profit over the amount allowed in the trade with the respondents, and in addition to this had used the car for their own purposes for a period of five or six months. This evidence has been pointed out to us by the respondents as conclusively showing the failure of the appellants to make proof of the essential elements of their cross-complaint, and the appellants have failed to make any reply thereto. We have not found any evidence in conflict with what has been referred to, and, upon the record, it necessarily follows that the appellants failed to sustain by proof the essential allegations of their cross-complaint, and for this reason they were not entitled to recover.

The portion of the judgment appealed from is affirmed.

We concur: LANGDON, P. J.; STURTEVANT, J.

73 Cal. App. 521

INTERNATIONAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5027.)

(District Court of Appeal, Second District, Division 1, California. July 9, 1925.)

1. Master and servant ⊂⊃417(7)—Finding contributions by deceased reasonable rental for home held conclusive.

In an application for certiorari to review an award of Industrial Accident Commission, where deceased had contributed $50 monthly toward paying a mortgage on the home of his mother, and nothing in the record shows the contrary, court will hold this amount to be a reasonable rental for premises occupied, as found by the Commission.

2. Master and servant ⊂⊃388—Reasonable contribution for support of family may be used to acquire home.

A reasonable amount, used out of contributions for support of family for the purpose of acquiring home, is within the intent and purpose of the Workmen's Compensation Act, particularly section 69 thereof.

3. Master and servant ⊂⊃388—Award for death of workman making contributions to pay mortgage on parent's home held proper.

An award made by Industrial Accident Commission for death of boy who had contributed $50 monthly to support of mother and minor brothers and sisters, the $50 being used to pay mortgage on home of mother, *held* proper, on theory that the $50 monthly was a contribution for support of family.

Certiorari to Industrial Accident Commission.

Application for writ of certiorari by the International Indemnity Company against the Industrial Accident Commission, Sarah E. Foster, and Fred Foster and others, minors, by their guardian ad litem, Sarah E. Foster, to review an order of the Industrial Accident Commission awarding compensation for death of Terry D. Foster. Award affirmed.

Clarence B. Runkle, Joe Crider, Jr., and W. I. Gilbert, all of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

HAHN, Justice pro tem. This matter comes before the court upon a writ of certiorari, the petitioner asking that an award of the Industrial Accident Commission of California be reviewed by this court.

It appears from the record that Terry D. Foster, an unmarried man, met his death while in the course of his employment with the Reliance Oil Company at Huntington Beach, Cal. The deceased left surviving him a mother and father and also four brothers and sisters, who were minors. At the time of Foster's death, and for some time prior thereto, he was residing with his mother, father, and family, although he was absent from home temporarily in his employment. The home located at Los Alamos stood in the name of the mother, and was subject to a $2,000 mortgage, which was made payable in monthly instalments of $50 each. At the time of the accident, and for several months prior thereto, the deceased had been working at Huntington Beach, and had been monthly sending $50 to his mother at Los Alamos. The father of the deceased was working in the oil fields near Norwalk, and was sending to his wife on an average of $3.62½ a day. The wife and mother maintained the home for the four minor children, who were attending school, and the money which she received from both her son and husband was placed in a common fund upon which the mother drew for the funds necessary to pay the $50 monthly on the mortgage, and also to provide food, clothing, and maintenance for herself and the four minor children.

The Industrial Accident Commission made the following finding and award in favor of the mother of the deceased and her four minor children:

"Said employee left surviving him Sarah E. Foster, Fred Foster, Bernice Foster, James Foster, and Ruth Foster, his mother, minor brother, minor sister, minor brother, and minor sister respectively, who were partially dependent upon him for support. The annual contribution for their support was $700, this amount being based upon payments of $50 a month and the additional sum of $100 a year. Said sum of $50 a month was paid by the deceased to the dependents to be applied upon the payment of installments due upon a mortgage on the real property which constituted the home of said applicants, said payment being in fact and ultimate effect for the purpose of meeting current expense equivalent to rent, and necessary to be paid to provide said dependents with a house in which to live. The payment of $100 a year was devoted to the purchase of clothing for said dependents. The death benefit to which said dependents are entitled is $2,100, payable in weekly installments of $20.83. Claimants are also entitled to an award for $100 for burial expenses, payable to Angus McCauley. Said weekly payments are based upon wages in excess of the maximum. Amount accrued to October 4, 1924 (thirteen weeks) is $270.79, on account of which nothing has been paid."

The petitioner herein attacks the award of the Industrial Accident Commission on the ground that the finding of the Commission is to the effect that the $50 per month contributed by the deceased prior to his death was used for the payment of the monthly instalments due on the mortgage, which, in effect, is a finding that these monthly payments were not contributed for the maintenance and support of the mother and minor children, but rather for an investment in the home. It appears that the Commission in

making the findings and award did so upon the theory that the $50 per month contributed by the deceased and used toward the payment of the mortgage was, in effect, the equivalent of the payment of rent, and if these payments on account of the mortgage had not been made, that the mortgage presumably would have been foreclosed, and the mother and minor children ejected from the home, and thus would have been without shelter. The petitioner concedes that it would have been well within the power of the Commission to have made a finding and award for rental, or as the equivalent of rental, but that the finding that the entire sum of $50 per month was the equivalent of rental is not supported by the evidence in the case, and, furthermore, that such a sum for rental, compared with the entire sum contributed for the maintenance of the mother and minor children, was out of proportion.

[1] There is nothing in the record to show that the reasonable rental value of the premises occupied by the dependents was less than $50 per month; nor is there any evidence to support petitioner's contention that a dwelling place was obtainable at a less sum than $50 per month that would have met with the needs and income of the family. Hence this court is not in a position to hold that the $50 per month, as found by the Commission, was not a reasonable amount to be allowed in lieu of rental for the family; and upon the further ground that where there is any evidence that will support the finding of fact made by the trial body or court, this court will not disturb such finding.

But even were we to assume for the sake of argument that the Commission was not justified in finding that the entire sum of $50 per month was the equivalent of rental, there is both reason and authority for the contention urged by the respondent that, even though a portion of the $50 payments was in fact used or operated as a fund for the acquisition of a home, nevertheless such payments would be regarded as well within the provisions of the Workmen's Compensation Act (St. 1917, p. 831).

In the case of Milwaukee Basket Co. v. Wiecki, reported in 173 Wis. 391, 181 N. W. at page 308, the court, considering the question as to whether or not payments made for the purchase of a home occupied by the alleged dependents should be treated as part of the necessary support of the family, said:

"Under present day conditions there cannot be any question but that payments, to a reasonable extent at least, for the purpose of maintaining the roof which shelters the family, either in the shape of rent if it be not their own, or interest upon existing indebtedness on such home if it be theirs, and for repairs, insurance, or such like items, should be considered a part of the necessary support of the family within the meaning of the statute."

Again, in the case of Pushor v. American Ry. Express Co., 149 Minn. 308, 183 N. W. page 839, the court had under review a judgment arising out of the Workmen's Compensation Act of Minnesota. It appears in that case that the deceased, an unmarried son, was contributing his weekly wages of $20 to the family fund. This fund was used to maintain the family, and, in addition, to make payments on account of a home purchased by the young man's father. The opinion, reversing the lower court in finding against the claimant, says:

"A year before the boy's death the parents had purchased the house where the family lived. During the year $900, taken from the common earnings of the family, had been paid on the purchase price. The remainder of the earnings was used to support the family. It was held that the boy's parents were partially dependent for their support upon the earnings of their son, and that compensation should be fixed on the basis of the difference between the amount he earned and the amount necessarily taken from the general family purse for his individual care and support. With respect to the payments for the house, the court remarked that they should be considered as part of the necessary support of the family sheltered under its roof and as the equivalent of rent, which, under present day conditions, is so large an item in the household budget."

In the case of In re McMahon, 229 Mass. 48, 118 N. E. 190, the Supreme Court of Massachusetts held that the sum of $288.87, saved by the deceased and contributed by him toward the payment of costs of certain alterations on the family home, was a contribution to the support of the dependents. That a reasonable amount contributed to the payment for a home occupied by the family is a contribution toward the support of the dependents is held in Atwood v. Connecticut Light & Power Co., 95 Conn. 669, 112 A. 269. To the same effect is the rule recognized in Day v. Sioux Falls Fruit Co., 43 S. D. 65, 177 N. W. 816.

[2] We believe that a reasonable amount used out of the contributions made for the support of the family for acquiring a home or permanent place of abode for the dependents is well within the purpose and intent of the Workmen's Compensation Act of California. A home that implies the elements of permanency, where the children of the family may gather at the fireside, and out of which as a rule emanates certain elements of pride and sacrifice, is quite as important in the general welfare and raising of children as many other elements which are regarded as essential to the maintenance of the family in addition to mere clothing and food. That the Legislature intended the act in question to be interpreted as including more than mere food and raiment is apparent when we read section 69 of the act:

"Whenever this act, or any part or section thereof, is interpreted by a court, it shall be

liberally construed by such court with the purpose of extending the benefits of the act for the protection of persons injured in the course of their employment."

[3] For the foregoing reasons, and upon the considerations set forth, we are of the opinion that the monthly sum of $50 contributed by the deceased to his mother was properly held by the Commission as a contribution for the support of the dependent family. The petition for writ of certiorari is therefore dismissed, and the finding and award of the Commission is approved.

I concur: CURTIS, J.

CONREY, P. J. (concurring). I am not prepared to agree that payments of the character here in question would be a sufficient basis for compensation beyond the point where the amounts of the payments made to be applied on the mortgage were the reasonable equivalent of rental of the premises. But under the findings, which I think are justified by the evidence, it may fairly be inferred that the payments which were applied on account of the mortgage indebtedness were nothing more than a substitute for rental, which otherwise would have been paid for leased premises occupied by the family.

Subject only to this reservation of opinion on the point stated, I concur in the decision.

DIMITY v. DIXON et al. (Civ. 5218.)

(District Court of Appeal, First District, Division 2, California. July 16, 1925.)

Appeal and error ⊂=792—Supreme Court without jurisdiction to entertain appeal not taken within prescribed time.

Where appeal is not taken within time prescribed by Code Civ. Proc. § 939, nor extension of time given, appellate court is without jurisdiction to entertain it whether respondents raise point or not, since provisions of statute are jurisdictional and mandatory, and it is duty of court to dismiss appeal on its own motion.

Appeal from Superior Court, Kern County; Erwin W. Owen, Judge.

Action by Ethel M. Dimity, as administratrix of the estate of O. G. Dixon, deceased, against A. H. Dixon and others. From a judgment for defendants, plaintiff appeals. Appeal dismissed.

Alfred Siemon, of Bakersfield, and L. E. Nathan, of Los Angeles, for appellant.

Claflin & Lambert and W. A. McGinn, all of Bakersfield, for respondents.

NOURSE, J. On February 13, 1923, plaintiff commenced this action to procure an accounting of the affairs of the partnership which she alleged had been formed by her former husband, O. G. Dixon, his father, F. S. Dixon, and his brother, A. H. Dixon, some time in the year 1908 for the conduct of an undertaking business in the city of Bakersfield. The plaintiff also sought to impress upon certain real property a trust which she alleged arose from the purchase of such property with funds of the alleged partnership. The complaint alleged that her husband, O. G. Dixon, died on October 6, 1914, and that his father, F. S. Dixon, died some time after February 10, 1920. Jessie C. Dixon was joined as a defendant on the theory that she was a purchaser of a portion of the property without consideration and with full knowledge of the alleged trust. Answers were filed, and the cause went to trial before the court, sitting without a jury, on November 7, 1923. At the close of plaintiff's case defendants A. H. and Hannah Dixon moved for a nonsuit, in which motion the defendant Jessie C. Dixon joined. The motion was granted, and on November 9, 1923, judgment of dismissal as to A. H. and Hannah Dixon was duly entered therein and recorded on November 10, 1924. On January 28, 1924, a paper entitled "Findings of Fact and Conclusions of Law" was filed, which concluded with a judgment of nonsuit in favor of Jessie C. Dixon. On February 13, 1924, the plaintiff filed her notice of appeal from the judgment, the notice specifying the judgment "dated November 10, 1923," and "entered November 10, 1923." The appeal was taken under what is usually termed the old method, and the record is presented upon a bill of exceptions which was settled on May 8, 1924. It does not appear from the record that any motion for a new trial was pending, that a motion for a new trial had been made, or that any similar motion was pending between the period of the entry of the judgment and the filing of the notice of appeal.

Under the provisions of section 939, Code of Civil Procedure, an appeal from any judgment may be taken within 60 days from the entry thereof. By the terms of the same section this time may be extended if a motion for a new trial is pending. The provisions of this section are jurisdictional and mandatory. "If an appeal is not taken within the time limited by the statute, the appellate court is without jurisdiction to entertain it." 2 Cal. Jur. § 165. As this objection goes to the jurisdiction of the appellate court to entertain the appeal, it is not waived by the failure of the respondents to raise it. On the other hand, it is the duty of the appellate court to notice the defect and to dismiss the appeal on its own motion. Id.

On the record before us it appears that the appeal was taken more than 60 days after the entry of the judgment appealed from,

and that none of the circumstances is present which the statute specifies as working an extension of the time given. This applies to the judgment in favor of A. H. and Hannah Dixon. As to the judgment in favor of Jessie C. Dixon, it appears that no appeal was taken. But anticipating that the appellant might insist that she intended to appeal from the judgment of January 28th as well, we have examined the entire record, and find that she wholly failed to sustain her burden of proof as to Jessie C. Dixon, as there is no showing that she was not an innocent purchaser for value.

The appeal is therefore dismissed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

73 Cal. App. 495

PEOPLE v. CARTER et al. (Cr. 1189.)

(District Court of Appeal, Second District, Division 1, California. July 6, 1925.)

1. Larceny ⟸66, 68(2)—Evidence held sufficient to convict of attempted larceny, question of intent being for jury.

In prosecution for attempted grand larceny of car, evidence of defendant's conduct in fleeing from car on owner's approach, and contradictory statements concerning his connection with offense, *held* sufficient basis for conviction, notwithstanding defendant's positive statement that he had no intention of stealing car, question of intent being for jury.

2. Larceny ⟸68(1)—Question of voluntary abandonment of attempted crime for jury.

In prosecution for attempted grand larceny, where defendant left car which he was attempting to start on seeing approach of two men, the question of whether there was a "voluntary abandonment" of the crime not prompted by an outside cause, so as to prevent completion of the offense charged, was for the jury.

3. Criminal law ⟸44—Abandonment of attempted crime no defense, where there is intent coupled with an overt act under the Code.

Where there is intent to commit a crime, coupled with an overt act, the abandonment of the criminal purpose is no defense to charge of attempt to commit the crime, in view of Penal Code, § 664.

4. Larceny ⟸66—Jury justified in finding an overt act in attempted larceny of car.

In a prosecution for attempted grand larceny, the jury was justified in finding overt act constituting more than mere preparation for the crime, where they could have found that defendant's attempt to steal the car failed because of inability to start it or fear of arrest by approaching men.

5. Larceny ⟸68(2)—Existence of criminal intent is for the jury, and finding is conclusive.

Existence of a criminal intent in a prosecution for attempted grand larceny is a question of fact to be determined by the jury from all the circumstances of the case, and its finding is conclusive.

6. Criminal law ⟸427(4)—The relation of defendants jointly indicted is relevant to issue of conspiracy to commit crime.

In a joint indictment of two defendants, where claim is conspiracy to commit grand larceny, evidence of relation of the defendants is relevant as tending to prove conspiracy, and defendant's objection to evidence, impeaching his testimony denying acquaintance with codefendant as being of a collateral issue, was properly overruled.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Willis E. Carter and Ernest G. Booth were convicted of attempted grand larceny, with a prior conviction of felony and defendant Carter appeals. Affirmed.

Shapiro & Shapiro and Marshall A. Stutsman, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and Hamish B. Eddie, of Los Angeles, for the People.

HOUSER, J. In the information, the defendants were charged jointly with the commission of the crime of attempting to commit grand larceny, with a prior conviction of a felony.

Defendant Carter appeals from a judgment of conviction and from an order of the court denying his motion for a new trial.

Appellant contends that the judgment is contrary to law, and that the verdict of the jury is not supported by the evidence.

From the record on appeal, it appears that the jury was justified in believing the followings facts to be true: A man named Shrader, who was the owner of an automobile, parked it near the curb on the street directly opposite a building in which his office was located, and from which place he saw defendant Carter seated in Shrader's automobile, manipulating the levers thereof. At the same time, Shrader could hear the "starter gears working in the car." After watching Carter for several minutes, Shrader and a man named James started across the street in the direction of the automobile, and when they arrived near the center of the street "Carter got out of the car and started to walk down the street." By the time Shrader reached his automobile, Carter and his codefendant Booth, who had been standing near Shrader's automobile while Carter was seated therein, were perhaps 25 feet away from Shrader, who "motioned" to them and called out "Wait a moment," or that he would like to speak to them. Instead of stopping or walking back to where Shrader, James, and a uniformed policeman, who had also arrived on the scene, were standing, the two defendants ran down an alley until it intersected with a street; thence

along that street until they came to an open garage fronting on the street, on the inside of which garage defendant Booth stopped and was arrested by the policeman.

The keeper of the garage testified:

"He (Carter) ran into my place of business and I ran after him and told him to stop, if he didn't stop I would shoot; I took out my revolver and told him if he didn't stop I would shoot. He didn't stop, so I shot in the air, and that didn't stop him; so then I went after him. He went in my place of business, in the garage, between Hope and Grand, down through the alley, through the store onto Pico street, around on Pico street to Grand avenue, down on Grand avenue again to the alley, through the alley, and run into the police officer's arms."

In the course of Carter's flight, as he rounded a corner, he met Shrader, who attempted to stop him. As Carter was running he was calling out "Stop thief!" When Shrader took hold of Carter's arm, Carter struck Shrader, from whom he escaped and continued to run until, as he turned another corner in the street or alley, he met the same officer who had arrested defendant Booth, whom he had in custody, but which officer immediately arrested defendant Carter. A day or two after the occurrence just narrated, Carter made a statement to the effect that he was not at the wheel of the automobile, but that it was another man, who was an ex-convict, who was seated in the automobile at the time in question. He also said that he and Booth "were walking south on Grand avenue about Tenth street, and that they had followed this party south on Grand where the man got into the Packard car" (the car belonging to Shrader); that he (Carter) was standing about 10 feet from this car; that Booth was standing still farther away, and that they "saw the man (Shrader) coming across the street, and they proceeded away from there"; that the reason why they had left the vicinity was that "they had been in trouble, and they didn't want to get caught around there with—when possibly an automobile was being stolen—get into more trouble again." The statement thus made by Carter was in most respects inconsistent with testimony which he gave on the trial of the case.

It also may be said that defendant Carter and his witnesses gave a plausible explanation of his conduct, which was consistent with his innocence, on the occasion to which reference has been had.

[1] Carter testified in effect that he had no intention of stealing Shrader's automobile, and his counsel here contend that the facts are insufficient to authorize a jury to find against his positive statement in that regard. But the question of intent is one that must be solved by the jury. The facts (as shown by the evidence) that defendant was seated in the automobile, manipulating the levers thereof; that the starting motor was running; that he got out of the automobile and walked away when Shrader and James approached him; that when "motioned" to and called upon to "Wait a moment," as Shrader wished to speak to him, after he and James were joined by a uniformed policeman, he did not stop; that he so persistently ran away, even when called upon to stop, or that the man who was following him would shoot; that he failed to stop even after a shot was fired; that he ran, not in a direct line, but in a devious course, along and upon different alleys, streets, and through storerooms, in a manner evidently well calculated to elude and evade his pursuers; that as he ran he shouted "Stop, thief!" that in his efforts to avoid arrest he struck at least one man in the face with sufficient force and violence to break the cartilage of his nose; that thereafter he continued to try to make his escape until intercepted and arrested by a police officer; and that he made inconsistent and contradictory statements regarding his connection with the affair—argue, if not conclusively, at least presumably, that he was guilty of the offense of attempting to commit grand larceny, as charged in the information.

[2] Appellant urges the point that:

"If an attempt to commit a crime be voluntarily abandoned before the act is put in process of final execution, there being no outside cause prompting such abandonment, then this is a complete defense."

The assumption that there was a "voluntary abandonment" and that there was "no outside cause prompting such abandonment" was apparently not shown by the evidence to the satisfaction of the jury. The jury may have concluded that the "outside cause prompting the abandonment" was that defendant saw Shrader and James approaching the automobile which defendant was endeavoring to start, and surmised that one of them was the owner of the automobile; or, the jury may have been convinced from the evidence that Carter had attempted to steal the automobile, but had failed to do so, because he was unable to start it.

[3] There can be no doubt that mere intent by a single individual to commit a crime is not sufficient to amount to a criminal act. However, it is also unquestionable that after the intent has been formed, and such intent has been coupled with an overt act toward the commission of the contemplated offense, the abandonment of the criminal purpose will not constitute a defense to a charge of attempting to commit a crime.

In the case of People v. Oates, 142 Cal. 12, 75 P. 337, it is ruled that in a proper case the giving by the trial court of an instruction that "a person who attempts to commit a crime, but fails, or is prevented or intercepted in the perpetration thereof, is punishable for said attempt," was not error,

as the instruction was substantially in the language of section 664 of the Penal Code.

As is said in the case of People v. Stewart, 97 Cal. 238, 32 P. 8:

"The fact that he [defendant] abandoned his wicked purpose upon the approach of other parties has not the slightest tendency to purge him of the legal consequences of his criminal conduct. If an assault with the intent here alleged is made, it is no less a crime, though the aggressor should abandon his intentions before the consummation of the act, by reason of the pains of a stricken conscience alone."

To the same effect see People v. Johnson, 131 Cal. 511, 63 P. 842; People v. Dong Pok Yip, 164 Cal. 143, 127 P. 1031; People v. Bowman, 6 Cal. App. 749, 93 P. 198.

[4] It is also contended by appellant that no overt act was shown on the part of defendant. The authorities appear to be harmonious to the effect that mere preparation, however elaborate the acts in connection therewith may be, will not suffice to support an accusation of the commission of an overt act as an essential element in an attempt to commit a crime. Something must be done in addition to the mere laying of the plans or the devising of the means by which it is hoped that the criminal offense may be committed. In the leading case of People v. Stites, 75 Cal. 570, 17 P. 693, where the defendant had conspired with a confederate to place a bomb on the track of a street railroad, it appeared that after constructing the bomb he placed it in his pocket and left his home with the intention of meeting his confederate with the ultimate purpose of carrying out the preconceived scheme to wreck one of the cars belonging to the street railroad company. It was there held that, notwithstanding the fact that each step taken by the defendant carried him just that much farther away from the spot which had been selected for the placing of the bomb, nevertheless it constituted an act which would have ended in the consummation of the criminal offense had there been no intervention of circumstances independent of the will of the defendant. To the same effect in principle are the cases of In re Magidson, 32 Cal. App. 566, 163 P. 689; People v. Paluma, 18 Cal. App. 131, 122 P. 431; People v. Petros, 25 Cal. App. 236, 143 P. 246; People v. Mann, 113 Cal. 76, 45 P. 182; People v. Heinrich, 65 Cal. App. 510, 224 P. 466.

In the instant case the jury was justified in believing from the evidence either that an attempt on the part of defendant to steal the automobile had failed because of his inability to start it, or that he had taken fright and abandoned his criminal purpose for the reason that he feared detection and arrest by Shrader and James, whom he saw approaching the automobile as he was manipulating its levers. If, in the nighttime, a man had attempted to pry open a window in a house not belonging to him, and while so engaged had seen two citizens and a policeman approaching him, and thereupon had left the house, and on being called upon to "wait a moment," instead of complying with such request had run away, and thereafter conducted himself as did the defendant on the occasion here in question, no one could doubt the intention of the man who was trying to break into the house.

[5] The decision of the question of the criminal intent, necessary to be attributed to defendant in order that he should be lawfully declared guilty of an attempt to commit grand larceny, rested wholly with the jury. It was one of the component parts necessary to the commission of the offense with which defendant was charged. What defendant's intention was could not be mathematically demonstrated. It was a question of fact to be proven just like any other fact in the case—by the acts and the admissions of the defendant and by other circumstances. If, from such evidence, the jury was satisfied beyond a reasonable doubt that defendant intended to steal the automobile, so far as the conclusion reached by the jury in that regard is concerned, it is final and conclusive (People v. Barker, 137 Cal. 557, 70 P. 617; People v. Johnson, 131 Cal. 511, 63 P. 842); and in the case at bar such decision was not only warranted and justified by the testimony of the witnesses and the physical facts presented, but, manifestly, it is the only logical conclusion that could have been deduced from the evidence.

[6] Defendant was a witness in his own behalf. On cross-examination he was asked for how long a time he had known his codefendant Booth. He replied in substance that he was unacquainted with him and knew him only by sight. In rebuttal thereof, over defendant's objection, the prosecution showed that, after defendant Carter was arrested, certain letters and papers purporting to be the property of Booth, together with three photographs of Booth, were found in Carter's room. Appellant contends that the action of the court in overruling defendant's objection, and in admitting such evidence, was prejudicial error. It is suggested that whether or not defendant was acquainted with Booth was collateral to the issue; and the principle that there can be no impeachment on such matters is invoked. It should be remembered, however, that by the information defendant Carter was charged jointly with defendant Booth. The prosecution claimed that a conspiracy to commit grand larceny existed between the two defendants.

In the case of People v. Childs, 127 Cal. 363, 59 P. 768, where the defendant Childs was charged jointly with a man by the name of Piggott, the question here presented by appellant was ruled on as follows:

"The court did not err in permitting the prosecution to show that Childs and Piggott had been frequently seen together on occasions oth-

er than the one at which the larceny is alleged to have been committed. The evidence tended to show that Childs committed the larceny by aiding and abetting Piggott in taking the stolen property from the person of the complaining witness. It was necessary therefore for the prosecution to show that the defendants were coconspirators in the commission of the crime; and it cannot be said that the fact of their being seen frequently together was entirely irrelevant, and did not tend in any degree whatever to establish the conspiracy."

And so it may be said in this case that the fact that defendant Carter was not only acquainted with defendant Booth, but that they were on terms of intimate friendship was a relevant circumstance in the case tending to prove that a conspiracy existed between them for the purpose of stealing the automobile referred to in the evidence.

In the case of People v. Tiley, 84 Cal. 651, 24 P. 290, which, as to the point raised by appellant, is to the effect that "a party cannot cross-examine his adversary's witness upon irrelevant or collateral matters for the purpose of eliciting something to contradict or impeach him"—is clearly distinguishable in its facts from those presented in the case at bar, in that in the Tiley Case the person regarding whom the defendant was asked as to his acquaintance was a wholly disinterested person and apparently connected with the action only as a witness; while in the instant inquiry, as heretofore mentioned, the individual as to whom the attention of defendant was directed by the question was a codefendant with the defendant on trial, and the question was asked for the purpose of tending to establish that a conspiracy existed between the two defendants.

We perceive no error in the record. The judgment and the order, denying the motion for new trial, are affirmed.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 476

KRUGER v. VERNON et al. (Civ. 3991.)

(District Court of Appeal, Second District, Division 2, California. June 30, 1925. Hearing Denied by Supreme Court Aug. 27, 1925.)

1. Chattel mortgages ⊂=278—Evidence held not to show conversion by mortgagee of mortgaged property.

In suit to foreclose chattel mortgage covering diamond ring which mortgagor had delivered to broker, who had negotiated mortgage, and who had taken care of its assignment to plaintiff, evidence *held* not to show broker was authorized by plaintiff to hold ring for her, so as to authorize recovery by mortgagor on cross-complaint for conversion of the ring.

2. Principal and agent ⊂=123(1)—Broker held not ostensibly general agent of assignee of chattel mortgage, under evidence.

In suit to foreclose chattel mortgage covering diamond ring which mortgagor had delivered to broker, who had negotiated mortgage, and who had taken care of its assignment to plaintiff, broker *held* not ostensibly plaintiff's general agent authorized to represent her in all matters pertaining to her investments, under evidence, within meaning of Civ. Code, §§ 2315, 2317.

3. Principal and agent ⊂=137(1)—Assignee of chattel mortgage not estopped to deny that she authorized broker to hold security for her.

In foreclosure suit by assignee of chattel mortgage covering diamond ring, plaintiff *held* not estopped to deny that broker was authorized to hold ring for her as her agent, merely because he had secured assignment of mortgage to her.

4. Chattel mortgages ⊂=237—Tender of payment of debt secured by mortgage not sufficient, where accompanied by condition wrongfully imposed.

Where mortgagor of chattels had delivered property, in violation of mortgage, to broker, who had acted as agent for mortgagee and assignee of mortgage, tender of payment of amount due on condition that property be returned *held* not effective tender, in absence of right of mortgagor to impose such a condition.

5. Appeal and error ⊂=1048(6)—Cross-examination of owner of mortgage as to whether broker, who absconded with security, had not been her general agent, not prejudicial error.

In foreclosure suit by assignee of chattel mortgage covering diamond ring, which had been delivered by mortgagor to broker negotiating assignment of mortgage for plaintiff, and converted by him on absconding, exclusion of cross-examination of plaintiff as to whether broker had not absconded with her securities, papers, and documents, being an attempt to show that he was her general agent in all matters, *held* not prejudicial error, where witness elsewhere testified that broker did not have charge of her papers or safe deposit box.

6. Appeal and error ⊂=1058(1)—Exclusion of hearsay evidence admissible for purpose otherwise proved not prejudicial.

In foreclosure by assignee of chattel mortgage covering diamond ring, which had been taken by broker, who acted as mortgagee's agent, and also as agent for assignee of mortgage, on absconding after delivery of ring to him by mortgagor, exclusion of testimony of mortgagee as to what broker had told her concerning possession of ring *held* not prejudicial, where his possession was proved by other and uncontradicted evidence.

Appeal from Superior Court, San Diego County; S. M. Marsh, Judge.

Action by L. M. Mann against Geo. T. Vernon and others to foreclose a chattel mortgage. Judgment for plaintiff, and defend-

ants Vernon appeal. On death of plaintiff after appeal. Fannie Kruger, administratrix, was substituted for deceased. Affirmed.

L. E. Dadmun, of Los Angeles, for appellants.

W. S. Staley, of San Diego, for respondent.

FINLAYSON, P. J. This is an action to foreclose a chattel mortgage given to secure a promissory note for the principal sum of $150. The appeal is by the defendants George T. and Zoe Vernon. The action was begun by Lillian M. Mann, who departed this life subsequently to the appeal, but prior to the submission of the case here. The administratrix of her estate has been substituted in this court. Because it will conduce to brevity, we shall refer to the decedent, throughout this opinion, either as the "plaintiff" or as the "respondent," notwithstanding her death and the substitution of her personal representative.

On January 10, 1917, at San Diego, the defendant Anna Archer loaned the Vernons the sum of $150 and took from the latter their promissory note for that amount payable to her order three months after date. To secure payment of the note, and contemporaneously with its execution, the Vernons executed a chattel mortgage to Mrs. Archer. The property mortgaged consisted of a piano, certain household furniture, a watch, and a diamond ring. The mortgage expressly declares that all of the mortgaged property is "located and contained in and about the premises at No. 3536 Grim street, San Diego, Cal.," and that "the same is to remain at aforesaid address and not to be removed without the consent of the mortgagee herein."

On March 11, 1919, the mortgagee, for the consideration of $150 paid to her by plaintiff, executed to the latter a written assignment of the note and mortgage. Thereafter plaintiff brought this action. The Vernons filed an answer and likewise a cross-complaint. In the latter pleading the cross-complainants allege that the diamond ring mentioned in the chattel mortgage had been delivered to and is now in the possession of plaintiff; that its reasonable value is $700; that on November 29, 1920, they tendered to plaintiff an amount equal to the principal of the note and the accrued interest thereon, and offered to pay the same, provided plaintiff would cancel the note, satisfy the mortgage, and deliver the diamond ring to them; that plaintiff refused to do any of these things; and that by reason of such refusal plaintiff has wrongfully converted the ring to her own use. Wherefore they pray damages against plaintiff in the sum of $700, and that the latter do not recover on the note or mortgage.

In her answer to the cross-complaint plaintiff denied that the diamond ring was ever delivered to her, and denied all knowledge of the ring, save such as may be afforded by the mortgage itself. The court found that the ring never was delivered to plaintiff and that she never had possession of it; also that the Vernons never tendered to plaintiff the amount due on their promissory note or any part thereof. As conclusions of law from its findings of fact, the trial court found that plaintiff did not convert the ring to her own use; that the Vernons have not been damaged in the sum of $700 or in any amount whatever; that plaintiff is entitled to recover from the Vernons the principal of the note, with interest thereon from September 10, 1919, and to have the mortgage foreclosed; and that the action should be dismissed as to the defendant Anna Archer. Judgment was entered accordingly, and, as we have said, the appeal therefrom is taken by the Vernons.

Appellants present several points. The contention upon which they lay especial emphasis is that the evidence is insufficient to sustain the finding that the diamond ring was not delivered to, and was never in the possession of, respondent. At or about the time when the note and mortgage were executed, one of the mortgagors, without any previous authority from the mortgagee, delivered the ring to a brother-in-law of respondent, one S. H. Kruger, who appears to have conducted a brokerage business in San Diego, and who absconded on August 8, 1919. It is probable that Kruger disposed of the ring for his own use and benefit before he left San Diego, or that he took it with him when he departed for regions unknown. At any rate, the ring was never in the actual possession of respondent or of her assignor, Mrs. Archer. Kruger represented Mrs. Archer in the matter of her loan to the Vernons and in the negotiations which led up to the execution of the note and mortgage. He also represented respondent in the matter of the assignment of the note and mortgage to her. Appellants claim that because they delivered the ring to Kruger he held it for Mrs. Archer as her agent while she was the owner of the note and mortgage, and that upon and after the assignment of those documents to respondent he held it for the latter as her agent. Wherefore it is claimed that Kruger's possession of the ring, at all times subsequent to the assignment of the note and mortgage to respondent, was her possession, and hence that the finding that she never had possession of the ring is unsupported by the evidence.

We think the evidence was amply sufficient to support the finding. The sole grounds advanced by appellants to support their contention that upon the assignment of the note and mortgage to respondent Kruger held the ring as her agent are: (1) That respondent conferred upon Kruger ostensible authority sufficient to make him respondent's agent to hold the ring for her; (2) that Kruger was respondent's general agent and as such was authorized to represent her in all matters

pertaining to her investments; and (3) that respondent is estopped from denying that she authorized Kruger to hold the ring for her as her agent. No other reason has been suggested by appellants why it should be held that Kruger's possession of the ring was respondent's possession, and we therefore shall confine ourselves to a consideration of the three theories so advanced by them.

[1] We do not think the evidence warrants the conclusion that respondent, either intentionally or by want of ordinary care, caused or allowed appellants to believe that Kruger was authorized to hold the ring for respondent as her agent; that is to say, so far as appellants are concerned, respondent did not confer upon Kruger ostensible authority for the purpose mentioned, or any authority beyond that actually delegated to him. Respondent, who took the witness stand in her own behalf in the court below, testified that she never had possession of the ring; that she never saw it; that she did not learn that it had been delivered to Kruger until some time after she had purchased the note and mortgage; that shortly before the purchase she had arranged with Kruger to let her know whenever he had a good mortgage to sell and to give her an opportunity to buy it; that, when she was not in San Diego, Kruger, if he had a mortgage to sell, would write her, and, if he said the security was good, she would send him the money to purchase the paper; that she was in San Francisco at the time when she bought this note and mortgage from Mrs. Archer; that Kruger wrote to her and told her he had a mortgage to sell, referring to the mortgage here in question; that she mailed him a check for the necessary amount, and that Kruger, at San Diego, acted for her in procuring the assignment for Mrs. Archer; that, if at any time when she was in San Diego Kruger told her he had a good mortgage for sale, she always looked at the property, and then, if the security met with her approval, she would purchase it; that prior to the assignment to her of this particular mortgage she had procured through Kruger, during her absence from San Diego, the assignment to her of three other mortgages executed by other mortgagors; and that she had seen Kruger upon but a few occasions prior to her purchase of the Vernon mortgage.

[2] Manifestly, Kruger possessed no ostensible authority such as is claimed by appellants and of which the latter can avail themselves in this action. In each instance when respondent purchased a mortgage through Kruger, she made him her special agent for that particular transaction. If Kruger had held the ring for respondent as her agent, then the contract of mortgage, in so far as it related to the ring, would have been converted into a contract of pledge. But respondent, when purchasing the note and its security, knew naught of a pledge. She knew only of a mortgage, and supposed that she was purchasing a mortgage and the note secured thereby. An agent has such authority as the principal actually or ostensibly confers upon him. Civ. Code, § 2315. The actual authority conferred upon Kruger by respondent did not authorize him to procure the assignment to his principal of a pledge. Respondent actually authorized Kruger to procure the assignment to her of the only security of which she had any personal knowledge, namely, a mortgage, not a pledge, and for that purpose she conferred upon him special authority. To entitle appellants successfully to claim that respondent conferred upon her agent ostensible authority sufficient to authorize him to procure the assignment to his principal of a contract of pledge, they must first show that, at the time when respondent purchased the note and mortgage, they had knowledge of the facts which they claim gave color of authority to the agent. Their contention that Kruger possessed ostensible authority of the nature and to the extent claimed by them is based upon the fact that Kruger represented respondent in a number of other similar transactions. But there is no evidence that appellants possessed any knowledge of these other transactions at the time when Kruger exercised the actual authority which respondent specifically conferred upon him in this particular transaction. Ostensible authority, as defined by our statute, "is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess." Civ. Code, § 2317. As a necessary ingredient of this definition it is held that a party maintaining that such authority existed "must prove that he knew of the facts giving color of authority to the supposed agent." Rodgers v. Peckham, 120 Cal. 238, 52 P. 483, quoting from Harris v. San Diego Flume Co., 87 Cal. 526, 25 P. 758. It follows, therefore, that appellants, who had no dealings with Kruger when the latter represented respondent in the purchase of this note and mortgage from Mrs. Archer, and who knew nothing of the other transactions in which respondent was represented by Kruger, are not in a position to claim that the latter possessed any ostensible authority, or any authority whatever beyond that which respondent actually and intentionally conferred upon him.

If appellants find themselves the victims of Kruger's fraud, they have no one but themselves to blame. One cannot read this record without perceiving that Kruger deliberately deceived respondent, intending all the while to keep her in ignorance respecting his possession of the ring in order that he might wrongfully convert it to his own use. But this was made possible by appellants' willful violation of that provision of their mortgage contract whereby they obligated themselves not to remove any of the mortgaged property

from No. 3536 Grim street without the consent of their mortgagee. There is no evidence that the mortgagee ever authorized or consented to the removal of the ring prior to its delivery to Kruger.

There is no evidence to justify the claim that Kruger was respondent's general agent with authority to represent her in all matters pertaining to her investments. Appellants seem to think that, because Kruger acted as respondent's agent in a number of transactions in which she purchased securities through him, he was her general agent to purchase securities for her. As we have pointed out, he was in each instance clothed with special authority only. In Barrett v. Irvine, 2 Ir. 462, it was held that no multiplication of acts as special agent could convert a special agent into a general agent. See, also, in this connection, Nourse v. Jennings, 180 Mass. 592, 62 N. E. 974; Rice v. James, 193 Mass. 458, 79 N. E. 807; Gregg v. Wooliscroft, 52 Ill. App. 214; and Campbell v. Sherman, 49 Mich. 534, 14 N. W. 484. In Gregg v. Wooliscroft, supra, the Illinois Appellate Court, holding that one Evans was the special and not the general agent of the appellee, said:

"It is in proof that Evans bought many cars of oats and of other grain for the appellee. This is relied upon as establishing the claim that he was a general agent. It is not, however, shown that he made such purchases otherwise than in pursuance of special directions given him from time to time to do so, as was his general custom or system of transacting the business in which he was engaged."

[3] Equally without merit is the claim that respondent is estopped to deny that she authorized Kruger to hold the ring for her as her agent. In Post v. City, etc., Bank, 181 Cal. 244, 183 P. 805, our Supreme Court quotes from Corpus Juris to the effect that—

"An estoppel does not arise from the mere fact that the agent has acted for the principal on one or more previous occasions, but not under appearance of a general authority so to act."

[4] It next is urged that the evidence is insufficient to support the finding that appellants did not tender to respondent the amount due on the promissory note. The argument advanced to sustain this contention is based upon the assumption that Kruger held the ring as respondent's agent at all times after the assignment to her of the note and mortgage. The only tender ever made by appellants was an offer to pay the amount due on the promissory note, provided respondent delivered the ring to appellants. As we have seen, respondent did not have possession of the ring, either actually or constructively as Kruger's principal, and the offer, therefore, was ineffective as a tender, since it was accompanied by a condition which appellants had no right to impose.

The court found the value of the ring to be $150, and not $700 as claimed by appellants. It is contended that the evidence is insufficient to support this finding as to value; but, since respondent was not accountable for the ring, the finding as to its value is entirely inconsequential.

[5] On the cross-examination of respondent, appellants' counsel asked her if it was not a fact that Kruger, at the time he absconded, had in his possession securities, papers, and documents which she had intrusted to him. In propounding this question, it doubtless was the purpose of appellants' counsel to show that Kruger was respondent's general agent in all matters pertaining to her investments. The court sustained an objection to the question upon the ground that it was irrelevant and immaterial. In this there was no error and no prejudice to appellants' rights. Elsewhere in her cross-examination respondent testified that Kruger did not have charge of her papers or of her safe deposit box.

[6] On the direct examination of Mrs. Archer, who had been made a defendant in the action, her counsel sought to show that Kruger told her, at the time when she transferred the note and mortgage to respondent, that he had the ring in his possession. At this stage of the witness' examination, the court, of its own motion, said:

"Anything he [Kruger] said may be stricken here. We don't want hearsay testimony in here."

It is claimed by appellants that the statements of Kruger were admissible under the principle that admissions made by an agent in the course of his employment are binding upon his principal. But it was not necessary to show by Kruger's statements to Mrs. Archer that the ring was in his possession. It was proved by other and uncontradicted evidence that the ring had been delivered to Kruger and that he had it in his possession.

Finally, it is claimed that the court failed to find upon all of the issues raised by appellants' cross-complaint and respondent's answer thereto. Appellants have not seen fit to favor us with a particularization of the issues upon which it is claimed the court failed to find. If there is any issue upon which the court made no finding, it is not of a character which would warrant a different judgment, even if the court had found thereon in appellants' favor.

The judgment is affirmed.

We concur: WORKS, J.; CRAIG, J.

73 Cal. App. 612

LITTLE v. UNION OIL CO. OF CALIFORNIA. (Civ. 5121.)

(District Court of Appeal, First District, Division 1, California. July 16, 1925. Hearing Denied by Supreme Court Sept. 10, 1925.)

1. Pleading ⊂=53(1) — Special demurrer on ground of inconsistent counts not aided by reference to other counts.

Special demurrer to complaint as a whole and to separate counts therein, on ground of ambiguities and uncertainties, appearing from the fact that certain allegations of one count are inconsistent with those of another, cannot be aided by reference to other counts.

2. Contracts ⊂=35—Typewriting name of party in contract not intended as subscription.

Where complaint alleged that contract was drawn in the office of one of parties, not being signed at the time but with the understanding that it was to be signed later, *held*, that the typewriting of the name therein was not intended as subscription.

3. Pleading ⊂=34(2) — Special facts pleaded control when inconsistent with conclusion drawn therefrom.

Where a conclusion is alleged and also special facts from which conclusion is drawn, but special facts are inconsistent with and do not support conclusion, former control, and sufficiency of complaint is to be determined from special facts pleaded.

4. Frauds, statute of ⊂=144—Circumstances rendering it fraud for opposite party to assert invalidity of contract under statute created estoppel.

Where terms of contract were reasonably shown, and opposite party agreed not to assert invalidity under statute of frauds, and party had, in reliance on contract, changed his position to his injury with knowledge of opposite party, circumstances being such as to render it fraud for opposite party to assert invalidity under the statute, such facts created estoppel.

5. Frauds, statute of ⊂=119(2)—Refusing to carry out promise to put contract within statute in writing is not such fraud as to take contract out of statute.

Refusal to carry out a promise to put in writing a contract within the statute is not such fraud as takes the case out of the statute even when party, in reliance on promise, has changed his position to his injury.

6. Frauds, statute of ⊂=126 — Agreement to execute an agreement within statute is itself within statute.

Agreement to enter into or reduce to writing and execute an agreement within the statute of frauds is itself within the statute, and neither promise is enforcible unless statute is satisfied.

7. Sales ⊂=411—Complaint for breach of contract for sale of gasoline held insufficient to state cause of action.

Complaint alleging that contract for purchase of gasoline was written at office of defendant, but not signed; that defendant promised to sign later, and that relying thereon, plaintiff entered into contract with third party for resale of gasoline, but was later released therefrom, *held* insufficient to state cause of action.

Appeal from Superior Court, City and County of San Francisco; Daniel C. Deasy, Judge.

Action by H. O. Little against the Union Oil Company of California. From a judgment for defendant, after demurrer was sustained, plaintiff appeals. Affirmed.

L. L. James, Jr., and C. A. S. Frost, both of San Francisco, for appellant.

Edwin T. Cooper, of San Francisco, Paul M. Gregg, of San Luis Obispo, and Jerry H. Powell, of Los Angeles, for respondent.

CASHIN, J. Action by appellant, H. O. Little, against respondent, Union Oil Company of California, a corporation.

Appellant, by his amended complaint, alleges, in the form of two separate causes of action, facts arising from the same transaction. As a first cause of action it is alleged that on August 24, 1923, a writing—in part a printed form used by respondent in the conduct of its business as a dealer in gasoline, and in part typewritten—was caused to be prepared in duplicate by one A. R. Atwood at the office of respondent in San Francisco, California, the writing being in words and figures as follows:

"Memorandum of Agreement.

"Effective Date: October 1, 1923.

"City: San Francisco, Cal.

"Union Oil Company of California: Please enter our order for the following products at the prices stated:

"Yearly requirements: Minimum 2,400,000, maximum 4,800,000, gals. of Union gasoline, deliveries to be made by Union Oil Company of California into the trucks of H. O. Little, in quantities not to exceed one-twelfth of the above amount in any calendar month. Price of above gasoline to be five cents (5c) per gallon under the prevailing tank wagon market price on date of delivery, on all delivered up to 200,000 gallons per month. If 200,000 gallons per month is exceeded the price on the total month's purchases to be five and one-half (5½c) cents per gallon.

"Upon the following terms and conditions: Deliveries f. o. b. Potrero plant, San Francisco, and to cover a period of one year from date. All orders to be filled with reasonable promptness. Delays caused by reason of war, rebellion, insurrection, governmental interference, fires, strikes, differences of workmen, earthquakes, or your inability to make deliveries from whatever cause, excepted. All deliveries to be made in fairly equal monthly shipments.

"Terms: ———.

"If, during the life of this agreement, our financial responsibility becomes impaired or un-

satisfactory to you, cash payment on delivery with the above discount or satisfactory security may be demanded by you, and it is a condition of further deliveries that such demands be complied with.

"All prices are subject to the addition of any tax that is or may be imposed by municipal, state or federal authority for war, internal revenue or other purposes, upon any commodity mentioned herein, and deliveries and shipments are subject to any restrictions or regulations imposed by any municipal, state or federal authority. ———.

"———.

"Accepted ———, 192—.

"Union Oil Company of California,

"By ———."

The portions typewritten, with the exception of the place therein provided for delivery, to wit, "Potrero plant, San Francisco," in the third paragraph, and the place and date of making the writing were, as shown by photostatic copy of the writing filed by stipulation as a supplement to the transcript on appeal, the first and second paragraphs thereof. It is further alleged that the writing contained all the promises and conditions to be kept and performed by plaintiff and defendant, and that, in the words of the pleading, "plaintiff and defendant then and there intended said typewritten agreement to be then and there mutually operative and binding on each other, and intended that the names of plaintiff and defendant typewritten therein should be and be deemed to be a subscribing by them of said agreement and authentication thereof, and in that behalf plaintiff alleges: * * *"

Appellant then proceeds to allege the circumstances of the transaction and the conversation between himself and Atwood preceding and following the preparation of the writing, from which his conclusion as to the intention of the respondent as above quoted is drawn, and which allegations are as follows: That respondent on the date mentioned had in writing authorized Atwood to execute on its behalf an agreement with appellant for the sale to him of the gasoline described upon the terms and conditions set forth in the writing, such being the subject, terms, and conditions of an oral offer by appellant made on that day and orally accepted by Atwood. That at the time of such oral acceptance appellant was negotiating with an organization known as the Garage Owners' Association for the sale and delivery by him to it of the quantities of "Union" gasoline mentioned in the writing at a net profit to appellant over the price mentioned therein of 1¼ cents per gallon. That on said date and before the acceptance of the offer by Atwood, appellant had informed Atwood of the terms of his proposed agreement with the association, stating that he desired the immediate execution of the writing. That he might on the evening of that day execute the agreement with the association. That the hour was then late, and that it was necessary for him to procure from his attorney drafts of the proposed agreement before his meeting with the association that evening. That Atwood then stated that appellant should, in the words of the pleading, "hurry to his attorney's office, there get said forms of contract with said Garage Owners' Association, and go ahead and execute his said proposed contract with said Garage Owners' Association that evening. That said *typewritten* agreement was effective, and was all that was necessary to enable plaintiff to sign up with said Garage Owners' Association," thereupon delivering a duplicate of the writing to appellant and retaining the original thereof, neither the original nor the duplicate being signed by the manual subscription of either party. That appellant received the writing so delivered in the belief that such was a concluded and mutually binding agreement between himself and respondent, and, acting on such belief and the representations of Atwood, executed on the same day the proposed contract mentioned above with the association. That respondent was the sole producer of "Union" gasoline; that appellant has performed the terms and conditions contained in said writing by him to be performed, and that respondent refused to perform. That due to such refusal appellant was unable to perform his contract with the association or to purchase Union or other gasoline at a price *equal to or below* the price provided in the writing, to his damage in the sum of $60.000.

As a second cause of action are alleged the same facts as above, with the exception of the allegation that the names of the parties *typewritten* therein were deemed to be a subscription by them thereto, and with the further allegation that Atwood, at the time of the delivery of the writing, stated that he would subscribe his name thereto as agent for respondent later in that week, and which he afterwards refused to do, stating that he had instructions from respondent not to go further with appellant.

It is not alleged that the name of respondent *printed* below the typewritten and printed portions of the writing containing the description of the subject, the price, the terms, and conditions of the alleged contract, was intended to constitute or was adopted as a subscription by respondent thereto.

Respondent demurred generally and specially to the complaint and each count thereof, and moved to strike out the allegations hereinbefore mentioned. The motion as to all the allegations above except that respondent was the sole producer of "Union" gasoline, the demand for and the refusal of performance and the damage alleged, was granted, and the demurrer sustained without leave to amend. Judgment was thereupon entered for respondent, and the appeal is taken therefrom. No application for leave to further

amend so far as shown by the record was made.

Appellant contends that the first cause of action states facts which sustain his conclusion that it was the intention of respondent to adopt its name *typewritten* in the writing as a subscription thereto, that the question of such intention was one for the jury, and that the facts alleged estop respondent from asserting that the writing was invalid under the statute of frauds; that the motion to strike was improperly granted, and that the demurrer should have been overruled.

[1] Certain grounds of respondent's special demurrer to the complaint as a whole and to the separate counts therein were the uncertainties and ambiguities appearing from the fact that certain allegations of one count were inconsistent with those of the other. The form of pleading adopted by appellant has been approved, and a demurrer on the grounds stated could not be aided by reference to other counts in the complaint (Stockton, etc., Works v. Glens Falls Ins. Co., 121 Cal. 167, 53 P 565; Cameron v. Ah Quong, 175 Cal. 377, 382, 165 P. 961; Froeming v. Stockton, etc., Ry. Co., 171 Cal. 401, 404, 153 P. 712, Ann. Cas. 1918B, 408.

The writing alleged as a memorandum of the agreement of the parties stated with sufficient certainty the essential terms of contract, with the name of the seller, and, from the provision therein naming the person to whom delivery should be made, by reasonable inference the name of the buyer. Sanborn v. Flagler (Mass.) 9 Allen, 474, 476.

[2] It is clear from the pleading that the act of typewriting the name of respondent in the writing was not intended as the subscription by respondent thereto, no facts being alleged supporting such conclusion other than that the writing was typewritten by a stenographer in the office of respondent, and from which alone such intention could not fairly be inferred.

While no California case directly in point has been called to our attention, it is the rule in other jurisdictions, and the case of California Canneries Co. v. Scatena, 117 Cal. 447, 49 P. 462, is authority for the conclusion that a subscription by a party to be charged need not be at the end of the writing, but, the intention being shown, such signature placed on any part of the writing is sufficient to satisfy the requirements of the statute; and that the words "signed" and "subscribed" are in meaning substantially the same except where in a statute some peculiar or additional meaning to either of the words is indicated.

The majority of cases in other jurisdictions hold that the signing required by statute is a signature to the memorandum placed there or adopted or appropriated with the intention of authenticating the writing, but that the statute is not satisfied by the writing, printing or stamping of the name of a party to the contract by him or by his authority, or by the adoption or appropriation of a name not for the purpose of signing and authenticating the instrument but for some other purpose. 27 Corp. Jur. p. 288, § 357.

If it was not the intention of respondent's agent to adopt or appropriate the name *printed* in the form shown at the end of the writing as its signature thereto, the form of acceptance so printed being obviously for the purpose of enabling its agent to authenticate agreements of this character, and appellant's pleading negatives such intention, it is not, in our opinion, a fair or reasonable inference from the circumstances and conversation alleged that its name *typewritten* therein as a part of a clause providing that deliveries should be made by it into the trucks of appellant and the quantities of gasoline so to be delivered each month, was intended by its agent to be adopted or appropriated as an authentication thereof.

All that might reasonably be inferred therefrom, in view of the fact that the whole transaction took place in the office of respondent, where the signatures of both could have been attached without appreciable delay, was the intention of the agent to assure appellant that the invalidity of the writing would not be asserted by respondent, and that the oral acceptance of the offer made would suffice as an effective and binding agreement between them.

[3] It is a general rule that where a conclusion is alleged and also the special facts from which the conclusion is drawn, if the special facts are inconsistent with and do not support the conclusion, the former control, and the sufficiency of the complaint is to be determined from the special facts pleaded. Ohm v. San Francisco, 3 Cal. Unrep. 314, 318, 25 P. 155; Horton v. Travelers' Ins. Co., 45 Cal. App. 462, 187 P. 1070; 31 Cyc. 85; Wright v. State, 104 Okl. 57, 230 P. 268; Heinzman v. Whiteman (Ind. App.) 139 N. E. 329; Wood v. Pynetree Paper Co., 29 Ga. App. 81, 114 S. E. 83; First Nat. Bank v. Grow, 57 Mont. 376, 188 P. 907; Phillips v. Vermeule, 88 N. J. Eq. 500, 102 A. 695; United States v. Union Pac. Ry. Co., 169 F. 65, 94 C. C. A. 433; Lovell v. Marshall (Minn.) 202 N. W. 64; Louisville & U. R. Co. v. National Bank, 188 Ala. 109, 65 So. 1003; Gymther v. Brown, 67 Or. 310, 134 P. 1186; Koehler v. Wilson, 144 App. Div. 473, 129 N. Y. S. 532, 534.

[4] Where the essential terms of a contract are shown with reasonable certainty, with representations by the opposite party that its invalidity under the statute will not be asserted, and it appears that the party urging the estoppel has, pursuant to the contract, in reliance upon and induced by the representations, changed his position, the intention to make such change being known at the time to the one making the representa-

tions, and as a result loss or injury is suffered, and the element of fraud appears in the transaction, in that the case is one where circumstances and conduct are such as to render it a fraud for the opposite party to assert the invalidity of the contract under the statute, such facts create an estoppel. Long v. Long, 162 Cal. 427, 122 P. 1077; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St. Rep. 154.

Appellant's claim of damages suffered is based upon the anticipated profit of 1¼ cents per gallon on the resale of the quantities of gasoline mentioned in the writing, to wit, 4,800,000 gallons. It is not alleged that the profit anticipated from performance of the contract with the association would have been greater than from a resale of the gasoline in the open market, or that appellant could not have procured the same quantity, kind, and quality at any price between the price mentioned in the writing and the selling price to the association. The change of position alleged as a ground of estoppel was the assumption of an obligation to deliver the above quantities to the association, the violation of which resulted in no loss, the association, as alleged in the complaint, having relieved appellant from liability thereon. This obligation was the consideration for the promise of the association to purchase, which promise was not procured until after the representations alleged were made.

While the act of the association restored appellant to his original position, in that he was relieved from obligation and suffered no loss therefrom, the act in its effect caused a second change in the position of appellant in the loss of the benefit of the obligation of the association. The latter change, however, was not the result of the representations alleged, but the consequence of defendant's refusal to perform.

Appellant's position, in view of the facts pleaded, is that of one who, while he has relied on representations which, the other elements being present, would result in an estoppel, has not changed his position to his injury; but, the general market conditions being such that a resale at a profit is certain, contends that to permit the seller to assert the invalidity of the oral agreement would result in a change of his otherwise advantageous position in the market and a consequent loss. The result of such application of the doctrine would be its use as an instrument of gain or profit, while its object is protective and limited to saving harmless or making whole the person in whose favor it arises. 21 Corp. Jur. p. 1118; Adler v. Pin, 80 Ala. 351; Lindsay v. Cooper, 94 Ala. 170, 11 So. 325, 16 L. R. A. 813, 33 Am. St. Rep. 105; Ramsey v. Chilson, 57 Cal. App. 785, 788, 208 P. 319.

Appellant alleges in the second count of the complaint that the agent of respondent, following the conversation hereinbefore set forth, agreed to subscribe the writing on behalf of respondent later during the same week.

[5] As the rule is stated in 12 California Jurisprudence, section 104, statute of frauds, the mere fact that one acts on an oral promise, hoping that it will be carried out by the promisor, does not estop the latter. So, as a general rule, the mere omission, coupled with performance, is insufficient to create an estoppel. The refusal to carry out a promise to put in writing a contract within the statute is not such fraud as takes the case out of the statute; and this is ordinarily true even when a party, relying simply on the word, favor, or promise of another, has changed his position to his injury on account of it. In all these cases, however, there must be, to avoid an estoppel, an absence of actual fraud. Seymour v. Oelrichs, supra; Long v. Long, supra.

[6] An agreement to enter into or reduce to writing and execute an agreement within the statute of frauds is itself within the statute, and neither promise is enforcible unless the statute is satisfied. 27 Corp. Jur. p. 355; Fuller v. Reed, 38 Cal. 99.

A fraudulent intent in making the representations or in refusing to perform, or that respondent took advantage of the information imparted by appellant to its agent, was not alleged in the complaint.

Notwithstanding the absence of actual fraud, a representation of a future intention absolute in form, deliberately made for the purpose of influencing the conduct of the other party and acted upon by him, is generally the source of a right, and may amount to a contract enforcible in a court of equity. Seymour v. Oelrichs, supra. As held, however, in the case last cited and in Standing v. Morosco, 43 Cal. App. 244, 246, 184 P. 954, the person to whom the representation or promise is made must have so altered his position as that he would be made to suffer loss or unconscionable injury. If no such injury or loss is shown, the rule of estoppel fails, and the excepted case is not established.

[7] It is our conclusion that the facts alleged were not sufficient to constitute a cause of action, that the judgment should be affirmed; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

73 Cal. App. 649

PEOPLE v. HAMIL. (Cr. 1252.)

(District Court of Appeal, First District, Division 2, California. July 17, 1925. Hearing Denied by Supreme Court Sept. 10, 1925.)

1. Bastards ⇐17½—Prosecution for nonsupport of illegitimate child proper, without first establishing duty to support in civil action under Code.

To prosecute an alleged father of an illegitimate child under Pen. Code, § 270, as amended by St. 1923, p. 592, for nonsupport, it is not necessary to first establish his duty to do so in a civil action, under Civ. Code, § 196a.

2. Bastards ⇐17½—Indictment in a prosecution for nonsupport of an illegitimate child held sufficient.

In a prosecution for nonsupport of an illegitimate child, an indictment, charging defendant with being the father of the child, and willfully failing to support it, sufficiently describes the offense charged, under Pen. Code, § 270, as amended by St. 1923, p. 592, no further particulars being required in view of sections 959, 960.

3. Criminal law ⇐688—Reopening case to recall prosecuting witness held within discretion of court and proper.

Permitting reopening of case for purpose of recalling prosecuting witness, after district attorney had announced his case closed and defendant had moved for a directed verdict of not guilty, was not error, such matter being within discretion of court.

4. Indictment and information ⇐176—To convict for failure to provide for child not necessary to prove failure to provide on date named in indictment.

In a prosecution for nonsupport of an illegitimate child, it is not necessary under Pen. Code, § 955, for the prosecution to prove that defendant failed to provide for child on or about date alleged in indictment.

Appeal from Superior Court, City and County of San Francisco; Pat R. Parker, Judge.

Louis Hamil was convicted of failing to provide for an illegitimate minor child, and he appeals. Affirmed.

H. D. Jerrett, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Leon French and Wm. F. Cleary, Deputy Attys. Gen., for the People.

PRESTON, Justice pro tem. The defendant was indicted by the grand jury of the city and county of San Francisco for unlawfully failing, without lawful excuse, to furnish necessary food, clothing, etc., for an illegitimate minor child, and thereby violating the provisions of section 270 of the Penal Code as amended in 1923 (St. 1923, p. 592). To this indictment defendant entered a plea of not guilty and went to trial before a jury, and the jury found him guilty. Defendant made a motion for a new trial and a motion in arrest of judgment, both of which were denied, and the court pronounced judgment imposing imprisonment in the county jail for a period of two years and a fine of $500. From this judgment, and the order denying his motion for a new trial, the defendant appeals.

Resolving all conflicts in the testimony against the defendant, as the jury did in finding him guilty of the offense charged, it appears that he is the father of a child who was born at St. Elizabeth's Infants Hospital in San Francisco on October 8, 1922, to a young, unmarried mother; that at all times during his acquaintance with the mother of this child, the defendant was married to another woman and that there were three children of that marriage; that defendant was supporting his legitimate family and earning his living by driving a laundry wagon; that he gave the mother of this illegitimate child, who is the prosecuting witness here, $50 or $60 before she went to the hospital for the birth of the child; that up to the time the prosecuting witness went to the hospital, which was about four or five months before her child was born, she worked as a waitress and earned her living in that way, and that after she left the hospital, about the 4th day of November, 1922, she resumed her work as a waitress, and defendant gave her $7 a week for the support of the child until about April, 1923. Since April, 1923, he has provided nothing towards the support of the child. The indictment charges the defendant with failing to provide for the child on September 1, 1924.

This defendant was convicted of failing to provide for this same child on April 1, 1923, under section 270 of the Penal Code, prior to the amendment of 1923, and the judgment of conviction was reversed by this court on February 26, 1924. People v. Hamil, 65 Cal. App. 786, 225 P. 10.

The present case is prosecuted under section 270 of the Penal Code, as amended in 1923, which provides, among other things, that the "father of either a legitimate or illegitimate minor child who willfully omits without lawful excuse to furnish necessary food, clothing, shelter or medical attendance for his child is guilty of a misdemeanor and punishable by imprisonment in the county jail not exceeding two years or by a fine not exceeding one thousand dollars ($1,000) or by both," and shall not be relieved from criminal liability "for such omission merely because the mother of such child, or any other person, or organization, voluntarily or involuntarily, furnishes such necessary food, clothing, shelter or medical attendance for such child," etc.

A great many contentions are made by appellant for a reversal of the judgment in this

case. It will only be necessary, however, to discuss a few of them.

[1] It is contended by appellant that there can be no prosecution of an alleged father of an illegitimate child for his failure to support it until his duty so to do has been established in a civil action, under section 196a of the Civil Code. This contention is wholly without merit; see People v. Stanley, 33 Cal. App. 624, at page 626, 166 P. 596.

[2] It is next contended by appellant that the court erred in overruling defendant's demurrer to the indictment. The charging part of the indictment is as follows:

"Louis Hamil is accused by the grand jury of the city and county of San Francisco of the crime of misdemeanor, to wit: Violation of the provisions of section 270 of the Penal Code, committed as follows: The said Louis Hamil, on the 1st day of September, 1924, at the city and county of San Francisco, state of California, was the parent and father of a certain minor child, to wit, David Sweet, then and there of the age of one year, and the said Louis Hamil did then and there on the said 1st day of September, 1924, at the said city and county of San Francisco, state of California, willfully and unlawfully, and without excuse, omit to furnish said minor child with necessary food, clothing, shelter, and medical attendance, or any thereof. * * *"

The demurrer is both general and special, and the portion of the demurrer especially relied upon by the defendant is "that the facts stated do not constitute a public offense against the defendant Louis Hamil, for the reason, and in particular, that said indictment does not sufficiently describe the offense charged to have been committed." In support of this demurrer, appellant contends that the portion of the indictment which charges that the defendant "was the parent and father of a certain minor child, to wit, David Sweet, then and there of the age of one year," etc., states merely a conclusion of law and that the indictment should have alleged "the date when, and the place where, and the person upon whom the child was begot; the name of the person who begot the child, the place where, and the time when, the child was delivered; that the child was born illegitimate, and that the defendant was the father of said child."

No such particularity is required in an indictment or information under section 270 of the Penal Code. The essential elements of the crime denounced by this section are that defendant is the father of said minor child, and the willful omission of the father, without lawful excuse, to furnish certain designated necessaries mentioned in this section to the minor child, etc. When these facts are clearly and distinctly set forth in ordinary and concise language and in such a manner as to enable a person of common understanding to know what is intended, it is all the statute requires. Sections 959 and 960, Pen. Code. Measuring the indictment by this rule, it states all the necessary elements to constitute a complete offense under section 270 of the Penal Code, and is amply sufficient. People v. Murphy, 39 Cal. 52.

[3] It is also contended by appellant that the court erred in permitting the reopening of the people's case in chief for the purpose of recalling the prosecuting witness, after the district attorney had announced the close of his case in chief for the people, and counsel for defendant had moved the court to advise the jury to return a verdict of not guilty. This contention is wholly without merit. The reopening of a case for further evidence was within the discretion of the trial court, and the record shows no abuse of that discretion. This proceeding is a very common occurrence in the trial of criminal cases and within the discretion of the trial court, and not violative of any of the defendant's rights. People v. Kennedy, 48 Cal. App. 545, 192 P. 556; People v. McPherson, 6 Cal. App. 266, 91 P. 1098; People v. Lewis, 124 Cal. 551, 57 P. 470, 45 L. R. A. 783.

[4] It is next contended by appellant that it was incumbent upon the prosecution to prove that the defendant omitted to provide for the minor child in question on September 1, 1924 (the date alleged in the indictment), or immediately prior or subsequent thereto. This contention, likewise, is without merit, and in answer thereto it is only necessary for us to cite section 955 of the Penal Code; People v. Stanley, supra; People v. Swiggy (Cal. App.) 232 P. 174; People v. Curry (Cal. App.) 231 P. 358.

Many other contentions are made by appellant for a reversal of the judgment, but we have examined the record and the voluminous briefs filed by appellant with care, and the jury could not have arrived, in our opinion, at any other verdict than that of guilty. Appellant does not advance any points upon the merits of the case, but relies upon a multitude of technicalities, all of which, as above stated, we have examined and found without any substantial merit.

From an entire review of the record in this case, we think the defendant was fairly tried and justly convicted upon evidence that admits of no reasonable doubt.

Judgment affirmed.

I concur: NOURSE, J.

73 Cal. App. 527

WETZLER et ux. v. PATTERSON (two cases). (Civ. 4003.)

(District Court of Appeal, Second District, Division 2, California. July 9, 1925.)

1. Landlord and tenant ⇐184(2)—Lease construed as providing not for deposit but for advance payments of rent not recoverable on breach by tenant.

Where tenant in written lease agreed to pay $933.33 on execution of lease, $700 of which was to be credited by lessor for rental due for last three months, and on default by tenant such sum to be forfeited to landlord, the $700 is to be construed as advance payment and not as deposit to secure performance of lease, and cannot be recovered by tenant on termination of lease for his default, nor offset against rent sued for by landlord.

2. Damages ⇐78(6)—Lease construed as providing for advance payment despite words of forfeiture to construe as a penalty would make it void under Code; "reserve."

Where lease provided that sum paid on execution of lease was to be "credited by lessor for the rental due upon said lease for the last three months," a further provision that on default by lessee the rent reserved for those months should be forfeited to the lessor *held* to nullify the covenant for advance payment of rent as one for penalty or forfeiture of liquidated damages, void under Civ Code, § 1670; "reserve" meaning "to keep; to hold; to retain."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Reserve—Reserved.]

3. Landlord and tenant ⇐233(1)—Finding that tract contained 80 acres, "more or less," held not to imply less than 80 acres.

In landlord's actions for rent and unlawful detainer, in which tenant counterclaimed for abatement of rent because of shortgage of acreage in land demised, a finding that the leased premises contained "80 acres, more or less," does not necessarily imply that tract contained less than 80 acres, the words "more or less," when used in a description of land in connection with quantity or as qualifying distances, being but words of safety and precaution intended to cover the possibility of some slight and unimportant inaccuracy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, More or Less (Realty).]

4. Landlord and tenant ⇐200(1)—Abatement of stipulated rent not allowed by reason of physical burdens shortening area.

A lessee is not entitled to abatement of stipulated rent for shortage of plantable area because of canals and roads on land, since lessee is deemed to have had notice of such physical burdens.

5. Evidence ⇐441(4)—Terms of written lease cannot be changed by contemporaneous parol agreement.

A complete written lease, which says nothing of acreage suitable for cultivation, cannot, in absence of fraud or mistake, be changed by a contemporaneous parol agreement that a specified acreage would be cultivated.

Appeals from Superior Court, Imperial County; Franklin J. Cole, Judge.

Separate actions by Charles L. Wetzler and wife against P. A. Patterson, tried together. Judgment for plaintiffs in each action, and defendant appeals. Affirmed.

F. H. Smith and Lamy & Smith, all of Los Angeles, for appellant.

Harry W. Norton, of El Centro, for respondents.

FINLAYSON, P. J. Plaintiffs, who are husband and wife, brought two actions in the court below. In the one first commenced they sued for the recovery of three months' rent, due, respectively, on the 15th of November, 1920, and the 15th days of February and March, 1921, and also for a sum alleged to be due for water used by defendant as the lessee, and which the latter, under the terms of his lease, had undertaken to pay. Later plaintiffs brought the other action, one for unlawful detainer, commenced after due service of the statutory notice to pay the overdue rent which had accrued since the first action was commenced, or to vacate the leased premises within three days. By this second action plaintiffs sought the recovery of the rent which became due on, respectively, the 15th days of April and May, 1921, damages for the unlawful detainer, and a forfeiture of the lease. In a separate answer and counterclaim filed in each of the actions, defendant alleged that, under the terms of the lease, plaintiffs undertook to rent to defendant a tract of land containing 80 acres: that in fact the tract contained but 65 acres; that by reason of this shortage in area the amount of the agreed rent should be proportionately abated; that at the date of the execution of the lease defendant paid plaintiffs the sum of $700; that this sum should be offset against the accrued rents; and that when so applied there would be left a balance due to defendant amounting to $263.52, for which sum defendant prayed judgment. The two actions were tried together, findings and judgment in favor of plaintiffs were filed in each case, and from the judgment entered in each of the actions defendant has appealed. The appeals were ordered by this court to be heard and considered together.

The facts necessary to an understanding of the points presented by the appeals are briefly these: On July 7, 1920, plaintiffs, as the lessors, and defendant, as the lessee, executed a written lease whereby the former leased to the latter, for the term of three years, commencing July 15, 1920, a tract of land in Imperial county, described in the instrument as follows:

"The south one-half (S.½) of the west one-half (W. ½) of tract 77 in section * * * township 14 south, range 13 east, containing 80 acres."

Of the covenants on the part of the lessee, the instrument contains the following:

"* * * The lessee agrees and binds himself: (1) To yield and pay to the lessors as rental for use of the above premises for the term above mentioned the full sum of $8,400, payable at the times and in the amounts as hereinafter set forth, to wit, $933.33 upon the execution and delivery of this lease, of which amount $233.33 shall be credited by the lessors upon the rental of the premises for the first month, to wit, the month beginning upon the 15th day of July, 1920, and ending upon the 15th day of August, 1920; $700 of this amount shall be credited by the lessor for the rental due upon said lease for the last three months of the full term of said lease, to wit, for the three months beginning on the 15th day of April, 1923."

It is then provided that a monthly rental of $233.33 shall be paid on the 15th day of each of the remaining months of the term, namely, on August 15, 1920, and on the 15th day of each succeeding month thereafter until and including the 15th day of March, 1923. Following certain other covenants on the part of the lessee, this paragraph occurs:

"It is further agreed by the lessee that upon the breach of any of the conditions above mentioned the sum of $700 heretofore mentioned as rent reserved for the last three months of this lease shall be forfeited to the lessor for breach of the conditions of this lease."

It is further provided that "the lessor may enter * * * to expel the lessee if he shall fail to pay the rent as aforesaid." We have set forth all of the provisions of the instrument which relate to rent, including the times, amounts, and manner of its payment.

On July 7, 1920, defendant took possession of the premises under the lease, and regularly paid the rent until the following month of November. He vacated the premises within a week after the commencement of the unlawful detainer action.

Though the lease does not mention the particular government section in which the tract is situated, no question is raised as to the sufficiency of the description. Indeed, the court found that the leased premises "are *known* and described as the south half of the west half of tract 77 in township 14 south, range 13 east." (Italics ours.) Defendant was shown the land before he executed the lease, and at the same time he observed the ditches, canals and roads on the premises.

In the findings filed in each case the trial court found, among other facts, the following:

"That said premises so leased * * * contain 80 acres, more or less;" also that "there were certain canals and highways located upon the sides of said tract so leased by the plaintiff to the defendant, covering approximately 11 acres, the major portion of which canals and roads were a necessary part of a general irrigation and road system for ingress and egress to said property and the irrigation thereof, along with other property; and that the amount of land actually occupied as farming land by defendant under said lease was approximately 68 acres."

No contention is made as to the sufficiency of the evidence to support the court's findings.

Appellant's several points, reduced to their simplest form, are: (1) That the court erred in not applying the $700 deposit to the satisfaction of the unpaid monthly rentals; and (2) that the court erred in failing to conclude, as a matter of law, that there was a shortage in the amount of land leased to appellant, due to a defect in respondents' title to approximately 11 acres, thereby entitling appellant to a corresponding abatement of the rent in diminution of the amount mentioned in the lease.

[1] The first of these contentions turns upon the true meaning and purpose of that provision of the lease whereby it was agreed that, of the $933.33 to be paid to respondents upon the execution of the lease, $700 should be credited to the rentals for the last three months of the term. If the $700 was intended to be a mere deposit by way of security to insure the faithful performance of appellant's covenants, then upon the forfeiture of the lease, which occurred when appellant failed to pay the accrued rent within the time fixed by the three days' statutory notice, the latter would be entitled to a return of the sum so deposited by him, less the amount of the rent then due and unpaid; and in such case it would be immaterial whether the sum so deposited as security be regarded as a penalty or as liquidated damages. Green v. Frahm, 176 Cal. 259, 168 P. 114; Rez v. Summers, 34 Cal. App. 527, 168 P. 156; Blessing v. Fetters, 40 Cal. App. 471, 181 P. 108. If, however, instead of intending the $700 to be a deposit to secure the faithful performance of appellant's covenants, the parties intended that this sum should be regarded as a payment to respondents upon the contract, by way of part performance by appellant; i. e., if it was intended to be an advance payment for and on account of the last 3 months' installments of rent—then and in that case no part of the $700 can be recovered by appellant, nor can any part of it be offset against the amounts sued for by respondents in these actions. The general rule deducible from the authorities is that rent paid in advance cannot be recovered by the tenant upon the termination of the lease for condition broken, when such termination was not brought about by the wrongful act of the landlord. Curtis v. Arnold, 43 Cal. App. 97, 184 P. 510;

Galbraith v. Wood, 124 Minn. 210, 144 N. W. 945, 50 L. R. A. (N. S.) 1034, Ann. Cas. 1915B, 609, and authorities cited in the note thereto; Dutton v. Christie, 63 Wash. 373, 115 P. 856; Rockwell v. Eiler's Music House, 67 Wash. 478, 122 P. 12, 39 L. R. A. (N. S.) 894; Evans v. McClure, 108 Ark. 531, 158 S. W. 487; Collier v. Wages (Tex. Civ. App.) 246 S. W. 743; Hepp Wall Paper, etc., Co. v. Deahl, 53 Colo. 274, 125 P. 491. "In case the rent has been paid in advance under a stipulation that it shall be so paid, and the landlord re-enters for conditions broken, even in the absence of an agreement to that effect, the landlord is entitled to retain the rent so paid, though the re-entry is before the expiration of the period for which the rent was paid." Galbraith v. Wood, supra. In Curtis v. Arnold, supra, Mr. Presiding Justice Waste, speaking for the court, said:

"If the money be regarded as given in consideration of the covenants of the lease when paid, the title thereto passed to the lessor (Ramish v. Workman [33 Cal. App. 19, 164 P. 26], supra; Dutton v. Christie, supra); if it is to be regarded merely as an advance payment of rent, the lessor is entitled to retain it (Galbraith v. Wood, supra * * *)."

In that case our Supreme Court denied a petition to have the cause heard in that court after judgment in the District Court of Appeal. The rule is stated in Ruling Case Law as follows:

"Provision is sometimes made in a lease for the payment in advance of the rents of the last or later periods of the lease, and such a provision has been held not to be a security merely for the lessee's performance of his agreements in the lease, but purely a payment of rent in advance, and therefore may be retained by the lessor though he terminates the lease for the default of the lessee as provided for in the lease." 16 R. C. L. p. 931.

Thus we are brought to a consideration of the proper interpretation to be placed upon the clauses in question. Do they mean that the $700 was a deposit to secure the payment of rent and the faithful performance of the lessee's other promises, or do they mean that the $700 is to be considered as an advance payment of the rent for the last three months of the term? We think the latter interpretation expresses the true meaning of the contract. It will be recalled that in the first of appellant's covenants in which the subject of rent is mentioned he binds himself to pay the $8,400—the total rent for the whole term—"at the times and in the sums hereinafter set forth, to wit, $933.33 upon the execution and delivery of this lease," etc.; and that of this sum, $700 "shall be credited by the lessor for the rental due upon said lease" for the last three months of the term. Here is an unequivocal covenant by the lessee to pay the total rental of $8,400 "at the times" and "in the sums" set forth in the paragraph wherein this covenant occurs. One of the sums thus to be paid by the lessee on account of the total rental for the whole term is the sum of $933.33. That sum was to be paid immediately "upon the execution and delivery" of the lease. Of the sum so to be paid to the lessors, $700 was to be "credited" for "the rental due upon said lease for the [last] three months of the full term." There is no reason why the lessors could not or should not credit this sum of $700 upon the rentals for the last three months immediately upon their receipt of the $933.33, i. e., immediately upon the execution of the lease. And it doubtless was the intention of the parties that the money should be so immediately credited by the lessors upon its receipt by them. Nowhere in the instrument is any provision made for the repayment to the lessee of the $700, or for the repayment of any part of the $933.33 which the latter undertook to pay upon the execution of the lease. No provision is made for its repayment at any time or upon any contingency. On the contrary, the language of this part of the lease clearly implies that all of the $933.33, including the $700 in question, was to belong absolutely to the lessors from the moment of its receipt by them. For these reasons we think it clear that the covenant which we are now analyzing, the one found in the first part of the lease, provides for and contemplates the payment of money, and not the deposit of security. That is to say, it is a covenant by the lessee for the immediate partial performance by him of his contract to pay rent by making immediately an advance payment of the rent for the last three months of the term.

[2] If there had been no further mention of the $700 than that found in the first part of the lease, it necessarily would follow from what thus far has been said that respondents own the money and may rightfully retain it. Is the nature of the above analyzed provision concerning the $700 changed from one for the advance payment of rent by the added stipulation, found in a subsequent paragraph of the lease, wherein it is provided that upon the breach of any of the lessee's covenants the "$700 heretofore mentioned as rent reserved for the last three months of this lease shall be forfeited to the lessor?" We think not. The reference to the $700 as "rent reserved for the last three months" is readily reconcilable with the true meaning of the covenant already analyzed by us—the one which, as we have stated, unmistakably provides for the advance payment of rent. "Reserve means to keep; to hold; to retain." Myers v. Conway & Co., 90 Ala. 109, 7 So. 639. The reference to the $700 as rent "reserved" for the last three months of the term is entirely consistent with the idea that the sum so reserved was intended to be an advance payment of rent, to be kept, held and retained by the lessors.

The one and only word in the whole lease which might cast any possible shadow of doubt upon the conclusion that the $700 was intended to be an advance payment of rent is the word "forfeited," occurring in the later paragraph—the one which provides that upon the breach of any of the lessee's covenants the $700 "shall be forfeited to the lessor." This word "forfeited," if it stood alone, might imply that the lessee still retained some sort of an interest in the $700 which he could lose by forfeiture. What, then, was the purpose, within the intention of the parties, of the provision that upon the breach of any of the lessee's covenants the $700 "shall be forfeited to the lessor?" If the lessee, in his covenant to pay the rent at the times and in the sums as set forth in the first part of the lease, had not unequivocally covenanted to pay the $700 in partial performance of his contract, as an advance payment of rent, or if there had been some provision for the return of this sum to the lessee upon any contingency whatever, there might have been some ground for construing the word "forfeited" as containing the implication that the lessee retained some forfeitable interest in the money. The contract must be considered as a whole, and the intention of the parties gathered from within the four corners of the instrument. It is the covenant first considered by us which deals with "the times" when and "the sums" in which the rentals are to be paid. That covenant, as we have seen, discloses an unmistakable intention to regard the $700 as a payment and not as a deposit—to regard it as an advance payment of rent. And, as we have shown, where rent is paid in advance the law itself, in the absence of any agreement therefor, authorizes the landlord to retain the rent so paid though he re-enter before the expiration of the term. We think the most reasonable conclusion to be deduced from a consideration of the lease as a whole is that in using the word "forfeited" in the subsequent paragraph of their writing it was the purpose of the parties to "make assurance doubly sure" by declaring what the law itself, in the absence of any provision for a forfeiture, would have declared. It is true that by putting this construction upon the word "forfeited" we in effect deprive it of all practical efficacy. But the same result would follow if we were to adopt the only other possible interpretation of the first-mentioned covenant. That covenant means either that the $700 was intended to be an advance payment of rent or that it was intended to be a mere deposit to secure the performance of the lessee's covenants to pay the rent. There is no other possible interpretation. If the second of these alternative interpretations should be adopted, then the word "forfeited" in the subsequent paragraph of the writing would be just as inoperative as it would be under the first and more obvious interpretation. That is to say, if we should interpret the earlier covenant as meaning that the $700 was intended to be a deposit by way of security for the payment of the rent, so as to leave some interest in appellant capable of being forfeited, then the provision for forfeiture found in the subsequent clause of the lease would be either a penalty or a provision for liquidated damages. But whether it were the one or the other, it would come within the terms of section 1670 of the Civil Code, and would be illegal and void. Green v. Frahm, supra. It follows, therefore, that under neither interpretation can any really operative effect be given to the forfeiture clause. And as it is not to be presumed that the parties deliberately entered into an illegal contract for a forfeiture, as would be the case if we treated the $700 as a sum deposited by way of security, we think that the more reasonable interpretation to put upon the forfeiture clause is that the parties intended thereby to emphasize their previously manifested intention that the $700 should be an advance payment of the last three months' rent, to be retained by the lessors in any event—to be retained by them as money unconditionally owned by them, regardless of whether the lease ran its full term of three years or was sooner terminated on account of the lessee's default.

[3, 4] We come now to appellant's second point—his claim that he is entitled to an abatement of the accrued rents in diminution of the amounts fixed in the contract. There was no shortgage in the area of the land actually leased to appellant. The finding of the trial court that the leased premises contain "80 acres, more or less," does not necessarily imply that the tract contained less than 80 acres. The words "more or less," when used in a description of land in connection with quantity or as qualifying distances, are but words of safety and precaution, intended to cover the possibility of some slight and unimportant inaccuracy, and do not weaken or destroy such indications of quantity or distance when no other guides are furnished. Oakes v. De Lancey, 133 N. Y. 227, 30 N. E. 974, 28 Am. St. Rep. 628. See, also, Hills v. Edmund Peycke Co., 14 Cal. App. 32, 110 P. 1088. Indeed, the evidence shows that the leased premises, the south half of the west half of tract 77, contained exactly 80 acres. In his brief filed in this court appellant admits that "there were 80 acres of land in the tract leased." What he does claim is, not that there was a shortage in the area of the land leased, but that there was a failure of title to 11 acres, more or less, because that amount of acreage was burdened with servitudes for the use of ditches and canals and the road which ran along them. But physical and visible burdens of that sort afford no ground for an abatement of the stip-

ulated rent. The lessee, who saw the ditches, canals, and roads before he executed the lease, is presumed to have leased the land with notice of the servitudes, and to have made his bargain with knowledge of the inconveniences resulting from them. In Ferguson v. Edgar, 178 Cal. 17, 171 P. 1061, the court had under consideration the question as to whether a public highway and a district canal used to convey water for irrigating a farm, in common with other lands in the district, constituted a burden thereon within the meaning of a covenant against incumbrances. Referring to that covenant, the court said:

"It was not considered as having reference to obvious and physical burdens, permanent in character, such as a state highway [or irrigating canal], the use of which was open and notorious. As to such obvious burden the party proposing to buy, having full knowledge of the servitude and the necessity therefor as a means of egress and ingress to the premises, contracts subject to the physical and visible burden imposed upon the land."

See, also, Jaques v. Tomb, 179 Cal. 444, 177 P. 280; McCarty v. Wilson, 184 Cal. 194, 199, 193 P. 578; Cement Co. v. Land Co., 187 Cal. 175, 201 P. 126; Weller v. Fidelity, etc., Co., 64 S. W. 843, 23 Ky. Law Rep. 1136; Wetherby v. Griswold, 75 Or. 468, 147 P. 388. In Dodds v. Toner, 3 Ind. 427, a farm was conveyed by warranty deed. At the time of the purchase the vendee knew that there was a schoolhouse on a part of the premises, occupied by a school and owned by the school district. In holding that the purchaser was not entitled to any abatement of the purchase price, the court in that case said:

"The purchaser of the farm was entitled to no deduction from the purchase money in this case by way of damages on account of the location of the schoolhouse, as he purchased with notice of its existence, location, and the condition of the title to the ground on which it stood."

The principle enunciated in these cases is equally applicable to the present case.

[5] Appellant claims that before he signed the lease it was represented to him that 80 acres of the land was suitable for the production of alfalfa. But since the leased premises contain the precise amount of acreage called for by the lease, to wit, 80 acres, and since 11 of those 80 acres were occupied by ditches, canals, and roads, it is obvious that appellant, who saw those visible and physical incumbrances, must have known that the whole area of 80 acres could not possibly be put under cultivation. Moreover, he has not pleaded either fraud or mistake. In the absence of fraud or mistake, the written lease, which is complete in itself and which says nothing about the amount of acreage suitable for cultivation, is the controlling evidence of the terms and conditions upon which the property was leased. Its terms cannot be changed by a contemporaneous parol agreement.

The judgment in each case is affirmed.

We concur: WORKS, J.; CRAIG, J.

---

73 Cal. App. 539

CHAPMAN v. OSTERGARD. (Civ. 5192.)

(District Court of Appeal, First District, Division 2, California. July 10, 1925. Hearing Denied by Supreme Court Aug. 31, 1925.)

1. Vendor and purchaser ⊂=229(2) — Good faith necessary to hold under prior recording of subsequent deed.

Plaintiff recorded a quitclaim deed given her by her husband for a valuable consideration, the deed having been recorded before, but given subsequent to a deed to defendant. Plaintiff had participated in proceeds of sale to defendant, knowing money was for property and had acquiesced in continued possession of defendant. *Held*, plaintiff was not entitled to decree quieting title under Civ. Code, § 1214, requiring that subsequent purchaser must have purchased in good faith.

2. Vendor and purchaser ⊂=242—Burden of proof on plaintiff to show good faith in prior recording of after-acquired deed.

In action to quiet title, where deed was recorded before but acquired subsequent to deed of defendant, burden was on plaintiff to show that purchase was made in good faith and without notice, actual or constructive.

3. Trusts ⊂=44(1)—Actions of plaintiff held to show no contemplation of trust.

Where, after a sale by a husband, the wife claimed the property sold by reason of express trust for advances made by her as against a prior purchaser holding under a subsequently recorded deed, no testimony showing that advances went into property nor that there was any written agreement, *held* that wife having knowingly received part of proceeds from sale, her actions showed that no trust in the property was contemplated by the parties.

Appeal from Superior Court, Contra Costa County; A. B. McKenzie, Judge.

Action by Katherine C. Chapman against Peter Ostergard. From a judgment for defendant, plaintiff appeals. Affirmed.

A. J. Hennessy, M. J. Mazuran, and Geo. D. Collins, Jr., all of San Francisco, for appellant.

Pierce & Carlson, of Richmond, and J. E. Rodgers and A. F. Bray, both of Martinez, for respondent.

NOURSE, J. The plaintiff commenced this action to quiet title to certain property situated in El Cerrito park, Contra Costa coun-

ty. The complaint is in the usual form. The answer denies the material allegations of the complaint and sets up two separate defenses—ownership of the property by the defendant and plaintiff's acceptance of the deed under which she claims with full knowledge of the fact that the property had therefore been conveyed to the defendant, and that he was the owner thereof, and that the plaintiff did not purchase the lands in good faith or for a valuable consideration. The cause was tried before the court without a jury, and judgment was entered in favor of the defendant. Plaintiff has appealed from the judgment on a record prepared under the provisions of section 953a, Code of Civil Procedure.

The facts of the case are that on the 16th day of March, 1922, the defendant entered into possession of the premises under a written lease executed by the then owner, Edwin Chew, and dated the 1st day of April, 1922, by which the premises were leased to the defendant for a period of one year from the 1st day of March, 1922, at the yearly rental of $540. One of the covenants of the lease was that, if the defendant at any time during the term of the lease or within 30 days after the expiration thereof "shall be minded to purchase the leased premises, the above amount paid as rent shall apply on the purchase price." On March 8, 1922, the said Chew executed and delivered to the defendant his receipt for the sum of $475 on account of the rental of the premises. After the defendant's occupancy began, he paid the further sum of $25, making the full sum of $500 paid on account of rental, and which was afterwards applied to the purchase price in the manner hereinafter stated. He immediately made numerous improvements on the premises which he occupied as his home, and frequently stated to the plaintiff that he intended to live on the place and that he intended to purchase it from Chew. The place had been previously occupied as the home of the plaintiff and said Chew, the plaintiff having recently been divorced from her husband, who was at that time confined in the county jail following a conviction for some misdemeanor. When the plaintiff and Chew removed from the premises for the purpose of giving possession to the defendant, plaintiff left in the house some of her household possessions.

After her former husband had been released from confinement, he returned to the premises and removed some of these household goods and placed them in storage. The plaintiff, however, claimed that some of her possessions had been left in the house and called frequently at the place while defendant was in possession for the purpose of securing what she claimed had been left behind. At these times she had conversations with the defendant in which he gave her to understand that he intended to exercise the option contained in the lease and to purchase the property for his own home. On April 21, 1922, a letter was mailed from the office of one of plaintiff's attorneys in the city of San Francisco to the defendant, and on the behalf of the plaintiff, in which the defendant was notified that the plaintiff claimed some interest in the property and that any conveyance thereof or any payment thereon from Chew, without the signature of the plaintiff, or that of one of her attorneys, would be treated as fraudulent by the plaintiff. In the same letter the defendant was given further notice "that any agreement to sell said property made and executed by and between Mr. Chew and yourself * * * will also be treated as being made for the express purpose to defraud Mrs. Chapman of her interest in said property." This letter was delivered to the wife of the defendant on the 25th of April, 1922, and she immediately turned it over to Chew and the evidence is that its contents were not brought to the attention of the defendant. On the same day, the defendant and Chew met at the Mechanics' Bank in the city of Richmond and completed the transaction for the sale of the premises. Chew executed his grant, bargain, and sale deed, and delivered the same to the defendant, who at the same time delivered his promissory note in the sum of $1,000, payable on or before the 1st day of July, 1922. The defendant immediately delivered his deed to an officer of the Mechanics' Bank, to whom he advanced sufficient funds for the payment of the internal revenue taxes and for the recordation of the instrument, and who, in turn, promised to see that it was duly recorded. Thereafter, and on April 27th, the said Chew executed and delivered to the plaintiff a deed purporting to convey all his right, title, and interest in and to the said property to the plaintiff. This document, which is in the usual form of a grant, bargain, and sale deed, contains a paragraph inserted between the conveying clause and the description of the lands purported to be conveyed, which reads as follows:

"All my right, title, and interest which I may now have or hereafter acquire in all real, personal and mixed property of whatever kind or nature or wheresoever situate."

This deed was duly recorded on the 4th day of May, 1922, and the prior deed executed to the defendant was duly recorded on the day following. The consideration for the deed to the plaintiff was found to be the sum of $1,500, part of which the plaintiff testified she had advanced to Chew in small amounts over a considerable period of time following his purchase of the property, and part of which she claimed for board and lodging of Chew while she was living with him. The trial court also found that prior to the mak-

ing and execution of the deed from Chew to plaintiff she did not make any inquiry from the defendant or any other person concerning what interests or right the defendant had in the premises and that "at the time she received the aforesaid deed from Chew (she) had no actual notice or knowledge that Chew had previously conveyed the said premises to Ostergard."

There are further facts appearing in the record upon which the trial court did not find, which are important as bearing upon the issue raised by the defendant that the plaintiff had constructive knowledge of defendant's interests and that she was not a purchaser in good faith. In this connection it was shown that the plaintiff had been informed of the existence of the lease by both Chew and the defendant; that she had been frequently informed of defendant's intention to exercise the option contained in the lease and to purchase the property; that as early as April 21, 1922, she knew, or at least had reason to believe, that a sale was contemplated and that an agreement for sale existed between Chew and the defendant, as on that date she attempted to notify the defendant through her attorney that she would treat the agreement to sell, as well as any contemplated conveyance, as a fraud on her; that within a day or two after the execution of the deed to the defendant—April 25th—the plaintiff discussed the transaction with Mr. Downer, president of the Mechanics' Bank of Richmond, informed him that the property had been transferred to the defendant, and stated that it would be necessary for her to consult her attorneys in order to protect her interests. It is in the testimony of this witness also that during this conversation nothing was said by the plaintiff regarding any deed having been made to her, and the inference may be properly drawn that the entire conversation took place prior to the date of the execution of the deed of Chew to the plaintiff. In addition to this it appears that the deed from Chew to the plaintiff was executed in the office of one of plaintiff's attorneys, who witnessed its execution, and that this deed contained the insertion not common to an ordinary grant, bargain, and sale deed to the effect that the grantor was conveying all his "right, title, and interest" which he might have in the property.

The actions of the plaintiff, subsequent to the execution and delivery of the two deeds, have an important bearing upon the issue of good faith on the part of the plaintiff, particularly as this is an action in equity in which the element of good faith is of first importance. It appears that, immediately after the passing of the deeds, Chew began to make insistent demands upon the defendant for moneys on account of the balance of the purchase price which was evidenced by the defendant's promissory note due July 1, 1922. These calls were made almost daily and payments were made to Chew in small amounts, either by the defendant directly or by his agent. On nearly all of these occasions the plaintiff was present with Chew and frequently took from Chew a part of the money which he received from the defendant. On other occasions the plaintiff would come herself to the home of the defendant and wait for the arrival of Chew for the purpose of collecting money from the defendant. The evidence is that the plaintiff knew at all times that these moneys which the defendant paid to Chew were being paid on account of the purchase price of the premises, and that she participated in the fruits thereof. On May 20, 1922, the defendant's note was paid in full and canceled, and Chew executed to the defendant his receipt for the payment of the full sum of $3,000. This transaction consisted of the payment to Chew by the defendant of $300 in cash, the delivery to him of a draft in the sum of $500, payable upon a bank in the city of Ukiah, and the delivery to him of an automobile valued at $700. It does not appear that the plaintiff was present on this occasion, but it does appear that immediately thereafter Chew went to Ukiah and that on his return, some time in July, he delivered to the plaintiff an automobile. On May 29, 1922, Chew executed to plaintiff an assignment of all moneys due or to become due him from the defendant arising out of the sale of the property in controversy, and on June 1st of the same year appointed and designated one of the plaintiff's attorneys as his attorney in fact and at law for the purpose of enabling said attorney to appear for said Chew in all matters, legal or criminal, and particularly in the matter of Chew against this defendant, to demand, sue for, or collect all sums of money which may be owing to said Chew. This power of attorney was made irrevocable, because it conferred upon the said attorney an equal one-half of the value of what he might recover. Notice of the execution of this document was served upon the defendant by letter addressed to him by the said attorney, acting as attorney in fact and attorney at law for both Mr. Chew and Mrs. Chapman.

[1, 2] It is argued on the part of the appellant that because of the provisions of section 1214, Civil Code, her deed having been recorded prior to that of the respondent, the latter is void and she is, therefore, entitled to a decree quieting her title to the property. The priority of appellant's recordation is not disputed, and the trial court found that the conveyance was made for a valuable consideration, a finding which is binding upon the respondent on this appeal, because there is some evidence which supports it. However, an essential requirement of the Code section is that the subsequent purchaser must

have purchased in good faith. Upon this issue, the trial court did not make any finding, and we are unable to conceive, in view of all the facts above related, how, if the trial court had made a finding on that issue, it could have been favorable to the appellant. Unquestionably, the burden of proof is on the appellant to show that she had made the purchase in good faith and without notice, actual or constructive. The rule is laid down in Eversdon v. Mayhew, 65 Cal. 163, 167, 3 P. 641, 644, where the court say:

"To entitle a party to protection as such a purchaser he must aver and prove the possession of his grantor, the purchase of the premises, the payment of the purchase money in good faith, and without notice, actual or constructive, prior to and down to the time of its payment."

This rule has been approved in all the later authorities which are aptly discussed by Mr. Justice Shaw in Bell v. Pleasant, 145 Cal. 410, 78 P. 957, 104 Am. St. Rep. 61.

The purpose of the Code section is to protect the innocent and bona fide purchaser from one who may procure a deed with an earlier date for the purpose of defrauding the other. It was never intended that the section should be applied to defraud one, who has in good faith and for a valuable consideration purchased property, and who has delayed placing his conveyance of record. The trial court here found that, at the time of the execution of the appellant's deed, she did not have actual knowledge of the existence of respondent's deed, and that she did not take her conveyance for the purpose of defrauding the respondent. However, it did not find that the appellant did not have constructive notice of the existence of respondent's conveyance or that she was acting in good faith. From the reading of the entire record, we are inclined to believe that the finding of the trial court as to the want of actual notice on the part of the appellant was a more favorable finding than she was entitled to, but as we have said, there being some evidence to support it, we must accept that finding as conclusive here. There is no escape from the conclusion, however, that if she did not have actual notice of the existence of respondent's conveyance she had every opportunity to obtain knowledge of that fact, and furthermore, that if she did not have actual notice thereof prior to the execution of her own conveyance she certainly did have actual notice before she recorded it. The fact that, when Chew executed his conveyance to her in the presence of her attorney, he inserted the paragraph which is commonly known as a "quitclaim" clause, or a safety valve to relieve the grantor from the responsibility of a fraudulent conveyance of a title which he did not possess, cannot be viewed in any other light than that the appellant and her counsel (who were also the counsel for Chew) knew or had some intimation that Chew was not legally capable of passing to the appellant a clear title. In addition to this, all the subsequent acts of the appellant, her participation in the fruits of the sale, her acquiescence in respect to the continued possession and improvement of the premises, compel the inference which we must draw in support of the judgment that she was not acting in good faith.

[3] On this appeal the appellant has raised for the first time the point that the facts show the existence of an express trust concerning the property wherein Chew was the trustee and the appellant was the beneficiary. This claim is based upon the testimony of the appellant, which was brought out on cross-examination, and which is to the effect that when Chew purchased the property, in October, 1921, he told the appellant that he would give her half of it. This agreement, the appellant testified, was made after Chew purchased the property. There was no testimony that the appellant advanced any of the money that went into the property; there was nothing to show the creation of a constructive trust, and there was no evidence showing any writing of any nature indicating the creation of an express trust. Upon the testimony of the appellant, she bases her claim at this time that an express trust was created, and argues that the statutory provisions requiring such trusts to be in writing are not applicable here, because they merely fix a rule of evidence governing the manner of the proof of agreements creating trusts in realty. It would serve no purpose to discuss the rules of law involved, because the facts show indisputably that the appellant did not at any time during the entire transaction, nor at the time of the trial in the court below, believe or understand that any trust had been created and no intimation of the purpose to claim the existence of such a trust was made at the time of the trial so that the respondent would be enabled to meet it with evidence. From the reading of the entire record, the conclusion necessarily follows that the advancements which the appellant made to Chew were in the most cases simply gifts which she did not expect to be returned; that no proof was made of any promise to repay any of these advancements to Chew at the time, and no writing of any kind was produced by the appellant, either acknowledging receipt of any of these moneys by Chew or obligating him to pay them. We cannot escape the conclusion that any promise which he made to her regarding the property was nothing more than an agreement to secure her for some of the moneys advanced, and all the circumstances leading up to the transaction of April 27th and following indicate that these transactions were had for the same purpose, particularly as the amount claimed to be due by the appellant was $1,500, whereas the admitted value of

the property conveyed on April 27th was $7,000, upon which was a bank mortgage of $4,000, executed by Chew alone. The actions of the appellant, in accepting the moneys and the automobile from Chew after the sale, are alone sufficient to negative any theory that a trust in the property was contemplated by the parties at any time prior to this litigation.

The outstanding consideration in the case is that the appellant failed to sustain the burden of proof that the conveyance to her was taken in good faith and without constructive knowledge, at least, of the interests of the respondent. Though the trial court did not find upon either of these issues, we are unable to conceive from the evidence how any finding could have been made favorable to the appellant. This being an action in equity, and the burden of proof being upon the appellant to prove the equities in her favor, we must assume in support of the judgment that the trial court would have found against her if a finding had been made. She is not, therefore, injured by the failure to find thereon. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750.

Judgment affirmed.

We concur: LANGDON, P. J.; STURTEVANT J.

---

73 Cal. App. 643

ESTES v. DELPECH. (Civ. 5117.)

(District Court of Appeal, First District, Division 1, California. July 17, 1925.)

1. Evidence ⟸441(9)—Contemporaneous parol agreement modifying written contract not a defense, under Code, to action on contract.

In an action to rescind a written contract for purchase of one-half interest in business, defense that plaintiff had failed to perform a contemporaneous parol agreement to devote full time to business, not omitted from contract by mistake, cannot be made under Civ. Code, §§ 1625, 1698, prohibiting modification by parol of terms of written contract.

2. Partnership ⟸21—Defendant held not justified in refusing to complete sale.

In an action to rescind contract for sale of one-half interest in business, where, as trial court found, there was no alleged oral agreement to devote full time to the business, but an intended subsequent agreement relative to the conduct of business never entered into, the defendant was not justified in refusing to complete sale.

3. Partnership ⟸108—Recovery of money between partners in a personal business transaction proper without partnership accounting.

Money paid by plaintiff to defendant in a personal business transaction, though used in partnership business, may be recovered from defendant without necessity of a partnership accounting.

4. Payment ⟸89(1)—Judgment for money paid, plus agreed value of car, part of consideration of contract, proper, though car sold for less.

In an action to recover money paid on a contract, where the consideration was cash and a car accepted at an agreed value, but which defendant sold for less, a judgment for the plaintiff for cash paid and agreed value of car was proper.

Appeal from Superior Court, Alameda County; Warren V. Tryon, Judge.

Action by R. F. Estes against Jules Delpech. From a judgment for plaintiff, defendant appeals. Affirmed.

W. E. Harvent and L. D. Manning, both of Oakland, for appellant.

Calkins, Hagar, Hall & Linforth, of San Francisco, for respondent.

KNIGHT, J. An appeal by defendant from an adverse judgment, given in an action brought by plaintiff as vendee for the rescission of an executory contract for the sale of a one-half interst in a food products business, including certain merchandise, formulas, and recipes thereunto belonging, and to recover purchase money previously paid thereunder. The agreed purchase price was $1,250, and of that amount the vendor, by the terms of the contract, acknowledged having received $1,150 at the time the contract was signed. Said contract provided that title to the interest in the property agreed to be sold should remain in the vendor until the full amount of the purchase price was paid, but that the vendee should "have the possession thereof and be entitled to half the net profits thereof after all expenses and rents in connection therewith were paid"; that upon full payment of the purchase price being made, the vendor should execute and deliver a bill of sale transferring to said vendee one-half interest in said property, and that thereupon title to the same should pass to the vendee; that if said vendee defaulted in making full payment, then the vendor was entitled to retake possession of said one-half interest and retain as liquidated damages all payments previously made.

The complaint alleged that, within the period of time specified in said contract, plaintiff tendered to defendant the balance of the purchase price with interest, and demanded a bill of sale transferring to him said interest in said business, but that defendant refused to accept said tender, and likewise refused to execute or deliver a bill of sale; that thereupon, and on May 12, 1923, plaintiff served notice of rescission of the contract, demanded return of the sum of $1,150 and offered to surrender to defendant everything he had received from defendant, "and otherwise to do all things necessary to restore

defendant to the position he had occupied when said contract was made, but defendant refused to comply with plaintiff's demand." Said complaint further alleged that plaintiff performed all obligations and conditions to be performed by him under said agreement, and "is ready and willing to relinquish and restore to defendant as the court may direct all right, title, or interest in and to the said property described in said agreement, which may have accrued to plaintiff by reason of said agreement or otherwise."

Defendant does not dispute the execution of the contract, or the tender by plaintiff of the balance due on the purchase price within the agreed time, or that he refused to accept the same, but he contends that such refusal was justified upon the following grounds: That said contract, in effect, created a partnership between them in relation to the operation of said business; that in addition to the stipulations contained in said contract, it was orally agreed between them that each should devote his entire time to said business, but that owing to a mutual mistake said oral agreement was not made a part of said written contract; that plaintiff failed to devote his entire time to said business, and consequently had not performed his part of said contract, and was not entitled to consummate the purchase.

[1, 2] It would appear that defendant's refusal to complete the sale upon the grounds urged cannot be sustained for two reasons: First, "the rule is elementary that a parol agreement, made at the time of the execution of a written instrument, which upon its face is a complete expression of the agreement of the parties, cannot be introduced for the purpose of modifying or contradicting the terms of such instrument. The rule is one of wide application, and requires no citation of authority for its support. Where parties have deliberately put their agreement in writing in such language as imports a legal obligation, it is conclusively presumed that the whole engagement and the extent and manner of their undertaking is there expressed. This rule has found expression in our Code (Civ. Code, §§ 1625, 1698), and, according to modern authority, has been held to be not one of evidence merely but also one of positive substantive law. Harding v. Robinson, 175 Cal. 534 (166 P. 808)." Lindemann v. Coryell, 59 Cal. App. 788, 212 P. 47. See, also, Code Civ. Proc. § 1856; Dollar v. International Banking Corporation, 13 Cal. App. 331, 109 P. 499; Fleming v. Law, 163 Cal. 227, 124 P. 1018. Secondly, although the trial court liberally allowed defendant to testify as to the existence of said oral agreement, it expressly found that it was not true that it was agreed that each party should give his entire time to said partnership business, or that the omission to include such a provision in the contract was due to mutual mistake, the court further finding in this regard that the parties "intended to make another and subsequent agreement relative to the conduct of said business, which should prescribe the services to be rendered to such business by plaintiff and defendant, but that such other subsequent agreement was never made or entered into." It is therefore apparent that defendant's refusal to accept the balance of the purchase price and to complete the sale upon the strength of said oral agreement was not justified under either the law or the facts.

[3] Further contention is made by defendant that the court was precluded from giving judgment in the action until a partnership accounting was had, it being claimed in this connection that the amount paid by plaintiff on the purchase price was, with plaintiff's knowledge and consent, used by defendant in the operation of said business, and that therefore there was nothing due plaintiff. Even assuming, as defendant contends, that a partnership in fact existed, we are unable to sustain defendant's contention that an accounting was essential to the rendition of judgment herein, for the reason that this action involved only a personal business affair between the parties themselves as distinguished from a partnership transaction. In re Bull v. Coe, 77 Cal. 54, 18 P. 808, 11 Am. St. Rep. 235, it is said:

"It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter. And it seems plain that a loan from one partner to another is not a partnership transaction, notwithstanding the fact that the borrower intends to put the money into the firm, and does so. Accordingly, it is well settled that the lender in such a case can maintain an action for the recovery of the money, although there has been no settlement of the partnership accounts. Currier v. Webster, 45 N. H. 226; Crater v. Bininger, 45 N. Y. 545; Morgan v. Nunes, 54 Miss. 312, 313; Scott v. Campbell, 30 Ala. 730; Grigsby v. Nance, 3 Ala. 350, 351; Terrill v. Richards, 1 Nott & McC. (S. C.) 20."

To the same effect are Arnheim v. Gordon, 21 Cal. App. 754, 132 P. 840, 30 Cyc. 465, 467; Bates on Partnership, §§ 868, 874, 875. It is true that the indebtedness here sued upon was not in its nature a loan, but on principle it amounted to the same thing, for the action was based upon a personal indebtedness due from defendant to plaintiff arising from the rescission of the contract by plaintiff. The case at bar is even farther removed from the rule of accounting than were either of the cases of Bull v. Coe, supra, or Arnheim v. Gordon, supra, because the evidence here does not show, as it did in those cases, that the parties intended that the purchase money should be invested in the business.

We are also unable to accede to the prop-

position made by defendant that plaintiff was not entitled to rescind because plaintiff had collected and withheld the sum of $48 belonging to said business. This matter is disposed of by the finding of the trial court to the effect that plaintiff offered to pay said sum to defendant when he gave notice of rescission, and that defendant refused to accept the same. This amount was in fact afterwards deducted from the sum found by the court to be due plaintiff, and the judgment in plaintiff's favor did not include that sum.

[4] Lastly, defendant complains that the judgment directs him to pay plaintiff $1,102 with interest, which represents the amount defendant acknowledged in said contract as having received from plaintiff, less the sum of $48 collected and retained by plaintiff whereas the evidence shows that the sum of $1,150 for which plaintiff was given credit was made up of the sum of $500 in cash and the transfer to him of an automobile, which he has since sold for the sum of $500. We think the judgment proper, for the reason that the court found upon sufficient evidence that, when the contract was signed, said automobile was of the value of $650, and defendant at that time agreed to accept it as part payment of the purchase price for that amount.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 605

WILLEY v. ALASKA PACKERS' ASS'N.
(Civ. 5116.)

(District Court of Appeal, First District, Division 1, California. July 15, 1925. Hearing Denied by Supreme Court Sept. 10, 1925.)

1. Appeal and error ⊜1002—Conflict in evidence, as to request for medical attendance and knowledge of physical condition, concluded by verdict.

In an action for damages for breach of contract to furnish plaintiff with medical treatment resulting in his illness, where evidence was conflicting as to whether plaintiff requested medical treatment or advised any one of his condition, this question was concluded by the verdict.

2. Master and servant ⊜77 — Employer not liable for failure to give medical aid in absence of request.

An employer, contracting to furnish employee with medical treatment, is not liable for failure to furnish such treatment in absence of request for medical aid or knowledge of employee's physical condition, there being no affirmative duty to investigate health of employees.

3. Master and servant ⊜77—Instruction on negligence in contracting disease held proper.

In action for damages for breach of contract to furnish plaintiff with medical treatment, instruction that, if plaintiff contracted tuberculosis through own gross negligence, and failure to exercise due care, he cannot recover was proper.

4. Master and servant ⊜77—Cause of illness question for jury.

Question, as to whether or not plaintiff contracted illness through failure to make his condition known, was one of fact for the jury.

5. Master and servant ⊜77—Evidence properly admitted to disprove testimony as to illness.

In action for damages for breach of contract to furnish employee medical attendance where employee's wife testified that he had never had a cough prior to his employment, evidence by fellow employees that he had suffered from a cough was properly admitted.

6. Trial ⊜304—No misconduct in jury filing letter with court requesting defendant to aid plaintiff's family.

Jury's letter, filed with trial court requesting defendant to aid plaintiff's family *held* not misconduct affecting verdict for defendant.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action by I. C. Kleppe against the Alaska Packers' Association. Judgment for defendant, and plaintiff appeals. Plaintiff having died since the rendition of the judgment, Chas. G. Willey, his executor, was substituted as appellant. Judgment affirmed.

H. W. Hutton, of San Francisco, for appellant.

Chickering & Gregory and Donald M. Gregory, all of San Francisco, for respondent.

TYLER, P. J. Action to recover the sum of $50,000 as damages for the alleged failure of defendant to provide plaintiff with medical and surgical necessities according to the terms of a contract, through which default it is claimed plaintiff contracted tuberculosis.

The complaint alleges that the breach of contract occurred under the following circumstances: On or about April 3, 1922, plaintiff was hired and employed by defendant corporation to serve in the capacity of mate of a certain vessel owned by it and known as the "Star of Finland." The vessel was on a voyage from San Francisco to a salmon cannery located at a place called Alitak, on Kodiak Island, in the territory of Alaska. Under the terms of employment, plaintiff, while in Alaska, was to work as master on a launch called the "Goney."

The shipping articles, among other things, contained a provision that all parties of the second part, of whom plaintiff was one, should "receive medical and surgical attendance and medical and surgical necessities" while engaged under the contract. The complaint charges that, while working on the "Goney" at Alitak, plaintiff was compelled to

leave the last-named place at 4 o'clock in the morning and make a 50-mile trip each day, and that defendant did not provide plaintiff at such times with proper food, as the contract of employment required; that he usually returned from these trips at about 7 o'clock in the evening, after meal times, and, generally, he had nothing to eat or drink but coffee and bread, which was not proper food for the work he had to perform, and in consequence of which his system ran down and his vitality became of a very low ebb, which prevented him from resisting any sickness that he contracted or might contract; that on or about the 14th day of August, 1922, while working on the "Goney" under these conditions and with an impaired vitality, he contracted a severe cold, which he was unable to throw off; that he applied to the superintendent and agent of defendant at Alitak for medicine, but was refused the same, although he was in need thereof; that about two weeks thereafter the superintendent did furnish the same to him, but in an insufficient quantity, at which time his cold was worse, and by reason of this lack of medicine and medical attention the cold settled on his lungs and developed into tuberculosis, which it is averred, has become permanent; that upon his return to San Francisco plaintiff went under the care of a physician, and was, at the time of the filing of the complaint, in a hospital.

The answer admits the employment but denies any failure on the part of defendant corporation to provide plaintiff with proper food, and denies that he was compelled to work at unreasonable hours, or that defendant ever refused to furnish him with proper medical or medicinal attention.

Trial was had before a jury, which resulted in a verdict in favor of the defendant corporation. A motion for a new trial was made and denied, and this is an appeal from the judgment and order.

Since the rendition of the judgment, Kleppe has died and his executor, Charles G. Willey, has been substituted as plaintiff. As ground for reversal it is first urged that the verdict is against the evidence, as it shows that defendant corporation breached its contract in failing to furnish plaintiff with the proper medical attendance and treatment that its contract and the maritime law demanded.

[1] The record discloses that plaintiff entered into the employment with defendant corporation as alleged in his complaint. That upon arriving at Alitak station he took charge of the "Goney" as master and proceeded to perform his duties. He testified that he contracted a cold and applied to the superintendent for some medicine to relieve it, but the same was not furnished him for some two weeks thereafter. He further testified, in substance, that he was compelled to work at unusual hours without proper food and under conditions that aggravated his complaint, in consequence of which he developed tuberculosis. He admitted that he made no request to be sent to a hospital, as he did not think he was sick enough to be there. Defendant introduced evidence to disprove that plaintiff was obliged to work at unreasonable hours or that he was not furnished with sufficient or proper food. In this connection other evidence was introduced to show that the "Goney," of which plaintiff was master, was used by the corporation to bring fish from fish traps located about 25 miles from the cannery; that on the route to these traps there was located a station about 14 miles from the cannery, where the corporation maintained a kitchen under the supervision of a cook, where food could be procured at all times, and that plaintiff had on occasions availed himself of this opportunity and had never complained of the food furnished. It also appeared that the "Goney" was supplied with provisions. The log book, kept in the handwriting of plaintiff, showed that except upon two occasions plaintiff had not been compelled to work at unusual hours; that he generally left the cannery about 6 a. m. and returned between 2 and 3 o'clock in the afternoon. It also appears that defendant operates, in connection with its business in Alaska, some eight medical stations and five hospitals, comfortably fitted with modern appliances and plentifully supplied with drugs and surgical instruments, and that it employs eight physicians, besides nurses and orderlies. There was other testimony to show that there was at all times a medicine chest at Alitak, but that plaintiff never asked for medicine or in any manner attempted to avail himself of these advantages. The physician whose duty it was to visit the cannery at Alitak denied that plaintiff had ever applied to him for medicine or advice, and that he never refused medicine to any employee who asked for it. The testimony of the superintendent was to the same effect. There being a conflict in the evidence upon the subject as to whether or not plaintiff had ever requested medicine or whether he advised any one of his condition, this question is concluded by the verdict.

[2] The case, therefore, so far as this court is concerned, presents the question as to whether or not defendant corporation was liable in damages for failure to furnish plaintiff with medical treatment in the absence of a request so to do, and where there was nothing to bring to the knowledge of the corporation that such service was required, for apart from his own testimony that he requested aid there is no evidence that any knowledge of his condition was brought home to the officials or agents of the corporation. In other words, was the corporation, under its contract, bound to affirmatively make an investigation of the health of its employees in absence of a demand so to do? We do not think that any such duty rested upon it. If the ailment or injury suffered was of such a character as to be perfectly apparent that aid

was required to relieve it, there can be no question but that it would be the duty of the corporation to furnish aid, even though it was not asked for. The Iroquois, 194 U. S. 240–246, 24 S. Ct. 640, 48 L. Ed. 955. But where, as here, plaintiff himself did not consider himself sick, and made no complaint nor asked for aid or assistance, the corporation was not bound to acquaint itself at its peril of plaintiff's latent ailment. The law imposes no such duty upon an employer, and it would be an unreasonable construction of the contract to hold that defendant corporation was, by reason thereof, under a legal contractual obligation to examine, from time to time, every one of its employees, which the evidence shows to be numerous, to ascertain if they might be suffering from some secret affliction. To so hold would be to declare an employer, under such circumstances, an insurer of the health of his employees. Such is not the law.

Complaint is made of many of the instructions to the jury. The trial court was of the opinion that defendant was under no obligation to furnish plaintiff with medical attention, unless it was asked for by him, in the absence of information sufficient to put it upon inquiry, and so instructed the jury.

[3] Most of the instructions complained of have to do with this question, and upon examination we see no errors in any of them. The jury was further instructed that if it believed from the evidence that plaintiff contracted tuberculosis by reason of his own gross negligence and failure to exercise proper care for his own health, he was not entitled to recover.

[4] The instruction was a proper one. A shipowner is not liable for damages on account of the sickness of a seaman where his gross negligence was a contributory cause of his sickness. The question as to whether or not plaintiff had contracted the disease complained of through failure to make his condition known was one of fact for the jury. 5 Labatt's Master & Serv., § 2008.

[5] It is next claimed that the court erred in admitting evidence showing that plaintiff was suffering from a cough prior to his employment by defendant. It appeared in evidence that plaintiff had been employed by defendant in the same capacity and at the same place for three years prior to 1922. His wife testified that up to the date last mentioned, plaintiff never had a cough and his physical condition had been good during their marriage relation, a period of some 10 years. To disprove this testimony, defendant produced fellow employees of plaintiff, who testified that they had known him prior to 1922, and that he always had a cough. Under these circumstances, the admission of this evidence was proper.

[6] And finally, plaintiff complains of misconduct of the jury. The claimed misconduct consisted in the jury filing with the trial court a letter addressed to the defendant corporation requesting it to assist plaintiff's family. This act in no manner affected the verdict, which embodied the conclusion of the jury on questions of fact litigated upon the trial. That the members of the jury, moved undoubtedly by compassion, made such request in no manner qualified or affected their verdict.

The judgment and order are affirmed.

We concur: CASHIN, J.; KNIGHT, J.

---

73 Cal. App. 548

PEOPLE v. PACE. (Cr. 1202.)

(District Court of Appeal, Second District, Division 1, California. July 10, 1925. Hearing Denied by Supreme Court Sept. 5, 1925.)

1. Constitutional law ⟸87, 240(1), 296(1)—Licenses ⟸7(1)—Act requiring broker's license by owner if he desires to sell his stock in several sales held unconstitutional.

Corporate Securities Act, § 2, subd. 9(a), as amended by St. 1923, p. 89, § 1, making the requirement for license as broker applicable to owner of securities not the issuer thereof, if he desires to sell his stock in more than one transaction, is in violation of Const. U. S. Amend. 14, and Const. Cal. art. 1, §§ 1, 13, as contravening right to enjoy, acquire, and protect private property.

2. Constitutional law ⟸87—Police power cannot be exercised by Legislature to interfere with sale of private property, though beneficial.

The Legislature cannot exercise its police power under guise of "general welfare" so as to interfere with sale by individual of his own lawfully acquired property, regardless of beneficial results to the public.

3. Constitutional law ⟸87—Act not upheld as a mode of regulating disposal of property, where it contains power to prohibit sale.

Corporate Securities Act, § 2, subd. 9(a), as amended by St. 1923, p. 89, § 1, requiring one to obtain broker's permit, issued only on showing of good business reputation, if he desires to dispose of his stock at successive sales, is more than a regulation of mode of disposing of property, since it gives power to prohibit sale of one's securities, on refusal of permit, and this comes under rule that act is unconstitutional if broad enough to authorize unconstitutional act.

4. Constitutional law ⟸87—Act strengthening legislative control over sale of securities does not justify invasion of rights in private property.

The difficulties of proper enforcement of Corporate Securities Act, § 2, subd. 9, as amended by St. 1923, p. 89, § 1, making more effective legislative control over sale of securities, does not justify invasion of private property rights guaranteed by the Constitution.

5. Constitutional law ⇐240(1)—Act prohibiting successive sales of stock by owner without license, but permitting single sale, unconstitutional.

Corporate Securities Act, § 2, subd. 9, as amended by St. 1923, p. 89, § 1, permitting owner of securities not the issuer thereof to sell them without license in one sale, but not in successive sales, is in violation of Const. U. S. Amend. 14, as denying the equal protection of law to owners desiring to sell their stock in several sales.

6. Statutes ⇐47—Act prohibiting successive sales of stock by owners without license unstitutional as indefinite.

Corporate Securities Act, § 2, subd. 9, as amended by St. 1923, p. 89, § 1, prohibiting owner of stock not the issuer thereof from selling same without license, at "repeated and successive transactions of like or similar character," is unconstitutional as indefinite and uncertain.

Appeal from Superior Court, Los Angeles County; Russ Avery, Judge.

S. A. Pace was convicted of violating the Corporate Securities Act, and he appeals. Reversed.

Hearing denied by Supreme Court; Lawlor, Acting Chief Justice, dissenting.

C. B. Conlin and E. R. Simon, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., H. H. Linney and John W. Maltman, Deputy Attys. Gen., for the People.

Puter & Quinn, of Eureka, and Randall & Bartlett and Ovila N. Normandin, all of Los Angeles, amici curiæ.

HAHN, Justice pro tem. The defendant in this case was accused by the district attorney of the crime of violating the Corporate Securities Act, committed as follows:

"That the said S. A. Pace on or about the 28th day of November, 1923, at and in the county of Los Angeles, state of California, did willfully, unlawfully, and feloniously engage, either wholly or in part, in the business of selling, offering for sale, negotiating for the sale of, and otherwise dealing in securities and securities issued by others, and of underwriting issue of securities and of purchasing such securities with the purpose of reselling them and offering them for sale to the public, to wit, as follows: Shares of stock in the United Candy Shops Corporation, a corporation. And the said S. A. Pace was not then and there an agent of the said United Candy Shops Corporation, a corporation, and did not then and there have any permit from the commissioner of corporations of the state of California as a broker, or otherwise, so to do."

The case was submitted to the jury upon a stipulation of facts based upon the testimony given and the evidence introduced at the preliminary hearing. From this stipulation the following material facts may be gleaned: That the United Candy Shops was a corporation formed under the laws of the state of California; that some time prior to March 8, 1923, (the exact dates not appearing in the stipulation), the commissioner of corporations of California issued an original and several supplemental permits granting to the United Candy Shops permission to sell certain portions of its capital stock; that these permits were all revoked on March 8, 1923; that the defendant, S. A. Pace, was granted a broker's permit on February 21, 1922, which entitled him to sell securities; that this permit was revoked on December 8, 1922; that the defendant was a director of the United Candy Shops and, some time in the month of February, 1923, was elected president of the corporation; that during the period that the permits to sell stock and the defendant's permit as a broker were in full force and effect, a number of subscriptions to treasury stock of the United Candy Shops were obtained and some of this stock was sold to purchasers on time payments. It would appear that the defendant made some of these sales on time contracts. The method pursued in connection with the partial payment contracts was for the purchaser to make the first payment in cash and give a promissory note for the balance of the purchase price. Thereupon the stock was issued in the name of the purchaser and indorsed in blank by the purchaser, and then returned to the corporation to be held as collateral security for the payment of the note. In a number of these contract sales the purchasers defaulted in their payments, and, the company being in need of cash, the defendant purchased from the company a number of these notes that were in default, paying to the company in cash the balance remaining unpaid, and thereupon the notes were assigned by the corporation to the defendant, and the collateral also delivered with the notes. Thereafter the defendant, by reason of the terms and conditions contained in the notes, dealt with this collateral stock as though it was his own stock, and disposed of at least a portion of this stock so acquired in 16 different sales covering a period of about 5 months. It does not appear whether he sold all or only a part of the stock so acquired. All of these sales were made after the permits issued to the corporation to sell stock had been revoked, and also after the permit issued to the defendant to act as broker had been revoked. It appears further from the stipulation that in practically all of these 16 sales the defendant informed the purchasers that the stock that they were buying was not treasury stock, but was being transferred to them from some individual, whose name, however, was not given by the defendant to the purchaser. It further appears that the corporation received

no part of the money paid by the purchasers, but all of the money paid for this stock was retained by the defendant as his own funds.

It was not contended at the trial, nor is it urged here on appeal, that the defendant was not the bona fide owner of the stock sold; nor does the Attorney General urge that the defendant, either in acquiring any of this stock or in making sales of any of it, was acting for the corporation. No suggestion is made that, in the defendant acquiring and selling this stock, a subterfuge was resorted to in order to avoid the necessity of the corporation procuring a permit.

The appeal before us squarely presents the question as to whether or not an individual, who is a bona fide owner of securities, may lawfully sell such securities, or any part of them, in repeated and successive transactions for like or similar character, without first complying with certain requirements of the Corporate Securities Act required of brokers, and without securing a broker's license. Paragraph 9 of section 2 of the Corporate Securities Act, as amended in 1923 (St. 1923, p. 89, § 1), reads as follows:

"The word 'broker,' as used in this act, includes every person or company, other than an agent, who shall, in this state, engage either wholly or in part in the business of selling, offering for sale, negotiating for the sale of, or otherwise dealing in any 'security' or 'securities' issued by others, or of underwriting any issue of 'securities,' or of purchasing such 'securities' with the purpose of re-selling them, or of offering them for sale to the public. The word 'securities,' as used in this paragraph, includes the following 'securities' issued by 'individuals':

"Any instrument offered to the public by an 'individual' evidencing or representing any right to participate or share in oil, gas or other hydrocarbon substances or other minerals of any sort, as yet undeveloped, or in the proceeds of sale thereof;

"All bonds, debentures and evidence of indebtedness offered to the public by an 'individual.'

"The following are excepted from the provisos of this paragraph:

"(a) Any owner of any security who is not the issuer or an underwriter thereof, who sells or exchanges the same for his own account: Provided, that such sale or exchange is not made in the course of repeated and successive transactions of like or similar character by him. * * *"

Appellant contends that the last clause in subdivision (a), which reads, "provided, that such sale or exchange is not made in the course of repeated and successive transactions of like or similar character by him," is unconstitutional and void for the following reasons:

First. That it violates the guaranties contained in that portion of the fourteenth amendment to the federal Constitution which reads as follows:

"No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Second. That it is in conflict with the declaration of rights as set forth in section 1 of article 1 of the Constitution of the state of California, which provides that:

"All men are by nature free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty; acquiring, possessing, and protecting property; and pursuing and obtaining safety and happiness."

Third. That it is also in conflict with that guaranty set forth in the declaration of rights and contained in section 13 of article 1 of the Constitution of the state of California, which provides that no person shall "be deprived of life, liberty or property without due process of law."

Appellant also urges that the clause in question is so indefinite, uncertain, and vague as to be unconstitutional and void.

Supporting counsel for the defendant in urging these contentions, several counsel interested in the question involved, upon permission being granted by this court, have filed briefs as amici curiæ.

It will readily appear from a reading of the portions of the Corporate Securities Act above quoted that any individual who is the owner of securities, and not the issuer or underwriter of them, may dispose of such securities by selling them for his own account, provided that he accomplishes the disposition of them in one transaction or one sale. But if he should find it inconvenient or impossible to dispose of his securities in a satisfactory manner to one purchaser, but should find two or more purchasers who would take them in separate lots, each lot to a separate purchaser and in a separate transaction, but must first secure a broker's license before he may lawfully make more than one sale.

The act further provides that before any individual may secure a broker's license he must make application to the commissioner of corporations, setting forth in such petition certain information concerning himself and the securities which he desires to sell. He must also file with his application a bond in the sum of $5,000, conditioned upon his compliance with the laws of the state of California in making any sales. However, before the broker's permit may be issued to him, the commissioner must satisfy himself that the petitioner is a man of "good business reputation." If the commissioner should not be satisfied that the applicant possesses a "good business reputation," or if, perchance, he concludes that the business

reputation of the applicant is bad, he must refuse to issue a broker's license to the applicant; and, further, if at any time after the issuance of the permit to the broker, the commissioner shall ascertain or conclude that the holder of the permit is a man of "bad business repute," or has violated any provision of the Corporate Securities Act, or has engaged in or is about to engage in any fraudulent transaction, the commissioner of corporations may revoke the broker's permit.

[1] If the provision of the Corporate Securities Act under consideration is a proper exercise by the Legislature of its constitutional power, then this situation may and would inevitably arise: A. and B. are each the owner of $25,000 in par value of bonds, stocks, or other securities; each is desirous of disposing of these securities. A. may be fortunate in having a banking or other connection to which he is able to dispose of all of his securities in one sale or transaction. In such event he would not be required to file an application for a broker's permit, or go to the trouble and expense of furnishing a $5,000 bond. Moreover, he might be a man of a most unsavory business reputation, and stand charged with, or even convicted of, all the crimes enumerated in the decalogue. Without any hindrance or control, the act permits him to exercise his inalienable right to thus dispose of his own property. B., for reasons that might in no way reflect upon his business integrity, honesty, or good character, may not have such a business connection or acquaintance that would enable him to dispose of all of his securities in one sale, but he might be able to make satisfactory disposition of them to two or more purchasers in as many different transactions. After he has made the first sale, he cannot make a second or succeeding sale until he has first filed his application for a broker's permit, posted a $5,000 bond, paid the commissioner's fee, and awaited a sufficient time to enable the commissioner to ascertain whether his business reputation is good or bad. If the commissioner is satisfied with his business reputation, after waiting an indefinite period—as there is no time limit provided in the act within which the commissioner shall issue the permit—a permit is issued, and B. is then enabled legally to dispose of the balance of his securities. If his securities were of a character that fluctuated on the market, this delay may mean a considerable loss to him, which A. is not compelled to suffer. If, on the other hand, the commissioner should find the business reputation of B. unsatisfactory, although nowhere near as unsavory as the reputation of A., the broker's permit is denied, and B. is thus prevented from disposing of the balance of his securities.

Manifestly, any act of the Legislature which creates such a situation is void as being in direct contravention of the inalienable right of every citizen to enjoy, acquire, possess, and protect his property, as guaranteed by the federal Constitution, and also the Constitution of the state of California.

The Attorney General, in his usual able manner, dwells at length in his brief upon the general proposition of the constitutionality of the so-called "Blue Sky" legislation. In view of the fact that the constitutionality of this type of legislation has been upheld by the Supreme Court of the United States in Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, and by our own Supreme Court in Re Girard, 186 Cal. 718, 200 P. 593, we do not feel it is necessary to discuss this general question, or even to consider in detail the opinions of the various courts in the cases cited by the Attorney General. However, it may be observed in passing that in only two of the many cases cited on the general subject does it appear that the court had under consideration the question of the right of an individual to sell or dispose of his own securities under circumstances such as are involved here, and certainly we have been unable to find any decision wherein a definite declaration is made by the court upon the question here involved.

In the case of Hall v. Geiger-Jones Co., supra, the court had under consideration an act of the Legislature of Ohio dealing with investment companies. This act, after defining the term "dealer," uses the following language in making an exception to the class included in the term "dealer":

"An owner, not the issuer of the security, who disposes of his own property, for his own account; when such disposal is not made in the course of repeated and successive transactions of a similar character by such owner; or a natural person, other than the underwriter of the security who is a bona fide owner of the security and disposes of his own property for his own account." Gen. Code, § 6373—2.

The first part of the above-quoted portion of the Ohio statute is almost identical in wording with the clause here under attack, but the last portion of the quoted clause clearly eliminates any question as to the right of a natural person, not an underwriter, to sell his own securities. Apparently the Ohio Legislature, feeling that the language in the first part of the exception might be ambiguous or cause confusion, added the closing paragraph in order to make it clear that the Legislature was not attempting to prevent a natural person from selling his own securities whether in one sale or repeated sales. In view of the wording of the Ohio statute, it is very clear that nothing in the opinion in the case of Hall v. Geiger-Jones Co., supra, can be regarded as supporting the constitutionality of the clause here under attack. It is quite clear that it is the

business of selling securities that is the subject of regulation. In Hall v. Geiger-Jones Co., supra, the court says:

"It will be observed, therefore, that the law is a regulation of business, constrains conduct only to that end, the purpose being to protect the public against the imposition of unsubstantial schemes and the securities based upon them."

In Ex parte Girard, supra, the sole question involved was whether the method of selling units by trustees who held the title to the property under a so-called "Massachusetts trust" came within the purview of the California Corporate Securities Act. The opinion written by Mr. Justice Shaw, sustaining the contention of the Attorney General that the acts complained of by the defendants in selling and transferring units came within the law requiring a permit from the corporation commissioner, clearly indicates that the question of the right of a natural person to dispose of his own securities by sale or exchange, even though in repeated and successive transactions, was not under consideration by the court.

Another type of cases cited in the brief of the Attorney General involves statutes which simply provide for the filing of certain information with some state official before stock securities or patent rights may be offered for sale or sold. In statutes of this type, no authority is vested in the state official with whom the information is required to be filed to exercise any discretionary power in granting or refusing a permit. This type of legislation has been generally sustained as constitutional on the general theory that the Legislature has power to direct the method to be followed in disposing of certain types of property. This power has been recognized in statutes requiring the recording and filing of certain documents, claims, notices, and other proceedings, in order that rights may be established or effectively maintained. Statutes of this type were under consideration by the court in the cases of Goodyear v. Meux, 143 Tenn. 287, 228 S. W. 57, Mason v. McLeod, 57 Kan. 105, 45 P. 76, 41 L. R. A. 548, 57 Am. St. Rep. 327, and Allen v. Riley, 203 U. S. 347, 27 S. Ct. 95, 51 L. Ed. 216, 8 Ann. Cas. 137.

In the case of Bracey v. Darst (D. C.) 218 F. 482, the court had under consideration the constitutionality of certain provisions of the so-called "Blue Sky Law" of West Virginia. The opinion in this case was written prior to the decision in the case of Hall v. Geiger-Jones Co., and deals at some length with the general question of the constitutionality of this type of legislation, and reviews all of the decisions rendered at that time on the subject. It is apparent in reading the opinion that the principal reason for holding the act unconstitutional was the fact that the law undertook to require any individual, before disposing of his own personal securities and for his own account, to secure a statement or permit from the state auditor. The opinion dwells at length upon a similar act of the Legislature of Florida which had been sustained, and which included this proviso:

"Provided, That nothing in this act shall extend to any seller of stock, bond or other security, who has purchased the same in good faith for value, and who is the bona fide owner of such stock, bond, or other security at the time of such sale." Comp. Laws Fla. 1914, § 3727f.

The following excerpt from the opinion of the court in Bracey v. Darst, supra, would indicate that the Attorney General in that case conceded that the act could not legally prohibit an individual from selling his own stock:

"It is now substantially admitted that if its intent is to prevent a 'citizen' from selling his own notes or other obligations, or bonds, securities, etc., which he may have acquired in the course of business, without a certificate from the auditor of solvency and 'sound business capacity,' it is clearly subversive of the inalienable right he has to acquire and sell property, and its validity cannot be asserted."

It is interesting further to note that Circuit Judge Woods, who sat in the case and wrote a dissenting opinion, makes the following interpretation of the language of the act as necessary to its constitutionality:

"In the first place, it seems quite clear that the statute is limited in its application to corporations, and to individuals acting in concert by organization—that is, by making a whole of inter-dependent parts—and was not intended to apply to a single individual conducting his own business."

In the case of William R. Compton Co. v. Allen, 216 F. 537, the United States District Court had under consideration the "Blue Sky Law" of Iowa, by the terms of which any person, whether natural or corporate, who was not a resident of Iowa, was required to secure from the secretary of state a statement or permit before he could sell his own stock or securities within the state of Iowa. The constitutionality of this act was attacked by a natural citizen of the state of Illinois as well as corporate citizens of other states. A restraining order withholding enforcement of the act was issued by the presiding judge, and subsequently sustained by the entire court, on the ground that it undertook to prohibit a person, being a citizen of another state, from selling his own stock or securities in the state of Iowa.

[2] In answering appellant's contentions, the Attorney General does not deny that the section of the act under attack will, if upheld, interfere with the freedom heretofore exercised by a natural citizen in disposing of his own securities, nor is any answer offered to the assertion that, under this sec-

tion of the act, an individual may be prevented altogether from selling his securities. Rather it is urged that this and any other results flowing from the enforcement of the section under consideration, and which may hamper the individual in selling his securities, are incidental to, but necessary in, accomplishing an effective control of investment companies; and inasmuch as the purpose of the act, to wit, the control and regulation of the business of selling securities, has been held to be a proper exercise of the police power, such burdens and restrictions upon the individual's right to sell his own securities as the Legislature may deem essential to accomplish the purpose of the act should be held likewise to be within the police power.

We are thus presented with the oft-occurring problem of determining how far legislative enactments shall be permitted to encroach upon the rights of the individual to acquire, possess, and dispose of his property. When the questions of health, morals, or safety are involved, the path for judicial action is clearly defined by a long course of decisions, but when the test is that of "general welfare," courts are confronted with many difficult and conflicting considerations, as well as a multitude of diverse judicial decisions. It must be conceded that the changes in our social and economic relations require from time to time changes in the rules which govern the relation of the individual towards society, and that these changes must needs be reflected in legislative enactment, and also in judicial interpretation. But there are well-defined limits as to the extent to which such legislation may go in depriving a natural person of his right to possess property. Nor will the argument of the greatest good to the greatest number, or even the unquestioned beneficial results that might flow from such legislation, avail as against the constitutional guaranty.

The Corporate Securities Act belongs to that type of legislation sometimes referred to as the "paternal activity" of government. It is an attempt to throw about the individual who is about to invest his money in certain kinds of property a protecting arm of governmental authority. In other words, by regulating and controlling those engaged in the business of selling certain types of personal property, and if need be prohibiting certain undesirable persons or concerns from engaging in that type of business, the law protects those from loss who, either through carelessness or ignorance, might otherwise become the victims of fraudulent design.

Legislation of this character from the outset has been vigorously assailed, and until the decision in the case of Hall v. Geiger-Jones Co., 242 U. S. 539, 37 S. Ct. 217, 61 L. Ed. 480, L. R. A. 1917F, 514, Ann. Cas. 1917C, 643, judicial opinion was divided on the question of the constitutionality of such legislation. But nowhere in the authorities sustaining the regulation of the business of brokers do we find authority to sustain the contention made here, that the police power under the guise of general welfare may be invoked to interfere with the sale by an individual of his own property when the acquiring and possession of such property is not contrary to law.

[3] The Attorney General in his brief makes this significant statement:

> "It is also true that laws may not be enacted which arbitrarily and without any reason therefor deprive a citizen of his liberty or property, but it must be remembered that it does not necessarily follow that a law which regulates the mode of disposing of property takes away the right of disposition. On the contrary, it is well established that laws which reasonably regulate the mode of disposing of property do not take away the owner's right of disposition."

The section of the act in question, if sustained, in connection with other provisions of the act, "does more than regulate" the mode of "disposing of property." As we have heretofore pointed out, the corporation commissioner would have the power and it would be his duty to refuse a person a broker's permit if he had a "bad business reputation," and by such refusal the person would be prevented from disposing of his own individual property which he had lawfully acquired and lawfully possessed if such disposition were made in more than one transaction. It does not answer the charge that the act in question is unconstitutional to say that a person clothed with such power may not see fit to use the power. The rule in determining whether the act is in conflict with constitutional guaranties is whether or not the act is broad enough to authorize such unconstitutional act.

[4] The Attorney General urges further that if the corporation commissioner is not given the power to control and regulate the individual in the sale of his own securities, the whole purpose of the Blue Sky legislation will be defeated, in that concerns desirous of disposing of securities tainted with fraud would circumvent the law by fraudulently placing such securities in the hands of individuals who would thus claim such securities as their individual property and dispose of them for the benefit of their principal. In answer to this proposal, we would suggest that if the purpose of the section is to prevent fraudulent conduct in the sale of securities, it would not be a difficult matter to draft a provision of the law that would meet such a need. We know of no authority that would sustain the contention that in order to make more effective a worthy regulation, that an invasion of individual rights as guaranteed by the Constitution would be justified. If the regulation of the business of brokers engaged in

the sale of securities cannot be enforced in a manner satisfactory to the corporation commissioner without giving him the power to reach out and invade individual rights, then the legislation in question must necessarily fail, in part at least, of the purpose which is sought in this enactment.

In Ex parte Quarg, 149 Cal. 79, 84 P. 766, 5 L. R. A. (N. S.) 183, 117 Am. St. Rep. 115, 9 Ann. Cas. 747, Mr. Justice Shaw, in considering the constitutionality of Legislative enactment prohibiting the sale or offering for sale of theater tickets at a price in excess of that originally charged by the theater, makes this comment:

"The constitutional guaranty securing to every person the right of 'acquiring, possessing, and protecting property,' refers to the right to acquire and possess the absolute and unqualified title to every species of property recognized by law, with all the rights incidental thereto, and, in connection with the right of personal liberty, it includes the right to dispose of such property in such innocent manner as he pleases, and to sell it for such price as he can obtain in fair barter."

The principle enunciated by Mr. Justice Shaw has been declared in frequent decisions, and needs no additional citations. However, it is urged that the opinion in Ex parte Quarg is not in point, because the sale of theater tickets does not involve the "general welfare." It must be conceded that the ownership of a theater ticket finds its basis in the same personal right that the ownership of a bond or any other security finds its law; and if the owner of a theater ticket may sell it unhampered by legislative regulation or prohibition, we are unable to ascertain upon what theory the owner of a bond or other security may not exercise the same untrammeled right.

The Attorney General concedes that it would invade the constitutional rights of a citizen if he were prohibited from selling his securities, which he would have the legal right to buy and possess, but contends that the law under consideration is simply a regulation, and in support of this argument cites certain cases which have sustained laws which were merely regulatory in their requirements. If the act under consideration were confined simply to a requirement that all owners of certain types of securities, before selling them, should file with some official certain information, and thereupon they would have the right to dispose of their property without any other burden or interference, the position of the Attorney General might be maintained. But this is not the situation that confronts us. The act in part provides for regulation, but also provides a power to refuse a permit, which would make absolute prohibition in the sale of one's securities. The only purpose of the act in requiring the filing of certain information in the form of a petition by a person desiring to sell securities is to lay the foundation for action by the corporation commissioner that may or may not, according to his finding, result in an absolute prohibition of the sale of his securities.

In these days when the urge is strong upon legislative bodies to extend the paternal arm of government into the realm of economic activities, it is particularly important that courts, in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of the individual and the general welfare of society presents oftimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation. Dobbins v. Los Angeles, 195 U. S. 223, 25 S. Ct. 18, 49 L. Ed. 169; Pacific Palisades Ass'n v. City of Huntington Beach et al. (Cal. Sup.) 237 P. 538.

[5] Appellant further urges that the defendant in this case is denied the equal protection of the law by the section of the act under consideration, in this: That any owner of securities who is not the issuer or underwriter thereof, and who sells for his own account, may do so without hindrance or complying with any provision of the act, provided that he accomplishes the disposal of the securities in one sale or exchange; but when, for any reason, he desires to make a second or a third or a fourth sale, he is by the act deprived of the rights which are accorded to one who desires to make only one sale. As we have pointed out in the outset of this opinion, it is readily apparent that if the act in question is sustained a great many individuals who are the owners of securities which they themselves did not issue or underwrite, would be required to secure a broker's license, which involves the filing of a petition, the awaiting of the decision of the corporation commissioner as to whether or not a broker's license will be issued, the securing and filing of a bond, and perchance eventually the refusal of a broker's license; while other individuals who find it convenient or possible to accomplish the same purpose in making one sale would be relieved from such burdens. It is difficult to believe that the Legislature intended to impose burdens on certain individuals in this manner that would not apply to all persons of the same class, for certainly there is no basis in law for such a distinction. We might suggest in passing that undoubtedly thousands of our citizens are selling from time to time securities which they have acquired, and disposing of these securities in repeated and successive sales without having secured any

broker's license, and without even the thought that such legitimate and innocent conduct, without securing a broker's license and furnishing a bond, is in violation of the Corporate Securities Act.

Any Legislative enactment that is reasonably subject to the interpretation we have just pointed out manifestly is in conflict with the Fourteenth Amendment to the Constitution of the United States. In 12 Corpus Juris, page 1144, this proposition is thus stated:

"The Amendment (the Fourteenth) was intended to secure equality of right, and it renders unconstitutional all laws which may properly be construed as applying to persons or property arbitrarily and with discrimination, unequally or unjustly."

[6] The appellant also urges that the language of the section is so indefinite, uncertain, and vague as to make it unconstitutional and void; and in this behalf it is pointed out that the term "in the course of repeated and successive transactions" is indefinite, as is also the term "of like or similar character." We feel that the section is subject to the criticism urged. It probably would be conceded that two or more transactions would constitute "repeated transactions," and necessarily, if one follows the other, they would be "successive transactions." But one contemplating the sale of his securities would be at a loss to know, so far as the section in question indicates, whether he would be liable if he should make one sale every 12 months, or every 36 months, or even every 10 years. In order that an act of the Legislature attempting to prescribe what acts shall be deemed a public offense may meet the test of validity, it is necessary that the language used shall be of such clarity of expression that one of average intelligence would be able to understand what is prohibited and what he may do without violating the law. Mr. Justice Melvin, in his opinion in the case of In re Lockett, 179 Cal. 581, 178 P. 134, discussing this question of clarity, says:

"So important is the liberty of the individual that it may not be taken away even from the most debased wretch in the land, except upon conviction of a crime which has been so clearly defined that all might know in what act or omission the violation of the law should consist"

The same question was before the Supreme Court of this state in the case of In re Peppers, 189 Cal. 682, 209 P. 896, where the court held unconstitutional section 10 of the California Fruit and Vegetable Standardization Act of 1921 on the ground of indefiniteness.

Chief Justice Waite of the United States Supreme Court, in the case of United States v. Reese, 92 U. S. 214, 23 L. Ed. 563, in discussing a similar question, observes:

"Laws which prohibit the doing of things, and provide a punishment for their violation, should have no double meaning. A citizen should not unnecessarily be placed where, by an honest error in the construction of a penal statute, he may be subjected to a prosecution for a false oath; and an inspector of elections should not be put in jeopardy because he, with equal honesty, entertains an opposite opinion. * * * Penal statutes ought not to be expressed in language so uncertain. If the legislature undertakes to define by statute a new offense, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime."

We do not deem it necessary to burden this opinion with extended citations which are available to support the propositions of law here urged by the appellant, nor the many authorities which may be cited in support of the application of the legal principles to the facts here involved.

We are of the opinion that the section of the Corporate Securities Act under consideration, so far as it attempts to require a natural person to secure a broker's permit as provided in said act before he may lawfully sell his own securities, where he is not the issuer or underwriter of the same, is unconstitutional and invalid for the reasons herein set forth.

It therefore follows that the judgment of the lower court must be and it is reversed.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 421

COLVER et al. v. W. B. SCARBOROUGH CO. (Civ. 4797.)

(District Court of Appeal, Second District, Division 1, California. June 29, 1925. Hearing Denied by Supreme Court Aug. 28, 1925.)

1. Mortgages ⟸151(3)—Judgment for mechanic's claim not affected by foreclosure of trust deed.

A valid judgment by holder of mechanic's claim for services cannot be affected by any such expedient as a foreclosure of a deed of trust on property.

2. Trusts ⟸371(2)—Allegations insufficient to establish a trust.

In suit by former owners of property to hold as trustees for their benefit the party advancing money for construction of buildings on property who had foreclosed trust deed executed in security of loan, complaint, failing to allege that plaintiffs ever borrowed any money from defendant, or that trust deed was executed by plaintiffs in favor of defendant, or that defendant caused property to be sold under deed, or purchased property at sale, or ever acquired property, *held* insufficient.

3. Trusts ⟸371(2) — Complaint not alleging existence of trust relationship at time of suit fatally defective.

In suit to establish trust relationship between former owners of property and purchaser at foreclosure sale under deed of trust from owners to secure a loan, complaint failing to allege creation and existence of trust at time suit was commenced *held* fatally defective, in view of Civ. Code, §§ 852, 2221, and Code Civ. Proc. § 1971.

4. Quieting title ⟸34(1)—Allegations insufficient to warrant relief.

In suit alleging that defendant held legal title for use of plaintiffs, and praying that plaintiffs' title be quieted, complaint *held* insufficient in either form or substance to warrant relief by quieting title.

5. Trusts ⟸87—Evidence of payments to purchaser after foreclosure sale, offered as defense against purchaser's claim to title, properly refused.

In suit to establish trust in purchaser at foreclosure sale, who claimed title thereunder, evidence of payments to purchaser after sale by former owner, having no bearing upon issue of purchaser's title, *held* properly refused.

6. Limitation of actions ⟸19(3)—Statute defining actual continued occupation of land under claim of title as adverse held not bar to suit to quiet title.

Code Civ. Proc. § 324, providing that actual, continued occupation of land under claim of title will be deemed adverse, *held* not a bar to a suit to quiet title claimed by purchase at foreclosure sale under deed of trust.

7. Limitation of actions ⟸19(3)—Suit to quiet title not barred by five-year limitation.

Code Civ. Proc. § 336, limiting actions for recovery of real property based upon a judgment or decree of court to within five years, *held* not a bar to a suit to quiet title based on purchase at a foreclosure sale under deed of trust.

8. Limitation of actions ⟸196(1)—Evidence in support of defense under inapplicable statute immaterial.

In suit to quiet title, to which Code Civ. Proc. § 336, limiting actions for recovery of real property, was inapplicable as a defense, evidence offered in support of defense *held* immaterial.

9. Trial ⟸388(3)—Findings of fact not required on judgment of nonsuit or on ruling sustaining objection to introduction of evidence because complaint did not state cause of action.

Although, in absence of waiver, parties are entitled to a decision in writing with a finding on all material issues under Code Civ. Proc. §§ 632–634, findings of court are not necessary where nonsuit is granted, or where judgment for defendant is based on ruling of court sustaining objection to introduction of evidence by plaintiff because complaint fails to state a cause of action.

10. Trial ⟸395(6)—Finding of ownership of real property is sufficient without enumeration of evidentiary facts supporting it.

Where ultimate fact to be determined is ownership of real property, finding upon the fact of ownership is sufficient without enumeration of probative or evidentiary facts from which conclusion of ownership may be deduced.

11. Mortgages ⟸8—Deed of trust held not a mortgage, notwithstanding contemporaneous agreement insuring payment of interest and insurance premiums.

Where to secure loans for erection of apartment building property owners executed deed of trust, a contemporaneous agreement which neither added to nor substracted from conditions specified in trust deed, but merely provided for insuring payment of interest to be due on obligation of which trust deed was security, and also insurance premiums, and that balance of income be applied to payment of principal, *held* not to render transaction a mortgage.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Suit by Kate Colver and another against the W. B. Scarborough Company to establish a trust, quiet title, and for an accounting. Judgment for defendant, and plaintiffs appeal. Affirmed.

Hearing denied by Supreme Court; Houser, Justice pro tem., not participating.

See, also, 238 P. 1102, 1104, 1110.

Wm. M. Morse, Jr., Arthur Lasher, and J. W. Hocker, all of Los Angeles, for appellants.

Scarborough & Bowen, of Los Angeles, for respondent.

HOUSER, J. According to the prayer of the complaint herein, the purpose of plaintiffs in bringing suit against the defendant was to procure a decree of court that the defendant held certain real property in trust for plaintiffs, that plaintiffs' title to said property be quieted, and that an accounting be had as to certain moneys alleged to have been paid by plaintiffs to the defendant on account of an indebtedness owing by plaintiffs to the defendant, the payment of which indebtedness being secured by a trust deed or trust deeds to the property involved.

In substance, the allegations of the complaint as amended at the trial were that Kate Colver, one of the plaintiffs, who was 81 years of age and the mother of Fred Colver (the other plaintiff), was the owner of two city lots, upon one of which were located three cottages, and that she was desirous of building an apartment house upon the other of such lots; that formerly she and her husband were socially, politically and religiously associated with W. B. Scarborough, and looked upn him as their friend and confidential adviser; that plaintiffs consulted with him regarding the proposed construc-

tion of said apartment house, and that they were "counseled by the said W. B. Scarborough that he would furnish the money to build such apartment house"; that the apartment house was completed about April 1, 1913, and that plaintiff Fred Colver, on his own account, personally bought the necessary furniture to furnish the same; and that W. B. Scarborough later incorporated his business into the W. B. Scarborough Company, a corporation, the defendant herein. The complaint further set forth:

"That the moneys advanced by the defendant corporation were represented by trust deeds in the sum of approximately $22,500, and subsequent thereto various amounts were advanced on an open book account to be used in carrying out the terms of an agreement entered into between the plaintiffs and the defendant corporation which agreement is in words and figures following, to wit:

" 'This agreement, made the 25th day of April, 1913, by and between W. B. Scarborough Company, hereinafter designated as the party of the first part, and Kate Colver, hereinafter designated as party of the second part, witnesseth:

" 'That whereas the party of the first part is advancing to the party of the second part certain sums of money for the completion of an apartment building on lot 1 of tract No. 2059, city of Los Angeles, state of California (said sum of money so advanced being secured by a trust deed on lots one [1] and two [2] of tract No. 2059) the party of the second part in consideration of said advancement of moneys agrees to turn the entire income from said apartment house into the office of the party of the first part; out of said income the party of the first part will pay the interest on the trust deed now on said property as the same becomes due, also the insurance premiums, the balance of the income to be applied on the principal due on the second trust deed.

" 'The party of the second part agrees that she will, as soon as 90 days has elapsed from the date of filing notice of completion on said building, endeavor to negotiate a loan or loans on this building with which to take up the loans held by W. B. Scarborough Company on this property.

" 'In the event said party of the second part is unable to secure a loan large enough to lift the entire indebtedness, the party of the second part will secure as large a loan as she can, and the party of the first part agrees to release the first trust deed and take a second trust deed for the balance, which trust deed will be paid out of the income as hereinbefore stated. W. B. Scarborough Company,

" '[Signed] By W. T. McAllister, Secy.

" 'Kate Colver.' "

In addition thereto, the complaint contained allegations in substance that at the time of the execution of the said agreement, and at all times mentioned in the complaint, plaintiffs were in possession of said apartment house; that according to the terms of said agreement, the defendant was to have the net income from the apartment house, and that the plaintiffs were to receive the rents accruing on the cottages located on the property; that at various times after the agreement herein referred to was executed, plaintiffs endeavored to procure from the defendant corporation a statement of the money remaining unpaid under said agreement, but that the defendant refused to furnish same; that in pursuance of the terms of the agreement plaintiffs negotiated for and arranged to get loans in excess of the principal amount of the trust deeds, but that W. B. Scarborough refused to accept the same.

The complaint also contained the allegation:

"That at all times since the date of foreclosure of said trust deed the said W. B. Scarborough Company has been a trustee holding the title to said premises for and on account of the plaintiffs herein, and that the acts of the plaintiffs herein, in paying the large sums of money to the defendant corporation was because of their belief in the existence of such trust, and because of their great reliance in the honesty, integrity, and uprightness of W. B. Scarborough, the manager and owner of said defendant corporation."

It was further alleged that W. B. Scarborough demanded from plaintiffs a quitclaim deed of the premises, and served a notice on the tenants of the apartment house to pay rent to W. B. Scarborough Company; that there were no arrangements entered into between plaintiffs and the defendant regarding the management of the apartment house, and that no compensation was paid to either of the plaintiffs for the use of the furniture belonging to plaintiff Fred Colver; that prior to the bringing of the action defendant threatened to take possession of the premises and to oust plaintiffs therefrom, and that such action, if taken, would cause great and irreparable loss to plaintiffs; that plaintiffs at all times since entering into said agreement diligently and carefully complied with all the terms and conditions thereof, and at the time of filing the complaint were ready, able, and willing to negotiate a loan on the property sufficient to pay off the claims of the defendant, in the event that the amounts due and unpaid could be determined by an accounting—which accounting plaintiffs alleged was necessary in the premises.

When the complaint was filed, it also contained averments to the effect that because of the fact that certain judgments had been recovered by mechanics' lien claimants against plaintiffs, which judgments constituted a lien against the property involved in this action, it was agreed between plaintiffs and the defendant that "they would make a friendly foreclosure of said trust deeds or one of them in order to defeat the said judgments held by the holders of said mechanics' liens, and it was then and there agreed by the defendant corporation that such foreclosure was a friendly foreclosure, and that the status of the plaintiffs would continue to be

the same as it was before under the terms of the agreement hereinabove set forth."

On the trial of the action, after the defendant had suggested to the court that because of plaintiffs' allegations of said fraud, in which plaintiffs had freely participated, plaintiffs could receive no relief from a court of equity, plaintiffs made a motion to strike from the complaint all allegations relating to any "friendly foreclosure" of the trust deed—which motion was granted by the court. Plaintiffs then offered evidence to prove the remaining allegations of their complaint, to which an objection was made by the defendant on the ground that the complaint as amended did not state a cause of action—which objection was by the court sustained. Whereupon the defendant offered evidence in support of its cross-complaint, and plaintiffs undertook to present evidence tending to show that the defendant was not entitled to any relief, first, by virtue of ownership of a part of the property by plaintiff Fred Colver, as evidenced by a deed executed by Kate Colver to Fred Colver conveying a portion of the property involved in the action; secondly, by adverse possession of the property by plaintiffs; and, lastly, by a showing of certain payments on the indebtedness secured by the trust deeds on the property, some of which were alleged to have been made before, and some after, the "friendly foreclosure" took place. Defendant's objection to the introduction of such evidence was sustained by the court. From a judgment in favor of the defendant, plaintiffs appeal.

Appellants' first specification of error is that the trial court erred in sustaining the objection of the defendant to the evidence offered by plaintiffs in support of the complaint as amended.

[1] It is contended by appellants that after the complaint was amended, the original complaint ceased to perform any function as a pleading; and while the respondent concedes that such "is true under ordinary circumstances," it is urged by the respondent that the allegations which were stricken from the complaint were of such a nature that they should be considered by this court. If, however, it should be determined that the complaint as finally amended failed to constitute a cause of action, the question of plaintiffs' right to equitable relief because of their failure to come into a court of equity with clean hands would become immaterial and unnecessary of determination. The appellants cannot complain if at their suggestion the complaint was considered by the trial court as though it had never contained any admissions of such fraudulent conduct as ordinarily would be deemed sufficient to justify a court of equity in shutting its doors in the faces of the complainants and denying them any relief from a situation to which, by their bad faith and inexcusable conduct, they had knowingly and intentionally contributed. But without deciding the question, it is not at all certain that, even assuming the allegations of connivance between the parties to bring about a "friendly foreclosure" for the purpose of defeating the judgments of mechanics' lien claimants to be true, it would follow that any fraud was actually committed. No matter what the purpose of the "friendly foreclosure" may have been, the rights of the parties had theretofore accrued; and it is clear that a valid judgment by the holder of a mechanic's claim for services rendered would not be at all affected by any such expedient as a "foreclosure," whether "friendly" or otherwise.

[2] The complaint as amended, and as in substance hereinbefore set forth, was incomplete in many necessary specific allegations in order that a cause of action be stated either to declare a trust, or as founded thereon and as incidental thereto, a suit for an accounting. There is no direct allegation contained in the complaint that plaintiffs ever borrowed any money from the defendant, or that any trust deed was executed by plaintiffs in favor of the defendant, or that the defendant ever caused the property in question to be sold under any trust deed, or that the defendant ever purchased said property at a sale under the powers conferred by any trust deed, or, indeed, ever acquired the property in any manner whatsoever. The most that can be said for the allegations of the complaint as amended, is that it may be inferred that some such things took place.

[3] But even though it might be assumed that the complaint as amended were otherwise perfect in its construction as to necessary allegations in order that it might be decreed by the court that the defendant was holding the property in question as a trustee for plaintiffs, the pleading remains fatally defective in that it contains no appropriate allegations with reference to the creation and the existence of a trust between the interested parties at the time suit was commenced. The provisions of section 852 of the Civil Code, so far as affects the facts of this case, are that no trust in relation to real property is valid unless created or declared by a written instrument subscribed by the trustee; and the same rule of law is to be deduced from section 1971 of the Code of Civil Procedure. Section 2221 of the Civil Code contains the provision that—

"A voluntary trust is created, as to the trustor and beneficiary, by any words or acts of the trustor, indicating with reasonable certainty * * * an intention on the part of the trustor to create a trust; and * * * the subject, purpose, and beneficiary of the trust."

It is therefore apparent that before it could be rightly claimed that a trust relationship legally existed between the parties, the existence of a written instrument, subscribed

by the defendant, setting forth with reasonable certainty an intention on the part of the defendant to create a trust with reference to the property in question, and also containing the "subject, purpose, and beneficiary of the trust," would have to be shown. It is a cardinal rule of pleading that allegations therein must be by direct statements; but even though such rule be not invoked, the complaint herein as amended is wholly lacking in averments from which it might be more than conjectured that there had been any attempt to comply with the requirements of the statute. The only written instrument between the parties which in any manner refers to a possible trust, such as is contemplated by the provisions of the statutes to which reference has been had, is that heretofore set forth herein; and a perusal of the terms of that agreement discloses nothing in the way of a compliance with the provisions of the law. That instrument, as shown by its date, as compared with the date of the deed executed on the sale of the property under the trust deed, as appears by the evidence introduced by the defendant under its cross-complaint, was executed several years before any trust relationship is even suggested as having existed between the parties. For obvious reasons, the agreement is therefore entirely silent with reference to any trust, or its subject, or its purpose or its beneficiary. So far, therefore, as a cause of action being stated to enforce a trust is concerned, we are constrained to hold that the ruling by the trial court sustaining the defendant's objection thereto was correct.

The only foundation upon which plaintiffs' action for an accounting could rest would be that a trust existed between the parties affecting the property in question. If the complaint as amended failed to show the existence of such relationship, it is apparent that a suit for an accounting based on a trust could not survive.

[4] As to the prayer of the complaint that in substance, after judgment by the court the defendant held the legal title for the use of plaintiffs, and after, in accordance with an order of the court, an accounting between the parties had been had, and proper instruments of conveyance had been executed by the clerk of the court granting or assigning rights and interests to the respective parties, as by the court decreed—then that plaintiffs' title be quieted to the property involved in the suit—it is equally clear that the allegations are insufficient in either form or substance upon which might be predicated such relief. Nor is such claim seriously advanced by appellants.

[5] With reference to the several asserted defenses to the cross-complaint regarding which, by order of the trial court in sustaining the objection by the defendant, plaintiffs were precluded from offering evidence, it need only be said that, as to the alleged payments of money made on the indebtedness secured by the trust deed, upon the trustee's sale of the property (which sale was admittedly made under the conferred power of the trust deed), any and all such payments were forever lost to plaintiffs under the provisions of the trust deed to the effect that any deed so executed by the trustee would be "effectual and conclusive as against the said party of the first part" (plaintiffs). See Roberts v. Colyear, 179 Cal. 669, 180 P. 937; Bryant v. Hobert, 44 Cal. App. 315, 186 P. 379; Duncan v. Wolfer, 60 Cal. App. 120, 212 P. 390.

Title in the purchaser at the trustee's sale being thus assured as against any claim by the trustor antedating the sale, it would follow that any payment of money made to the purchaser after the trustee's sale had become effective would at least have no bearing upon the purchaser's title, however consequential might be the result as to any other possible remedy by the former owner of the property as against the purchaser.

[6, 7] As a separate answer to the defendant's claim of title to the property, as set forth in its cross-complaint, plaintiffs pleaded sections 324 and 336 of the Code of Civil Procedure as a bar. The former section is as follows:

"Where it appears that there has been an actual continued occupation of land, under a claim of title, exclusive of any other right, but not founded upon a written instrument, judgment, or decree, the land so actually occupied, and no other, is deemed to have been held adversely."

Section 336 of the Code of Civil Procedure relates to the "time of commencing actions other than for recovery of real property," and provides:

"Within five years: 1. An action upon a judgment or decree of any court of the United States or of any state within the United States. 2. An action for mesne profits of real property."

No authority has been cited by appellants as sustaining their position that either of such statutes constitutes a defense to a suit to quiet title such as is here in question, and this court is unable to perceive the application of either of them thereto.

[8] Appellants, however, suggest that the trial court erred in refusing to permit the introduction in evidence of a deed to a portion of the property here involved, executed by Kate Colver as grantor to Fred Colver as grantee. In appellants' specification of error the statement concerning said deed is that it was "offered in support of the plea of limitation"; but in view of the ruling that no statute of limitation having application to the facts of the case was pleaded, and as it is not contended by appellants that the proffered instrument had any other bearing upon the controversy between the parties, it is apparent that any evidence offered as a de-

fense under an inapplicable statute would be immaterial.

[9] It is next urged that "there were no findings of fact—the pretended findings of fact being merely conclusions of law, and do not constitute a finding of any fact, although the complaint and answer join issues of fact to be determined; and the cross-complaint and answer thereto join issues of fact to be determined," etc. It is unquestioned law that in the absence of a waiver, either express or implied, "upon the trial of a question of fact by the court," the parties to the litigation are entitled to a "decision" in writing (sections 632, 633, 634, Code Civ. Proc.) and that ordinarily a finding must be made on all material issues, although no particular form is required. As is said in Clary v. Hazlitt, 67 Cal. 286, 7 P. 701:

"If the truth or falsity of each material allegation not admitted can be demonstrated from the findings, the requirements of the Code are met."

It will be remembered that the objection by the defendant to the introduction of any evidence by plaintiffs on the ground that the complaint did not state facts sufficient to constitute a cause of action was sustained by the trial court. It has been repeatedly held that, on the granting of a nonsuit, no findings by the court are necessary. Gilson Quartz M. Co. v. Gilson, 47 Cal. 597; Reynolds v. Brumagim, 54 Cal. 254; Harney v. McLeran, 66 Cal. 34, 4 P. 884; Toulouse v. Pare, 103 Cal. 251, 37 P. 146; Kennedy, etc., L. Co. v. Dusenbery, 116 Cal. 125, 47 P. 1008; Jewell v. Pierce, 120 Cal. 79, 52 P. 132.

There is no difference in principle, so far as the right to findings is concerned, between a judgment for defendant granted on a motion for nonsuit and a judgment for defendant based upon a ruling by the court sustaining an objection to the introduction of any evidence by the plaintiff for the reason that the complaint fails to state a cause of action. In the former case the facts proved are deemed insufficient, and in the latter case the facts alleged, considered as proven, are held insufficient. So that, so far as relates to the complaint herein as amended, plaintiffs were not entitled to any findings thereon by the court.

[10] As to the issues raised by the cross-complaint, and the answer thereto, it appears that by the cross-complaint the defendant alleged in substance that it was the owner of the property in question, and that plaintiffs had no right, title, or interest therein; and, in addition thereto, the defendant set up certain evidentiary matter to support its claim to ownership of the property. Plaintiffs' answer to the cross-complaint, besides containing a specific denial of the defendant's allegations of ownership and the several facts tending to establish same, as a separate defense included a practical repetition of the allegations of plaintiffs' original complaint.

The ultimate issue raised by the cross-complaint and the answer thereto was the ownership of the property described in the pleadings.

The issue tendered by plaintiffs as to the statute of limitations under sections 324 and 336 of the Code of Civil Procedure, as heretofore pointed out, had no bearing upon the facts of the case, and presented no defense to the allegations of the cross-complaint. Quoting the language used by the court in Estate of Aufret, 187 Cal. 34, 37, 200 P. 946, 947:

"We know of no decision to the effect that a judgment or decree for a petitioner may be reversed for want of a finding, where the answer does not set forth any defense. Error is never presumed."

The findings by the court of which complaint is made are as follows:

"That the plaintiffs have not, nor has either of them, any right, title or interest in or to said property as against said defendant; nor have the plaintiffs herein any right to the possession of said property, nor to any of the rents, issues or profits growing out of the same; nor have they any right to rent or lease said property or to collect the rents therefrom; and all claims which the plaintiffs may have in or to said property or any portion thereof, or any interest therein, or to possession thereof as against the defendant herein, are without right or foundation."

It thus appears in effect that the defendant was found to be the owner of the property, and that plaintiffs had no right, title or interest therein. With reference to the sufficiency of a finding of "ownership" of real property as distinguished from a finding of the evidentiary facts from which the conclusion of such ownership may be deduced, it has been repeatedly held by the courts of this state that ownership is the ultimate fact which may be so pleaded and proved by the litigant and afterwards so found by the court. In the case of Gavin v. Swain, 113 Cal. 324, 45 P. 677, where the question was directly before the court, it is said:

"That ownership or (in technical language) seisin of real property is a fact that may be pleaded, proved, and found as a material ultimate fact in all cases involving title to real property is unquestionable in this state. Payne v. Treadwell, 16 Cal. 244; Murphy v. Bennett, 68 Cal. 528 [9 P. 738]; Daly v. Sorocco, 80 Cal. 367 [22 P. 211]; Gill v. Driver, 90 Cal. 72 [27 P. 64]."

Where the ultimate fact to be determined is that of ownership of real property, it is the settled rule in this state that a finding upon the fact of ownership, without any enumeration of the probative or evidentiary facts necessary to support such ultimate fact, is all that is required.

In the case of Adams v. Crawford, 116 Cal.

495, 499, 48 P. 488, 490, the question of the sufficiency of findings in a quiet-title suit is passed upon by the court as follows:

"Appellant also contends that the court failed to find upon several issues. The specifications in that regard are all of probative facts, such as that the court failed to find whether the plaintiff made a valid location, whether the allegations of certain paragraphs of the complaint were true, and other matters of like character. The court found as ultimate facts that the plaintiff is not and was not at any time the owner of the property described in the complaint, and that the defendants are the owners of said property. These are the ultimate facts in the case, and include the finding of all probative facts necessary to sustain the finding of the ultimate facts."

In the later case of Cooley v. Miller & Lux, 156 Cal. 510, 523, 105 P. 981, 986, it is said:

"The rule seems to be that in cases where it is sufficient for the plaintiff, suing in regard to property, to allege merely that he is the owner thereof, a denial of this allegation is sufficient to authorize the admission of evidence that the title under which plaintiff claims was absolutely void and not voidable merely, or any evidence to show that plaintiff had no title, and that in such cases a finding upon the fact of title or ownership is good without a finding of the particular facts upon which such title or want of title depends."

See, also, Cooper v. Miller, 113 Cal. 238, 45 P. 325; Montecito Valley Co. v. Santa Barbara, 144 Cal. 578, 594, 77 P. 1113; Estate of Hill, 167 Cal. 59, 138 P. 690.

[11] Appellants finally urge that the contemporaneous agreement construed with the terms of the deed of trust would, in effect, make the transaction a mortgage, and cite several authorities in support of the doctrine that a deed, though absolute on its face, may be held to be only security for the payment of a debt. But a deed of trust in itself is nothing more than that, coupled with certain powers in the trustee not capable of being provided for, or at least not usually stipulated in, an ordinary mortgage. The agreement between the parties, which was entered into contemporaneously with the execution of the deed of trust, neither added to nor subtracted from the conditions specified in that instrument. So far as affects the trust deed, it simply provides for a method of insuring the payment to the defendant of the interest to become due on the obligation of which the trust deed is security, also the insurance premiums on the policy of insurance covering the buildings on the premises, and, lastly, the balance of any income to be applied to the payment of the principal debt.

We find no prejudicial error in the record.

It is accordingly ordered that the judgment be and the same is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

73 Cal. App. 435

W. B. SCARBOROUGH CO. v. COLVER et al.

(Civ. 4798.)

(District Court of Appeal, Second District, Division 1, California. June 29, 1925. Hearing Denied by Supreme Court Aug. 28, 1925.)

1. Principal and agent ⟸40—Written notice, terminating rights of defendants to collect rent for plaintiff, properly admitted to show termination of that authority.

Where property owners executed trust deed to secure loan for erection of apartment building, and executed contemporaneous agreement whereby they were to collect rents from apartments, but where trust deed was subsequently foreclosed and former owners continued by an oral agreement to collect rents, a written notice terminating arrangement could properly be introduced in action for money had and received by collection of rents, after arrangement was claimed to be terminated.

2. Trial ⟸404(2)—Findings of fact, substantially following allegations of complaint, held sufficient.

In action for money had and received, charging that defendants became, and are now, indebted to plaintiff for money had and received and no part of indebtedness has been paid, findings of fact following allegations of complaint *held* sufficient as such, and not mere conclusions of law.

3. Principal and agent ⟸78(1)—Owner of apartments entitled to action for money had and received against former agent who had not accounted for rents collected.

Owner of apartment buildings *held* entitled to action for money had and received by a former agent after his authority had been terminated, and for which he had not accounted.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by the W. B. Scarborough Company against Kate Colver and another for money had and received. Judgment for plaintiff, and defendants appeal. Affirmed.

Hearing denied by Supreme Court; Houser, Justice pro tem. not participating.

See, also, 238 P. 1102, 1104, 1110.

Wm. M. Morse, Jr., Arthur Lasher, and J. W. Hocker, all of Los Angeles, for appellants.

Scarborough & Bowen, of Los Angeles, for respondent.

HOUSER, J. So far as is deemed material to this appeal, the facts herein appear to be as follows:

On April 24, 1913, defendants executed a trust deed conveying certain real property (on which was erected an apartment house) to a trustee for the purpose of securing a loan made by the plaintiff to defendants, which trust deed contained the usual provision that in case of default in the payment of

either the interest or the principal, upon giving notice as provided in said trust deed, the trustee was empowered to sell the property. Contemporaneously with the execution of the trust deed, the plaintiff and defendants entered into a written agreement which, among other things, contained a provision that defendants were "to turn over the entire income from the apartment house on the property to the plaintiff, and out of the income the plaintiff to pay the interest on a prior trust deed and insurance premiums, and the balance of the income to be applied on the principal of the second deed of trust executed therewith."

Defendants failed to pay the indebtedness secured by the deed of trust as therein provided, and on November 24, 1917, the trustee sold the said property. At such sale the plaintiff became the purchaser of the property, and the trustee thereupon executed a deed therefor to the plaintiff. During all the time after the execution of the trust deed, and up to the time of the sale of the property by the trustee, defendants were in possession of said property and were operating the same as an apartment house.

The evidence admits of the conclusion that after the date of the sale of the property the plaintiff employed defendants to remain thereon and to operate the same, with the understanding that defendants were to account to the plaintiff for the rents received. On March 20, 1923, the plaintiff served on defendants a written notice which, among other things, in effect terminated the arrangements theretofore existing between the plaintiff and defendants and canceled the authority of defendants to thereafter collect rents from tenants for the use and occupation of any of the apartments or rooms in said apartment house. Notwithstanding such notice, and during the months of April, May, June, and July, 1923, defendants actually collected and received rents from the tenants in the rooms or apartments of said apartment house aggregating the sum of $2,715. No part of the sum so collected having been paid to the plaintiff, the action at bar was brought for money had and received, the complaint alleging:

"That within one year last past the defendants Kate Colver and Fred Colver and each of them became and are now indebted to the plaintiff in the sum of two thousand dollars ($2,000) for money had and received by the said defendants and each of them for the benefit of the plaintiff, and no part of which sum has been paid."

Defendants' answer is a denial that they are indebted to the plaintiff in any amount whatsoever.

Judgment was rendered in favor of the plaintiff for the sum of $2,000, and defendants appeal therefrom.

[1] Appellants' first specification of error is that, over defendants' objection, the court erred in admitting evidence of the "notice" given by the plaintiff to defendants terminating the right of defendants to collect rents from the tenants of the apartment house. The "notice" was as follows:

"Los Angeles, California, March 20, 1923.

"Kate Colver and Fred Colver:

"You are hereby notified that the employment and arrangement heretofore existing between you and this company for the management and operation of that certain property known as the Colver Apartments and the house adjoining thereto, both being situated on lots 1 and 2, tract No. 2059, in the city of Los Angeles, for the collection of the rents from the tenants in said property, is hereby terminated and ended, and that you have no further authority to rent any of said apartments nor to collect any of the rents due from the tenants therein, and you are hereby notified not to collect any such rents, nor to lease or rent any of said apartments, nor to have anything further to do in the management of said property.

"You are further notified that your use and occupancy of an apartment in said property is hereby terminated and ended, and the undersigned demands that you vacate said premises and remove therefrom on or before April 1, 1923; and if you occupy said apartment on and after April 1, 1923, you will be charged a rent of $75 per month, payable monthly in advance on the 1st day of each and every month beginning April 1, 1923; and if said rent be not paid at the time it is due, proceedings will be taken to recover said premises from you."

Appellants urge that the "notice" could not have been considered as a rescission of the agreement which was entered into between the interested parties contemporaneously with the execution of the trust deed, and which agreement provided, among other things, for the method to be employed in the payment of interest, insurance premiums on the buildings on the property, and the balance on the principal of the obligation secured by the deed of trust. But at the time when the action was tried in the lower court it was not claimed by the plaintiff, nor is it here suggested by the respondent, that the "notice" constituted a rescission of the agreement. According to the record, the plaintiff's purpose in introducing the "notice" in evidence was to show the termination of the arrangement or relation, if any, that had theretofore existed between the parties. So considered, it is clear that no error was committed by the trial court in admitting the "notice" in evidence.

[2] The next alleged prejudicial error of which complaint is made is that the trial court erred in failing to make proper findings of fact—"the complaint being upon a common count and the answer being a general denial." So far as affects the point which is thus raised by appellants, the findings are:

"That within one year last past * * * the defendants * * * became and are now indebted to the plaintiff herein in the sum of

$2,000 for money had and received by the said defendants and each of them for the benefit of the plaintiff; that no part of said indebtedness has been paid."

It will thus be noticed that the findings substantially follow the allegations of the complaint.

In the case of McCarthy v. Brown, 113 Cal. 15, 45 P. 14, where the authorities are reviewed, it is held that findings which follow the pleadings in the statement of ultimate facts are sufficient. The same conclusion is reached by the court in the case of Dam v. Zink, 112 Cal. 91, 44 P. 331, where it is said that "if facts are stated in the findings in the same way in which they are stated in the pleadings, they are sufficient."

In the case of Carter v. Canty, 181 Cal. 749, 186 P. 346, plaintiff brought an action in the form of a common count against the defendant on account of legal services performed and costs advanced. Judgment went for the plaintiff, and the findings followed the allegations of the complaint. An appeal was taken from the judgment, and in the course of the opinion, after stating that the common counts may be used to state such a cause of action as was there involved, notwithstanding the requirement of the Code of Civil Procedure (section 426) that the complaint must contain a plain and concise statement of the facts constituting the cause of action (citing cases), the court said:

"The findings of the trial court in regard to indebtedness are substantially in accord with the allegations of the complaint except as to amount, and were findings of fact, and not mere conclusions of law, as claimed by appellant."

The further criticisms by appellants that the findings are not sufficient to support the conclusions of law, in that the findings are but conclusions of law, and that the judgment is not supported by sufficient or any findings of fact, are fully answered to the contrary of their contentions by the decisions of the courts of this state contained in the cases just cited.

[3] The point is advanced by appellants that the judgment is contrary to law in that whatever indebtedness, if any, was owing by defendants to the plaintiff was the result of an express contract existing between the parties, and that an action for money had and received cannot be maintained on that account. The evidence, however, at least justified the conclusion on the part of the trial court that the facts were otherwise than as claimed by appellants. The precise question, therefore, submitted by appellants becomes unnecessary of decision. It may be true that in its inception, as shown by the written agreement between the parties with reference to the occupancy of the premises by defendants and the payment by them to the plaintiff of the income arising from the operation of the apartment house, a relationship arising from the operation of an express contract existed between the parties thereto. But on the sale of the property under the provisions of the trust deed, the contractual relations which theretofore may have obtained between the parties came to an end, and in place thereof, as testified to by one of the witnesses in the case, a new "arrangement" was orally entered into, whereby, under certain conditions, possession of the property was to remain in defendants as agents of the plaintiff, and the plaintiff was to have the income derived from the rentals received from the tenants of the apartment house. The evidence also is sufficient to warrant the inference that by reason of the "notice" to which reference heretofore has been had, the said oral "arrangement" was abrogated. Thereafter, in the absence of any subsequent agreement between the parties, whatever was done by defendants in the way of collecting rents from the tenants in the apartment house was at least not by virtue of the existence of any express contract relating thereto. Assuming the fact as admitted by appellants, that they did collect such rents and for which no accounting was made to the plaintiff, it is incontrovertible as a matter of law, and for which principle no authority is needed, that an action by the plaintiff against defendants would lie for money had and received.

The judgment should be affirmed.

It is so ordered.

We concur: CONREY, P. J.; CURTIS, J.

---

73 Cal. App. 441

COLVER et al. v. W. B. SCARBOROUGH CO. et al. (Civ. 4799.)

(District Court of Appeal, Second District, Division 1, California. June 29, 1925.)

1. Execution ⟹253(1)—Ordinarily, motion to vacate is proper procedure to set aside sale under execution.

Motion to vacate is proper procedure for setting aside a sale under execution, except where some special facts are alleged which may create jurisdiction in equity.

2. Execution ⟹256(2)—Finding of valid attachment sustained under evidence.

Evidence *held* sufficient to sustain finding that levy of attachment by sheriff on furniture in apartment house was a valid compliance with Code Civ. Proc. § 542, subd. 3, requiring sheriff to take property into custody, notwithstanding most apartments containing furniture were locked, and furniture was never actually in view of sheriff.

3. Execution ⟹256(2)—Finding that attached property constituted furnishings and fixtures of houses sustained under evidence.

In suit to set aside execution sale of furniture in an apartment building, evidence *held* to

support finding that property attached constituted furnishings and fixtures of houses in which it was located, where it appeared that "fixtures" was used solely as description of furniture and furnishings.

4. Execution ⊂=245—Judgment debtor held to have waived objection that property sold on execution was not in view at sale.

Where, shortly before execution sale of furniture in apartment house, judgment debtor removed some of attached property and ordered all tenants of house to keep their doors locked, and also made several bids on property when sale took place, *held*, that he waived right to object that property was not within view of those attending sale as required by Code Civ. Proc. § 694, especially where his attorney stated to officer making sale that there was no way of getting to property, and that it might be sold just as it was.

5. Execution ⊂=224—That furniture in apartment house was sold en masse on execution not objectionable in absence of showing of prejudice.

That furniture in apartment building was sold en masse *held* not objectionable, in absence of showing that price received was not full value, or that a better price could have been obtained by selling it in separate parcels, in view of Code Civ. Proc. § 694.

6. Attachment ⊂=319—Deputy sheriff having no personal knowledge of facts competent to make return.

Deputy sheriff who signed return of writ of attachment in sheriff's name *held* competent to make return, notwithstanding he was shown to have been personally unacquainted with facts, in view of Pol. Code, § 4171, duty of returning writ being an official, not personal, duty.

7. Trial ⊂=387(1)—Opinions declared by judge during trial not binding.

Opinions declared by judge during course of trial or thereafter are not binding, but the findings and judgment are conclusive.

8. Trial ⊂=396(7)—Answer admitting allegation of complaint held to raise no issue requiring finding by court.

Allegations in an answer, which in effect were but admissions of allegation of complaint, *held* to raise no issue requiring a finding by the court.

9. Appeal and error ⊂=1071(6)—Failure to make findings which could not change result held not prejudicial.

Where findings as made upon material issues of pleading were ample to support the judgment, omission of findings which might have been made on other issues, but which would not affect conclusions of law or invalidate the judgment, *held* not to require reversal.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Kate Colver and another against the W. B. Scarborough Company and others to set aside a sheriff's sale. Judgment for defendants, and plaintiffs appeal. Affirmed.

See, also, 238 P. 1096, 1102, 1110.

Wm. M. Morse, Jr., Arthur Lasher, and J. W. Hocker, all of Los Angeles, for appellants.

Scarborough & Bowen, Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy County Counsel, all of Los Angeles, for respondents.

HOUSER, J. Plaintiffs brought a suit against the several defendants, W. B. Scarborough Company, I. H. Fiske, and William I. Traeger, as sheriff of Los Angeles County, to set aside a sheriff's sale.

The material facts leading up to the sale by the sheriff of which complaint is made are substantially as follows: Some time before the sale in question took place, the defendant W. B. Scarborough Company had commenced an action against the plaintiffs herein, and in connection therewith had caused a writ of attachment to issue and to be served, under and by virtue of which defendant Traeger, as sheriff, acting through his deputies, levied upon certain household furniture and furnishings belonging to the defendants in that action.

Some days thereafter defendant Fiske, who theretofore had recovered a judgment against the plaintiffs herein, assigned said judgment to defendant W. B. Scarborough Company, which company caused defendant Traeger, as said sheriff, to levy what is termed a "paper" execution, as distinguished from an actual levy, upon the same household furniture which previously had been attached in the action brought against plaintiffs herein by the defendant W. B. Scarborough Company. It was under said "paper" levy that the sale was made by defendant Traeger as said sheriff, and which sale is here the subject of appellants' attack.

[1] At the outset it may be stated as a general rule supported by many authorities that a proceeding to set aside a sale under execution, excepting where some special facts are alleged which may create jurisdiction in a court of equity, the proper procedure is by motion to vacate the sale in the action under which it is claimed any irregularities occurred. 23 Corpus Juris, 682 et seq.; Boles v. Johnston, 23 Cal. 226, 83 Am. Dec. 111; Ketchum v. Crippen, 37 Cal. 223; Browne v. Ferrea, 51 Cal. 552; Craig v. Stansbury, 37 Cal. App. 668, 174 P. 404, where the authorities are reviewed; Morris v. Winans, 30 Cal. App. 575, 159 P. 213.

However, without considering whether plaintiffs' remedy, if any, was necessarily by way of motion rather than by a suit in equity, appellants' points for reversal will be here considered as though there was no question of the correctness of the procedure adopted by them.

As several of appellants' specifications of error deal particularly with the court's findings of fact, so much thereof as is pertinent to such specifications is hereafter set forth:

"That on July 10, 1923, a writ of attachment was duly issued out of this court in the action mentioned in paragraph 5 of the plaintiffs' complaint (W. B. Scarborough Co. v. Colver), and placed in the hands of the defendant sheriff for levy, and the sheriff did levy said writ upon the property particularly described in paragraph 6 of the complaint (the furniture, etc., which was the subject of the sheriff's sale), and the sheriff thereafter returned said writ of attachment with his written return indorsed thereon, certifying that he had levied said writ upon said property, and that he had taken said property into his possession and custody by leaving his keeper in charge thereof; and said writ of attachment and return thereon has never been changed, modified or set aside, and the court finds that under and by virtue of said writ the sheriff did take said property into his possession and control and placed a keeper in charge who has ever since remained in control thereof.

"That on the 19th day of July, 1923, an execution issued out of this court in the action mentioned in paragraph 8 of the complaint (Fiske v. Colver), was placed in the hands of the defendant sheriff, and was levied upon the same property which the defendant sheriff had previously attached under said writ of attachment, and of which the sheriff then had possession and control by his keeper as above mentioned; and on the 24th day of July, 1923, the sheriff sold the said personal property to the defendant W. B. Scarborough Company, who was then and there the highest and best bidder at said sale, and immediately thereafter, to wit, on July 24, 1923, the defendant sheriff executed to the defendant W. B. Scarborough Company a certificate of sale for said property.

"The court further finds that said sale by said sheriff was had and conducted on the premises where said personal property was located, and at and near the houses in which said property was then situated; that said property constituted the furnishings and fixtures of the houses in which it is located, and could not then be removed without serious injury thereto, and could not be taken out and removed by reason of the attachment which had theretofore been levied; that some of the property was in the immediate presence of the parties, and some of the doors of the houses were open, but some of the doors to the apartments where the property is situated were closed, but the court finds that the plaintiffs were on the premises at the time of the sale and that the plaintiff Fred Colver was present at the sale and made bids for the property when offered for sale by the sheriff, and the plaintiffs at that time made no objection to the doors being locked nor as to the property not being in view of the officer, and as to the property being sold in one parcel, and that plaintiffs made no request that the property be otherwise sold; and the court finds that by their conduct the plaintiffs waived any objection that they might have had to any of said matters.

"That there was no evidence introduced in the action concerning the title to the real property where said personal property was located nor as to the title to the personal property itself, nor was there any evidence introduced to support the allegations in paragraphs 13 and 14, of the complaint, and for that reason the court makes no finding upon the same.

"That after the said sale the plaintiffs did offer to pay the amount specified in paragraph 15 of the complaint to the defendant sheriff, but the court finds that there was no tender made to the purchaser of said property, to wit, W. B. Scarborough Company, and the court finds that the plaintiffs did pay to the clerk of the court the sum specified in that paragraph."

[2] Appellants contend that the court erred in its findings to the effect that the sheriff levied said attachment and by virtue thereof "did take said property into his possession and control and placed a keeper in charge, who has ever since remained in control thereof," for the reason that there is no testimony in support of such finding, and that such finding "is a mere conclusion of law." Also, that because the second levy was necessarily dependent upon the validity of the first levy, there is nothing on which to base the finding to which objection is made. To be more specific with reference to appellants' charges, they are, in substance, that in making the levy of the attachment in the case of W. B. Scarborough Company v. Colver, the sheriff did not "view" the property, nor did he ever have same under his custody and control; that in making the sale under the "paper" levy in the case brought by Fiske against Colver, the sheriff failed to offer the property in separate parcels, but sold it en masse, and that it was not in "view" at the time the sale was made.

The evidence, though conflicting, admits of the conclusion that at the time the levy on the attachment was made the officer entered the main hallway of the apartment house and the rooms therein occupied by the Colvers; that thereupon he gave to defendant Kate Colver a copy of the summons and complaint, and told her that he had a writ of attachment on the "contents of the property," and that he "was going to leave a keeper there in charge of the property." The officer also gave to defendant Fred Colver a copy of the writ of attachment, and stated to him that he was making a service on him "in an attachment suit." Although, with the exception of the hallways and the apartment occupied by the Colvers, the rooms and the various apartments in the apartment house were all closed or locked, and the officer did not enter any of them, a keeper for the sheriff was left in charge, who remained continuously on duty as such keeper from the date when the levy was made to and including the day of sale. Defendant Fred Colver testified that "he (the keeper) stayed on the porch during the daytime, and in a vacant apartment on the third floor during the evening." In this connection, it is appellants' contention that, under the provisions of subdivision 3 of section 542 of the Code of Civil Procedure, the sheriff was required to take the attached property "into custody," and that by the authority of adjudicated cases, such as Taffts v. Manlove, 14 Cal. 49, 73 Am. Dec. 610, and Crawford v. Newell, 23 Iowa, 453, at the time the property was attached it was necessary

that it "be within the view of the officer; i. e., that he must see it, and know what he is attaching, and take the property into his actual custody."

Subdivision 3, of section 542 of the Code of Civil Procedure, provides that "personal property, capable of manual delivery, must be attached by taking it into custody."

The case of Taffts v. Manlove, 14 Cal. 49, 73 Am.Dec. 610, is generally relied upon by text-writers and by some judges in their opinions for the construction placed upon statutes requiring that the attaching officer shall take the attached property "into custody"—that at the time the levy is made such attached property "must be within the view of such officer." In the case referred to, the officer was attempting to levy upon a stock of goods in a store, the doors of which, upon his arrival thereat, being locked, thereupon he placed a keeper at the rear door of the store while the officer remained at the front door thereof. No claim was made by the officer that up to that time a levy had been made. Later he obtained a key which enabled him to enter the store; whereupon he levied upon the contents of the store, made an inventory thereof, and left a keeper in charge. Referring to the acts of the officer prior to his entry of the store, the court, in rendering its opinion, said:

"However this may be, we can conceive of no principle of law, and have been referred to no case, which holds that the acts relied on by appellant constitute a levy. Waiving everything else, the essential element of an intention to levy prior to the entry seems to be wholly wanting from anything we can see in the agreed statement. That the sheriff came to the house in order to make the levy is very certain; but that he intended to make, or considered that he had made, a levy on goods in the house, by standing at one door and putting his companion at the other, does not appear. He made then no note or memorandum of the levy—did not, perhaps, even know what goods were in the store, their description or value; and besides this, demanded the key afterward and entered, and then seized the goods, took the inventory, and indorsed the levy. There is neither proof nor probability that, before this time, he considered he had seized the goods, or if he did, we think he was clearly mistaken. * * *

"But it cannot be necessary to pursue this inquiry. It is too plain for argument, that there can be no levy when the officer does not even know the subject of the levy. As well might a sheriff stand in the street and levy upon the contents of a banking house as to stand in a store door at midnight and claim that merely by standing there and preventing any person from coming into the store he had levied on the contents, whatever they were, of the store; and this without having any knowledge of the general nature of the stock, much less of the particular description or value. But, as we have said before, nothing appears to show that the mere watching and guarding of the storehouse was meant to be a levy upon the property inside; but these were acts merely in prosecution of the design to enter the house and levy on the property there, which purpose was afterwards accomplished."

It would appear clear that the case is an authority covering the particular facts thereof only, and cannot be taken as a pronouncement that in all cases the attached property must be in the actual view of the attaching officer. While the authorities on the subject are not harmonious, the general statement may be frequently found that, to constitute a valid levy upon personalty, the attaching officer must not only have such property in view, but as well must assume such dominion over it as would render him liable to an action for trespass were it not for the protection afforded him by the court's process. Vol. 6, Corpus Juris, p. 223, and cases cited. A limitation upon such rule is also announced, which is likewise supported by many authorities, that the taking by the attaching officer may be either actual or constructive, dependent upon the nature and the situation and the location of the property attached. See Rogers v. Gilmore, 51 Cal. 309; Sinsheimer v. Whitely, 111 Cal. 378, 43 P. 1109, 52 Am.St. Rep. 192. Manifestly, the requirement that the property proposed to be attached must be within the "view" of the attaching officer should serve some useful purpose. Assuming its object to be that of future identification, if need be, of the property, in most cases, especially where the levy is made upon many different articles such as might be found in different pieces of furniture and furnishings (as in the case at bar) in a large apartment house, the "view" by the officer would fail of its purpose, for the reason that no man, however observant and retentive of memory, on a casual inspection or examination of attached property (such as is ordinarily had by an attaching officer) would be capable of either noting in his mind even the essential differences, if any, existing between the attached property and other properties of the same style and manufacture, or of remembering any considerable number of such several dissimilarities after any great lapse of time. Even in those authorities which follow the assumed holding in the case of Taffts v. Manlove, 14 Cal. 49, 73 Am.Dec. 610, to the effect that the attaching officer must "view" the property proposed to be levied upon, it will be found that their rulings do not apply to a state of facts such as is here presented. In nearly all of those cases the property upon which the levy was sought to be made was not within even the constructive control of the attaching officer, much less of the actual dominion by him over it. The purpose of the statute in requiring that in executing the writ as to personal property it "must be attached by taking into custody" is obviously that of being certain to hold the identical property for the uses intended by the process of the court. The impracticability of compliance with a hard and fast rule, requiring

that the officer levying the attachment must actually see that upon which the levy is made, may be illustrated by an extreme situation: In levying upon a large number of articles, presumably all of the same general description, such, for instance, as canned fish, contained in closed wooden cases or boxes, or grain of any kind, enclosed in bags or sacks, it would appear ridiculous to demand that a valid levy, in order to come within the terms of the statute and thereunder that the attaching officer must actually "view" the property, would require that, as to the canned fish in the wooden cases, he must not only break open each case, but each can as well; or as to the grain in the bags, that he must cut open each bag, so that he might attest the fact of personal vision by him of that which his return showed had been the subject of the levy. No such idle and useless and destructive acts are contemplated by the statutory requirement that the attached property must be taken "into custody." As is said in the case of Crawford v. Newell, 23 Iowa, 453, which case is cited by appellants but which appears to not sustain their contention:

"To constitute a valid, operative attachment levy under the provisions of the statute, the officer should do that which would amount to a change of possession, or something that would be equivalent to a claim of dominion, coupled with a power to exercise it."

And see Freeman on Executions, § 262; Hemmenway v. Wheeler, 14 Pick. (Mass.) 408, 25 Am. Dec. 411; Russell v. Major, 29 Mo. App. 167; Poling v. Flanagan, 41 W. Va. 191, 23 S. E. 685; Laughlin v. Reed, 89 Me. 226, 36 A. 131.

In the case at bar the acts of the attaching officer, coupled with those of the keeper left in charge of the attached property, indicated not only a change of possession of the property from the defendants in the action to the sheriff, and that the sheriff thereafter not only claimed dominion over it, but as well that with the exception of that part of the furniture which was removed by defendant Fred Colver, the sheriff actually exercised dominion over the property to the exclusion of every other individual or agency whatsoever.

The case of Moore v. Brown, etc., Furniture Co., 107 Ga. 139, 32 S. E. 835, in its facts was strikingly like the facts of the case at bar, in that the levy which was there attached was upon furniture in a hotel. Prior to making the levy the attaching officer did not "view" the furniture other than possibly so much thereof as was visible in the dining room and the office of the hotel. The other acts, however, by the officer making the levy were perhaps somewhat stronger than those in the instant case. Those matters, however, were unquestioned. The point was solely as to the necessity of a "view" of the attached property by the officer making the levy. The court reviewed and distinguished the authorities, including the case of Taffts v. Manlove, 14 Cal. 49, 73 Am. Dec. 610, which it was contended indicated that in order to constitute a valid levy the attached property must be within the "view" of the attaching officer, and ruled that the essential acts of such officer need not necessarily include a "view" of the attached property. In referring to a statement found in Freeman on Executions, vol. 2, § 260, and some adjudicated cases to the effect that "he (the officer) must have it (the property) within view," the court said:

"These are the authorities cited by the author to establish the doctrine that, to constitute a levy of personal property, the officer must have it within his view. The adjudications referred to do not sustain the literal meaning of the text. But, from all those cited, it is sufficient if the property be in the control and custody of the officer."

This court is therefore convinced that the criticized finding is supported by the evidence, and that the requirements of section 542 of the Code of Civil Procedure applicable thereto were substantially met by the attaching officer.

[3] For the alleged reason that the findings by the court were not supported by the evidence, appellants make further complaint that the court found as a fact "that said property constituted the furnishings and fixtures of the houses in which it is located," etc.—the criticism of appellants being particularly directed to the word "fixtures"—on the ground that fixtures are not personal property. But an inspection of the remainder of the record herein shows conclusively that the term "fixtures" was not used in the sense suggested by appellants, but was intended solely as a description of the furniture and furnishings included in the attached property as disclosed by the sheriff's return on the levy and the sale. So construed, the evidence in the case is ample to support the findings of which complaint is made.

[4] Further objection on the part of appellants to the findings by the court is that the court erred in its findings that, at the time of the sale, "some of the property was in the immediate presence of the parties, and some of the doors of the houses were open," for the reason "that there was no testimony to support such finding; that it was contrary to the evidence and contrary to the stipulations of the parties entered into in open court." In connection with such objection, it is urged that at the time the attached property was sold by the sheriff none of the articles of furniture or furnishings was in view of any of the bidders at the sale, as is required by the provisions of section 694 of the Code of Civil Procedure. The sale took place

on the premises where the attached property was located. The testimony given by the officer who made the sale was, that at the time the sale was made, he entered one of the apartments, "not very far in—just to see that it was an apartment and a lot of furniture"; that "the keeper went over to two apartments, * * * and both doors were locked"; that he (the officer) inquired of an attorney who was present and who represented the Colvers if there was some way to see the furniture, and was informed by him that "the houses were all locked up—no way of getting in"; that the officer then asked the attorney, "What do you want to do, do you want to sell it just the way it is here?" and the attorney replied, "Yes."

The evidence further shows that just before the sale took place defendant Fred Colver had removed some of the attached property from the apartment house, and that he had ordered "all tenants to keep their doors locked"; also that when the sale took place he made several bids on the property.

In the case of Marsh v. Lapp, 180 Cal. 231, 180 P. 533, in which was involved the question of the right of the judgment debtor on execution sale of furniture in an apartment house to have the property "within view of those who attend the sale," as provided by section 694 of the Code of Civil Procedure, it appeared that after the defendant had been served with the notice of the sale he removed about one-half of the furniture from the apartment house and stored it in a warehouse. With reference to the contention of the appellant in that case that the sale was void because the property was not within the view of those persons who attended the sale, the court said:

"Under the circumstances of this case there is no merit in this point. The statutory rule is intended for the protection of the judgment debtor, and he may waive his right thereunder if he sees fit to do so. Lexington Bank v. Wirges, 52 Neb. 649, 72 N. W. 1049. The removal of the property by defendant after notice of the sale amounted to such a waiver, and he cannot now be heard to complain of a result produced by his own voluntary act. Foster v. Goree, 5 Ala. 424, 429."

In the instant case the attached property was sold en masse because the attorney representing the defendants had stated that "the houses are all locked up—no way of getting in," and when asked by the officer making the sale, "What do you want to do, do you want to sell it just the way it is here?" he replied, "Yes." Besides which the acquiescence of the judgment debtor in the sale was manifested by the fact that defendant Fred Colver made several bids on the property while it was being auctioned by the officer.

[5] Section 694 of the Code of Civil Procedure, on which appellants rely, provides, not that a sale of personal property must be made in parcels, but that it must "be sold in such parcels as are likely to bring the highest price." There is no showing by appellant that the price received for the property was not its full value, or that if it had been sold in separate parcels the price received would have exceeded the price for which the property was sold.

The appeal in the case of Smith v. Randall, 6 Cal. 47, 65 Am. Dec. 475, involved, among other things, the question of vacating a sale on the ground that certain real property had been sold as one parcel rather than in separate parcels. It appeared that the failure on the part of the sheriff to sell the property in separate parcels was occasioned by the incorrect description of the premises given to the sheriff by the defendant, and by his request that the property be sold "in gross." The court said:

"To set aside the sale on this ground, under the circumstances, would be to allow a party to take advantage of his own deceit or negligence."

To the same effect, see Hopkins v. Wiard, 72 Cal. 259, 262, 13 P. 687, 688, where it appears that the defendant's attorney indorsed "as satisfactory" an order by the trial court that the property be sold "in gross." In Hudepohl v. Liberty Hill W., etc., Co., 94 Cal. 588, 592, 29 P. 1025, 1026 (28 Am. St. Rep. 149), the court said: "The judgment debtor may by parol waive a sale of the land in parcels, and give authority to sell in mass"—citing Smith v. Randall, 6 Cal. 52, 65 Am. Dec. 475; San Francisco v. Pixley, 21 Cal. 59; Smith v. Meldren, 107 Pa. 348. See, also, Frink v. Roe, 70 Cal. 296, 301, 11 P. 820. It must therefore be concluded that the evidence supported the finding of which complaint is made, and that the irregularities, if any there were, on the part of the officer at the time he made the sale were waived by the defendants in the action.

[6] It is further contended by appellants that the trial court erred in its findings that "the sheriff thereafter returned said writ of attachment with his written return indorsed thereon, certifying that he had levied said writ upon said property, and that he had taken said property into his possession and custody," for the reason, as assigned by appellants, that "the said written return shows upon its face as executed by 'Wm. I. Traeger, Sheriff, by M. Q. Adams, Deputy Sheriff,' and the testimony shows that one Tucker attempted to serve said writ of attachment, and that M. Q. Adams, personally, knew nothing about what was done in the premises." In support of such contention, no authority is cited by appellants, nor is this court favored with any argument other than the statement that, although the rule is that a deputy performing the act must make the return thereof in the name of his principal, such rule does not ex-

tend to another deputy who has no personal knowledge of the facts.

In the case of Carter v. O'Bryan, 105 Ala. 305, 315, 16 So. 894, 897, it was held that:

"The objection that the sheriff, who made the levy and who had failed to make the proper returns, could alone make them, and that his successor, in compliance with an order of the court to do so, could not make them, was without merit. The duty to be performed attached to the officer, and was an official, not personal duty." See Pol. Code, § 4171.

If a successor in office, who was personally unacquainted with the facts, was qualified to make a return, it would appear plain that a deputy of the sheriff in office, although having no personal knowledge of the facts, would be equally competent.

[7] Appellants complain that the trial court made findings contrary to "decisions of the court expressed at the trial." But it is well settled that opinions declared by the judge during the course of the trial or thereafter are not binding, but, to the contrary, that the findings and judgment are conclusive. Churchill v. Flournoy, 127 Cal. 355, 360, 59 P. 791; Belger v. Sanchez, 137 Cal. 614, 618, 70 P. 738; Northern Cal. Power Co. v. Waller, 174 Cal. 377, 381, 163 P. 214.

[8, 9] The point is advanced by appellants that because the trial court failed to find on certain issues presented by the pleadings, the judgment should be reversed. With reference to the first of such so-called issues, the allegations in the answer of the defendant in effect were but an admission of an allegation contained in plaintiff's complaint, and therefore required no finding by the court. As to the other omissions by the trial court to make the findings regarding which complaint is made, upon examination of the record it is apparent that the findings as made upon the material issues of the pleadings are ample to support the judgment, and that any omitted findings which might be made on other issues, however favorable to plaintiffs' contentions, would not affect the conclusion of law made by the trial court from the findings as a whole. In the case of Sharp v. Pitman, 166 Cal. 501, 505, 137 P. 234, 236, it is said:

"If the findings which are made are of such a character as to dispose of issues which are sufficient to uphold the judgment, it is not a mistrial or against law to fail or omit to make findings upon other issues, which if made, would not invalidate the judgment."

See, also, Lincoln v. Hoggard (Cal. App.) 225 P. 770.

The judgment is affirmed.

We concur: CONREY, P. J.; CURTIS, J.

73 Cal. App. 455

COLVER et al. v. W. B. SCARBOROUGH CO. et al. (Civ. 4799.)

(District Court of Appeal, Second District, Division 1, California. June 29, 1925. Hearing Denied by Supreme Court Aug. 28, 1925.)

Execution ⟸55—Money voluntarily paid to clerk of court held not in custody of law.

Where, in action to set aside execution sale, plaintiffs voluntarily tendered to clerk of court amount required to satisfy judgment on which execution had been issued, money *held* not in custody of the law, so as to be exempt from levy by another judgment creditor.

Appeal from Superior Court, Los Angeles County; John L. Fleming, Judge.

Action by Kate Colver and another against the W. B. Scarborough Company and others. Judgment for defendants, and plaintiffs appeal. On motion to restore moneys deposited. Denied.

Hearing denied by Supreme Court; Houser, Justice pro tem., not participating.

See, also, 238 P. 1096, 1102, 1104.

Wm. M. Morse, Jr., Arthur Lasher, and J. W. Hocker, all of Los Angeles, for appellants.

Scarborough & Bowen, Edward T. Bishop, County Counsel, and J. A. Tucker, Deputy County Counsel, all of Los Angeles, for respondents.

HOUSER, J. The matter here involved comes to this court on an independent motion made by appellants that the respondents "immediately return to the treasury of the county of Los Angeles the deposit of $713.09, deposited with the county clerk and by the county clerk deposited in the treasury of the county of Los Angeles. * * * as a tender made by the plaintiffs herein to the sheriff of the county of Los Angeles, one of the defendants herein, on the ground and for the reason that the said sum of money so deposited was in the custody of the law and not subject to attachment, and for the further reason that said sum of money when so deposited as a tender until the tender was refused by the party to whom it was made was then and there the property of the party to whom the tender was made, and not subject to attachment against the defendants herein, or either of them."

The essential facts, so far as the present inquiry is affected, are as follows:

The plaintiffs brought a suit to set aside a sheriff's sale; and in connection therewith, according to the allegations of their complaint and the findings by the court, they paid into the hands of the clerk of the court the sum of $713.09 for the alleged purpose of paying the amount of the judgment, costs, and interest in the case in which the levy,

which resulted in the sale of which complaint was made, had issued.

In the suit instituted by the plaintiffs to set aside the sheriff's sale, judgment was rendered in favor of the defendants. Theretofore one of the defendants in the suit to set aside the sheriff's sale had, in another action, recovered a money judgment against plaintiffs herein, upon which judgment execution was levied on the moneys paid by said plaintiffs to the clerk of the court in the suit brought by them to set aside the sheriff's sale, and which levy resulted in such money being paid by the sheriff to the party (one of the defendants herein) who caused such execution to issue.

The principal point relied upon by the moving party in this proceeding is that the money deposited with the clerk of the court was "in the custody of the law and therefore not subject to levy."

One of the allegations contained in plaintiffs' complaint is "that plaintiffs have tendered and offered to pay the full amount of said judgment, * * * and are now still willing to renew said tender, although said I. H. Fiske and said W. B. Scarborough Company, a corporation (defendants) and said defendant sheriff, and each of them, have refused to accept said tender and offer of payment, and these plaintiffs do at the filing of this complaint pay into the hands of the clerk of this court the sum of $713.09, being sufficient to pay the amount of said judgment, costs and interest."

At the conclusion of the trial the court's findings of fact were in accordance with the said allegations of plaintiffs' complaint in that regard. Primarily, then, the question to be determined is whether or not the acts of the plaintiffs in paying the money "into the hands of the clerk of this court" had the effect of placing such funds in the custody of the law.

No claim is made by the moving party that the money was paid to the clerk under or in pursuance of any order of court, and it thus appears that the payment to the clerk was a purely voluntary act on the part of the plaintiffs.

The general rule is that before funds may be said to be in the custody of the law, an order of the court is required to make a deposit of money with the clerk or other representative of the court. The principle is thus stated in Corpus Juris, volume 18, page 770:

"In order to complete a deposit and render it legally effective, the money must be delivered pursuant to an order of the court; and if the deposit is made without such order or a subsequent ratification the clerk may refund it" [citing cases].

In the case of Kimball v. Richardson-Kimball Co., 111 Cal. 386, 43 P. 1111, it appeared that a bank paid money into court in a suit in interpleader without first having obtained an order of court so to do. The money was attached, and the court held (syllabus):

"When property is lawfully taken by virtue of legal process, it is in the custody of the law and not otherwise; and money voluntarily paid into court without an order of court therefor, by a garnishee who has filed a complaint in interpleader against attaching creditors with a view to being discharged from liability to conflicting claimants, is not in the custody of the law, and is the subject of attachment."

In the body of the opinion (page 394 [43 P. 1113]), among other things, the court said:

"We may suppose the court possesses the power to make the order permitting a party in a proper case to do so, but in the present case no such order was made or asked for, and until it was obtained the bank could not, on its own volition, relieve itself from responsibility, by voluntarily placing the property and money in the hands of the clerk, and when so placed it was in no proper sense in the custody of the law.

"When property is lawfully taken, by virtue of legal process, it is in the custody of the law, and not otherwise. Gilman v. Williams, 7 Wis. 334, 76 Am. Dec. 219.

"* * * It is sufficient to say that the property in question was not in the custody of the law, and whether in the hands of the bank or of Ward it was subject to attachment."

See, also, Coffee v. Haynes, 124 Cal. 566, 57 P. 482, 71 Am.St.Rep. 99.

No authorities to the contrary are cited by the plaintiffs other than such as in their respective facts show a constructive custody of the funds by the court, such as money collected by a sheriff on execution (Clymer v. Willis, 3 Cal. 364, 58 Am.Dec. 414), or money deposited with a sheriff for the release of an order of court so to do. The money was 581); but such cases, as is said in Kimball v. Richardson-Kimball Co., 111 Cal. 386, 394, 43 P. 1111, 1113, are distinguishable from cases where the facts are such as are presented in the instant case, "because it [the money] is a symbol of and stands in place of the attached property."

It would therefore appear that plaintiffs' contention that the moneys deposited by them with the clerk were in the custody of the law cannot be sustained.

Plaintiffs also present the point "that prior to the levy of the garnishment, no order of court having jurisdiction had ordered the release of said moneys to the plaintiffs." But if the rule heretofore announced, that the money was not in the custody of the court, is correct, no order of the court releasing the money in the hands of the clerk would be required.

Several other suggestions, including the question of the authority of this court to grant the order asked by appellants, are made by the respondents as a cause for denying plaintiffs' motion; but, in view of the conclusion reached that the money was not

in the custody of the court, a consideration of such reasons becomes unnecessary.

The motion is denied.

We concur: CONREY, P. J.; CURTIS, J.

MEMORANDUM DECISIONS

196 Cal. 785

In the Matter of the Application of W. H. GOHLKE for a Writ of Habeas Corpus. (Cr. 2799.) (Supreme Court of California. July 17, 1925.) In Bank. Application for writ of habeas corpus, prayed to be directed to the sheriff of Fresno county to secure release of petitioner from custody for driving automobile without owner's consent. Prisoner remanded. Charles A. Hill, of Fresno, for petitioner. George R. Lovejoy, Dist. Atty., and William A. White, Deputy Dist. Atty., both of Fresno, and U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for respondent.

PER CURIAM. The facts of this case are the same as in Re Gohlke (Cal. App.) 237 P. 779. Upon the grounds and for the reasons stated in the opinion in that case (per Knight, J.), the writ is discharged, and the petitioner remanded to the custody of the sheriff of Fresno county.

CALIFORNIA REPORTER

239 PACIFIC REPORTER

239

196 Cal. 753

JANSS INV. CO. v. WALDEN et al.
(L. A. 8050.)

(Supreme Court of California. Aug. 26, 1925. Rehearing Denied Sept. 24, 1925.)

Vendor and purchaser ⟸39—Provision in sale contract restricting use of property to Caucasian race held valid.

A provision in installment contract for sale of a lot, that property should not be used or occupied by any person who was not of the white or Caucasian race *held* valid, it being a restraint on use of property, and not on alienation.

In Bank.

Appeal from Superior Court, Los Angeles County; T. A. Norton, Judge.

Suit by the Janss Investment Company against James J. Henry Walden and others. From a decree for plaintiff, the defendant named appeals. Affirmed.

Wills O. Tyler, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher and E. H. Conley, all of Los Angeles, for respondent.

HOUSER, Justice pro tem. This is an appeal from a decree in a suit to quiet title. The facts are not in dispute. It appears that the plaintiff, Janss Investment Company, is a subdivider of land into town lots; that from one of its subdivisions it sold a lot to defendant Walden under an installment contract, which contained as one of its conditions a paragraph of which the following is a copy:

"No part of said real property shall ever be leased, rented, sold or conveyed to any person who is not of the white or Caucasian race, nor be used or occupied by any person who is not of the white or the Caucasian race, whether grantee hereunder or any other person."

The contract also provided:

"This contract is not transferrable without the written consent of the party of the first part, and then only upon payment of the usual fee of $1. * * *"

The contract was entered into on May 3, 1922. On the following day Walden, who was a white man, attempted by a quitclaim deed to convey all his right, title, and interest in the property to defendants Walling, who are negroes. On September 2, 1922, defendant Walden, after having decided that the mode of conveyance used by him was insufficient for his purpose, made an assignment in writing of all his interest to defendant Betty Walling, which attempted assignment, it is conceded by the appellant, failed for the reason that the plaintiff refused to give, and did not give, its consent in writing thereto; nor was the sum of $1 paid to the plaintiff for making such assignment. However, without reference to the state of the

title to the property as between defendant Walden and the defendants Walling, or either of them, no question is raised as to the fact that the Wallings were let into the possession of the lot in question, and that at the time the suit was commenced they were in the use and occupation thereof.

At the conclusion of the trial in the lower court judgment was rendered in favor of the plaintiff, and defendant Walden has appealed therefrom.

The sole question presented for determination by this court is as to the validity of that part of the condition of the contract between the parties thereto that:

"No part of said real property shall ever * * * be used or occupied by any person who is not of the white or the Caucasian race. * * *"

If the question were a new one to this court it would demand careful investigation of the legal principles and the authorities presented by appellant in support of his contention touching the constitutionality of the condition set forth in the contract, to which reference has been had. In view, however, of the fact that the identical question has been raised recently in a preceding case and passed upon by this tribunal adversely to appellant's contention in the case at bar, it becomes unnecessary and inadvisable to devote much time or thought to a consideration of the legal points suggested by appellant. We refer to the case of Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A. L. R. 115. The facts therein, as stated in the opinion of the court, were that the plaintiff was the owner of a tract of land, which had been subdivided into town lots; that it sold one of such lots to a man named Renaker, who in turn sold it to defendant Gary, who was a negro, and who, with his wife, who was a colored woman, thereafter went into the use and occupation of the property. The deed by which the property was conveyed by the plaintiff therein to Renaker contained a condition "* * * that the said property shall not be sold, leased or rented to any persons other than of the Caucasian race, nor shall any person or persons other than of Caucasian race be permitted to occupy said lot or lots." The deed there, as the contract here, also contained the usual forfeiture and reversionary clauses for breach of any of its conditions. It will thus be seen that the facts in the two cases are practically identical one with the other.

The matter seems to have been thoroughly considered both by the court sitting in department and later, on petition for rehearing, by the court sitting in bank. The conclusion reached, as fairly stated in the syllabus, was that:

"The provision in a deed that no person or persons other than of the Caucasian race shall be permitted to occupy the property is not a restraint upon alienation, but upon the use of the property, and is valid."

This court feels itself bound by the ruling reached in that case. The date of the decision was December 11, 1919, since which time it has been considered as settled law in this state, and accordingly followed by subdividers of property and by purchasers of town lots and the owners of real property in general. It cannot now be disturbed.

The judgment is affirmed.

We concur: MYERS, C. J.; WASTE, J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; KNIGHT, Justice pro tem.

---

196 Cal. 756

O'DELL v. HALL et al. (L. A. 7701.)

(Supreme Court of California. Aug. 27, 1925.)

Appeal and error ⇐766—When record is not presented as prescribed by law, Supreme Court will not consider merits of appeal.

Where appeal under the alternative method was taken from judgment after demurrer was sustained, the Supreme Court will not consider the merits of the appeal, when no argument was made or authorities cited as to sufficiency of complaint, and brief contained no portion of record appellant would call to attention of court, nor was extension of time asked to print a supplemental brief under Code Civ. Proc. § 953c, as amended by Laws 1923, p. 748.

In Bank.

Appeal from Superior Court, Kern County; T. N. Harvey, Judge.

Action by W. H. O'Dell against W. H. Hall and another, Andrew A. Crosbie, individually and as City Marshal of the City of Taft, and the American Surety Company of New York. From a judgment for the last-named defendant, plaintiff appeals. Affirmed.

George M. Cook, of Taft, for appellant.

Irwin & Laird, of Bakersfield, and Charles Del Bondio, of Taft (Rowen Irwin, Rollin Laird, and T. F. Allen, all of Bakersfield, of counsel), for respondents.

WASTE, J. In an action for false imprisonment, brought by the plaintiff against three peace officers of the city of Taft and the American Surety Company, surety on the official bond of the defendant city marshal, the defendants demurred jointly to the second amended complaint. The court overruled the demurrer as to the three defendant peace officers, but sustained it as to the defendant surety without leave to amend. From the judgment thereupon entered in favor of the surety company, the plaintiff has appealed.

The appeal is taken under the alternative method. The only point or argument

made in support of the appeal is found in appellant's two-page opening brief (the only one filed), wherein he says:

"There is nothing in the record by which this court may even infer as to or upon what grounds the judge of the superior court sustained the demurrer of the American Surety Company."

No argument is made, and no authorities are cited in support of the sufficiency of the complaint as against the demurrer, which was sustained. Appellant has not printed in his brief, or in a supplement thereto, any portion of the record he would call to the attention of this court, nor has he at any time asked for an extension of time in which to print and file a supplemental brief, as he might have done under section 953c of the Code of Civil Procedure as amended in 1923 (St. 1923, p. 748). There is, therefore, no record here presented in the manner prescribed by law upon which this court can consider the merits of the appeal.

The judgment is affirmed.

We concur: LAWLOR, Acting C. J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

---

196 Cal. 761

MARSHALL v. MARSHALL. (S. F. 10950.)

(Supreme Court of California. Aug. 27, 1925. Rehearing Denied Sept. 24, 1925.)

1. Divorce ⟸289 — Adoption of children by mother, before decree of divorce, does not defeat jurisdiction of court as to alimony.

Where a decree of divorce provided alimony for support of minor children of wife by former marriage, they having been adopted by husband at time of marriage and readopted by wife before divorce, an order modifying decree by striking provisions for alimony as being void, on ground that court had no jurisdiction after the adoption of children by mother, *held* erroneous.

2. Divorce ⟸308—Recital in decree, that alimony is for support of children, surplusage.

Where husband adopted the children of his wife by former marriage, and before final decree of divorce of these parties the wife readopted children, a provision in the decree for the application of alimony for support of children *held* to be surplusage or error, since trial court had jurisdiction to award alimony to wife under Civ. Code, §§ 139, 141, 142, 146, 147.

3. Divorce ⟸245(1)—Trial court retains jurisdiction to vacate or modify decree.

A trial court, having awarded alimony in a divorce proceeding, retains jurisdiction to vacate or modify decree in its exercise of sound discretion under Civ. Code, §§ 138, 139.

4. Adoption ⟸4—"Adoption" by husband of wife's children by former marriage does not legally sever parental relationship of mother, so that she could subsequently adopt them.

Where husband adopted children of wife by former marriage under Civ. Code, § 221 et seq., the petition and order in the adoption proceeding, setting out that relationship of parent should be held jointly with his wife, *held* that such adoption did not legally sever mother's parental relationship, so that she could subsequently adopt the children, notwithstanding section 229, since a joint adoption makes a child in law a child of both spouses, and since "adoption" is the act by which relations of paternity and affiliation are created between persons not so related by nature or by law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Adopt—Adoption.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Suit by Emily G. Marshall against John C. Marshall. From an order modifying interlocutory and final decrees of divorce, plaintiff appeals. Reversed and remanded, with directions.

Devoto, Richardson & Devoto, of San Francisco, for appellant.

Charles L. James, of San Francisco, for respondent.

MYERS, C. J. This is an appeal by plaintiff from an order made long after judgment purporting to modify both the interlocutory decree and the final decree of divorce by striking out therefrom the provisions therein for the payment of monthly alimony by the defendant to the plaintiff for the support of the latter's two minor children. The plaintiff was a widow with two minor children by her first husband and married the defendant, who thereafter legally adopted these children by proceedings pursuant to the provisions of the Civil Code, sections 221 et seq. Thereafter differences arose between the parties, and on December 15, 1920, they entered into an agreement reciting that they had resolved to live separate and apart and had "mutually agreed to divide the community property as follows": Then followed provisions for the equal division of the community property, and then the following provisions:

"Said party of the second part [defendant] further hereby agrees to pay the sum of $100 a month for the support and education of Vincent A. Marshall and Monica T. Marshall, that is, $50 a month for each, until they reach the age of majority.

"Said party of the second part also agrees that he will surrender the adoption of said children, and it is understood that Mrs. Emily G. Marshall shall readopt said children."

Thereupon, on December 27, 1920, plaintiff filed a petition for the adoption of these two children, together with the written consent thereto of the defendant, and a decree was thereupon entered purporting to accomplish the adoption of her own children by the plaintiff. Four days thereafter an interlocutory decree of divorce was rendered in favor of the plaintiff by default, which awarded the custody of the two children to the plaintiff, but did not refer to them as minor children or as the children of the parties, and contained no finding or recital of fact that they were the children of the parties. It made the same provision for the payment of alimony and substantially the same provisions for the division of the property as were contained in the contract between the parties. Thereafter and on January 13, 1921, plaintiff and defendant entered into another agreement reciting the entry of the interlocutory decree of divorce and providing:

"Whereas, said parties hereto have agreed to settle their property rights in accordance with this agreement as amendatory of said interlocutory decree, and it is hereby agreed between them as follows":

Then follow provisions for a somewhat different division of the community property, but no mention of the subject of alimony. The defendant paid the alimony as provided in the first contract and in the decree for 26 months thereafter, a final decree having in the meantime been entered containing the same provisions respecting the payment of alimony and division of property as were contained in the interlocutory decree. On December 1, 1922, the defendant moved for an order modifying the interlocutory and final decrees by striking therefrom the provisions for the payment of alimony on the grounds "that said order was obtained by misrepresentations made to the court; that the court had no jurisdiction to make said order; and that said order is oppressive and unreasonable." After the hearing, the court granted the motion and made the order upon the ground "that at the time of the issuance and entry of the interlocutory decree of divorce and at the time of the issuance of the final decree of divorce herein there were no children of the marriage of the parties hereto. * * *" This order was evidently predicated upon the conclusion that the adoption of the two children by their own mother changed their status so that they were no longer the children of the parties to the divorce action and that, therefore, the court in the divorce proceeding had no jurisdiction to award alimony for their support. This conclusion was rested upon the authority of Younger v. Younger, 106 Cal. 377, 39 P. 779, wherein by a final decree of divorce the custody of the minor child was awarded to the mother. Thereafter with her consent the child was regularly adopted by its grandfather, pursuant to the provisions of the Civil Code. Subsequent thereto the father applied to the court in the divorce proceedings for a modification of the order awarding the custody of the child to the mother, and this court held that the adoption proceedings had changed the status of the child so that it was no longer the child of either of the parties and the court in the divorce proceedings was deprived thereby of jurisdiction to make any further order affecting the status or custody of such child.

[1-3] The order appealed from herein, purporting to modify the interlocutory decree and final decree, was made long after the expiration of six months. To the extent that such order was made solely upon the ground that the provision for alimony as originally included in the decrees was void as in excess of the jurisdiction of the court, we think it was erroneous. The trial court in the divorce proceeding (which was upon the ground of extreme cruelty) had jurisdiction and power to divide the community property between the spouses or to award all of it to the wife, or to award her alimony in lieu of a division of the property, or in addition thereto, regardless of the question of the existence of children of the marriage of said parties. Civ. Code, §§ 139, 141, 142, 146, 147. It seems therefore that the provision for the application of the alimony thus awarded, to wit, for the support of the two children, may be regarded either as surplusage or as error. If the former, it could be disregarded; if the latter, it became final by the failure to appeal therefrom. Of course, under sections 138 and 139 of the Civil Code the court, having awarded alimony in a divorce proceeding, retains jurisdiction to vacate or modify the same in the exercise of a sound discretion. But it appears with reasonable certainty from the record herein that the modification here appealed from was not made in the exercise of such discretion, but was made solely upon the ground that the original provision was void.

[4] There is another question involved herein which has not been touched upon in the briefs of counsel, namely, the question of the validity and effect of the proceeding whereby the mother purported to adopt her own children. Our Civil Code provisions respecting adoption contain no definition of the term, but all of the definitions seem to be in substantial agreement to the effect that it is the act by which relations of paternity and affiliation are created and recognized as legally existing between persons not so related by nature or by law. In other words, it is a proceeding by which the adopting parent assumes a parental relationship toward the child of another. See 1 Corpus Juris, 1370; 1 R. C. L. 592. It seems unthinkable that one who is both the natural mother and the legal mother of a child can legally adopt such child. The natural mother of a child could legally adopt such child only in a case where-

in her parental relationship had theretofore been severed as a matter of law, and this brings us to the question whether or not the adoption of plaintiff's two children by the defendant, her husband, had the effect of legally severing her parental relationship toward the children. We do not think that it had this effect, under the circumstances of this case, notwithstanding the provisions of Civil Code, section 229, that:

"The parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the child so adopted, and have no right over it."

If, after the adoption of plaintiff's two children by her husband and no further proceedings had, the plaintiff had died, would we hold that her two children were not legally her children and were not her heirs? It seems unlikely It is plain from the record of the adoption proceedings herein that the parties thereto did not intend thereby to sever the parental relationship between the mother and the children. The husband's petition for adoption recited (italics added) that:

"Your petitioner herein is a fit and proper person to be allowed the *joint custody and control* of said minor children * * * *with that of the right of their mother* to have such custody and control. * * * Wherefore your petitioner prays that this honorable court make an order that the above-named minors [be] adopted and that they be declared to be adopted by your petitioner, in that he shall *jointly together with his wife*, Emily Gabriel Marshall, be adjudged on such adoption as having the status of the natural father of said minors. * * *"

The written consent to the adoption filed therein by the mother was to the effect:

"That the said John Charles Marshall adopt the said Vincent Anthony Marshall and Monica Thelma Marshall, minors, my children, as his own natural children, and that in conjunction and *jointly with me* act, maintain, and have the legal status of a father and * * * shall *jointly with me* maintain the relationship of a parent to said minors herein mentioned."

The order for adoption ended as follows:

"And that all other persons shall be henceforth relieved of any parental duty towards, and all responsibility for, the said children and have no right or control whatever over them *save that of the mother* of said minors, namely, Emily Gabriel Marshall, wife of petitioner herein."

It seems plain, therefore, that after the completion of this adoption proceeding the mother of the children still retained her parental relationship toward them, legally as well as by blood. If this be so, it would follow that the proceeding thereafter, whereby she purported to adopt these children, was an utter nullity. If it was not, it would follow as matter of logic, for example, that a wife could, with her husband's consent, legally adopt their minor child and thus sever, as a matter of law, the parental relationship between such child and its father.

In Re Williams, 102 Cal. 70–79, 36 P. 407, 41 Am. St. Rep. 163, it was held that although no express authority therefor is to be found in the Code, nevertheless a husband and wife may jointly adopt a child pursuant to the procedure therein prescribed, the result of which is to make the child, in law, the child of both spouses. Such was the obvious purpose and intent of both of the parties and of the court in the proceeding whereby the defendant herein purported to adopt the minor children of the plaintiff, his wife. We are not prepared to hold that section 229 of the Civil Code was intended to apply to a situation such as this, and to effect a result so plainly opposite to that which was intended.

We conclude, therefore, that the trial court had jurisdiction to include in its decrees the order for the monthly payments by the defendant which was included in both the interlocutory and final decrees, and that the order vacating the same, which was made not in the exercise of discretion under section 138 or section 139 of the Civil Code, but as the setting aside of a void order, should be reversed, and the cause remanded, with direction to the trial court to consider the pending motion upon the merits thereof, and to determine the same in accordance with its sound discretion.

It is so ordered.

We concur: LAWLOR, J.; LENNON, J.; SEAWELL, J.; WASTE, J.; RICHARDS, J.; KNIGHT, Justice pro tem.

---

196 Cal. 725

In re VALIDATION OF EAST BAY MUNICIPAL UTILITY DIST. WATER BONDS OF 1925.

EAST BAY MUNICIPAL UTILITY DIST. v. ALL PERSONS et al.

(S. F. 11669.)

(Supreme Court of California. Aug. 24, 1925. Rehearing Denied Sept. 21, 1925.)

1. Municipal corporations ⇐918(1)—Bonds authorized at election held within 30 days after passage of ordinance calling election held valid.

In Municipal Utility District Act, § 15, subd. 4, provision that in all particulars not recited in ordinance calling for election for issuance of bonds in pursuance of section 10, election shall be held as provided in Municipal Bond Act, § 3, does not relate only to manner of holding election, but applies generally, and bonds authorized by election held 21 days after ordinance calling it were valid, in view of publication sufficient to notify electors, and provi-

sion in statute that irregularity should not affect proceedings, regardless of St. 1921, p. 250, § 10, providing that ordinance passed by board of directors shall not take effect within less than 30 days after its passage.

2. Constitutional law ⟸55—Legislature prescribing procedure to be pursued may provide that irregularity, consisting of failure to carry out directions as to such procedure, will not render void object sought to be attained.

Legislative power, which prescribes procedure to be pursued in any given proceeding, may also provide that irregularity, judicial or otherwise, not involving due process, consisting of failure to carry out directions in legislative act as to such procedure, will not render void object sought to be attained.

3. Municipal corporations ⟸917(2)—Evidence held to sustain finding bonds authorized at election were valid.

In proceeding to validate municipal bond issue under Municipal Utility District Act, evidence *held* to sustain finding of trial court that there was no error, irregularity, or omission in proceeding affecting any substantial rights of parties objecting to issuance of bonds, that they had full notice of election at which question of issuance of bonds would be submitted to electors, and that vote at such election was full and fair expression of qualified electors.

4. Municipal corporations ⟸918(5)—Court's duty to validate bond election.

As rule, wherever possible to validate municipal bond election, court has duty to do so.

5. Municipal corporations ⟸918(4)—"Majority" construed to mean majority of electors voting.

Requirement of Municipal Utility District Act of approval of bonds by "majority of electors" of district before acquiring or contracting for public utility, means a majority of those voting on such proposition.

Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Majority.]

6. Municipal corporations ⟸271—Municipal Utility Act held not to prevent acquisition of source of water supply.

In view of Municipal Utility District Act, § 15, subd. 1, and section 20, provision in statute that only revenue producing utility should be acquired, owned or operated means that only such utilities as are in their nature revenue producing should be acquired, which would not prevent acquisition or construction of water system because of possibility that it might not be self-sustaining, regardless of fact that district at present has no distribution system.

7. Municipal corporations ⟸911—Failure to provide distribution system for water supply of utility district held not to invalidate bonds.

In proceeding to validate municipal bonds issued under Municipal Utility District Act, where purpose of bonds was to obtain water supply and facilities to be used by district and to dispose of any surplus water, and intention was to take water to boundaries of district and impound it in reservoir already connecting with distribution system supplying inhabitants of part of district, fact that no system of distribution was provided by project, or as part of it, did not make bond issue invalid because project was not within public purpose of district.

8. Municipal corporations ⟸325—Determination of board of directors of utility district that public interest required acquisition of source of water supply held conclusive.

In proceeding under Municipal Utility District Act to validate bonds of municipal utility district for purchasing water supply system and equipment, in absence of fraud and of any attack, finding by trial court that board of directors of district at regular meeting adopted resolution determining that public interest and necessity demanded acquisition of source of water supply and other property to be used for supplying water is conclusive that district will be benefited by proposed improvement.

In Bank.

Appeal from Superior Court, Alameda County; J. J. Trabucco, Judge.

Proceeding by the East Bay Municipal Utility District to validate district water bonds of 1925, opposed by D. Hadsell and others. From a judgment declaring the bonds valid, D. Hadsell and others appeal. Affirmed.

Hadsell, Sweet & Ingalls, of San Francisco, for appellant Hadsell.

Jared How and G. S. Arnold, both of San Francisco, for appellants Read and Hays.

William J. Locke, Edward F. Treadwell, T. P. Wittschen, and Goodfellow, Eells, Moore & Orrick, all of San Francisco, for respondent.

HOUSER, Justice pro tem. The proceeding which is involved herein had for its purpose the obtaining of a judgment declaring valid certain bonds authorized to be issued at an election held pursuant to the provisions of a statute known as the Municipal Utility District Act (Stats. 1921, p. 245). Judgment was rendered in favor of the validity of the bonds, and the defendants have appealed therefrom.

[1] No question is raised regarding the regularity of the proceedings up to the time of the adoption of the ordinance calling the election for the authorization of the issuance of the bonds, but appellants urge that, because by the general terms of the statute, the ordinance calling the election could not go into effect within less than 30 days after its passage, and because of the fact that the election was actually held 21 days after the passage of said ordinance, the election was invalid, and consequently that no authority existed for the issuance of the bonds.

It appears that on October 14, 1924, in purported accordance with the requirements of the statute, the directors of the plaintiff organization enacted "an ordinance ordering,

calling and providing for, and giving notice of, an election to be held in the East Bay municipal utility district, state of California, on Tuesday, November 4, 1924, for the purpose of submitting to the qualified electors of said district the proposition of incurring a bonded debt by said district for the construction, completion, and acquisition by said district of a source of water supply from the Mokelumne river and other properties, to be used by said district for acquiring and impounding water for said district and conveying the same thereto, * * * and this ordinance and such publication thereof shall constitute notice of said election. * * *"

As is said by appellants Read and Hays in their opening brief, the procedure set forth in the ordinance "is the complete plan prescribed by the Legislature whereby the district is to be protected against hasty and ill-considered action. It is the only provision made for adequate notice;" and it is apparent from the ordinance that its only purpose was to give notice of the election.

The general language of the statute, found in one of its sections, which, it is claimed by appellants, affects the validity of the ordinance and ultimately the election, is:

"Sec. 10. The board of directors shall act only by ordinance or resolution. * * *

"No ordinance passed by the board shall take effect within less than thirty days after its passage. * * *"

The particular section of the statute, however, which provides for the entire procedure relating to the plan of acquiring a public utility, and, as incidental thereto, the preparation of an ordinance by the board of directors of the district providing for the submission to the electors thereof of the question of the issuance of bonds for the ultimate purpose of financing the proposition, contains, among other things, the following provision (section 15, subd. 4):

"The ordinance calling such election shall recite the objects and purposes for which the indebtedness is proposed to be incurred, the estimated cost of the proposed public improvements, the amount of the principal of the indebtedness to be incurred therefor, and the rate of interest to be paid on said indebtedness, and shall fix the date on which such election will be held, the manner of holding such election and the voting for or against incurring such indebtedness, and in all particulars not recited in such ordinance, such election shall be held as provided in the act entitled 'An act authorizing the incurring of indebtedness by cities, towns, and municipal corporations for municipal improvements, and regulating the acquisition, construction, or completion thereof,' Statutes 1901, page twenty-seven."

It is the contention of the respondent that, by virtue of the language of the statute to which reference has just been had, the notice of the election to be given to the electors of the district is governed by the provisions of said statute of 1901 (page 27), as follows (section 3):

"Such ordinance shall be published once a day for at least seven days in some newspaper published at least six days a week in such municipality, or once a week for two weeks in some newspaper published less than six days a week in such municipality, and one insertion each week for two succeeding weeks shall be a sufficient publication in such newspaper published less than six days per week. In municipalities where no such newspaper is published, such ordinance shall be posted in three public places therein for two succeeding weeks. No other notice of such election need be given."

If the respondent is correct in its contention, there can be no question, so far as this particular point is concerned, as to the validity of the election. It thus becomes of importance to determine which of the two provisions of the statute applies to this case.

The statute of 1901 (page 27) is frequently referred to as the Municipal Bond Act. Its predecessor was the Municipal Bond Act of 1889 (Stats. 1889, p. 399). With reference to the latter act it has been said by this court:

"The whole proceeding from beginning to end is a single special proceeding for the accomplishment of a single special purpose, though consisting of a series of acts." Derby v. Modesto, 104 Cal. 515, 521, 38 P. 900, 902.

That language is applicable to the provisions of the act here under consideration. Those provisions (together with its reference to the statute of 1901, p. 27), present in a single section of the act a complete plan for the "acquisition, construction, or completion" of a public utility. In effect, it therefore becomes a special act in itself, as distinguished from the general provisions of the entire statute. It follows that if the special provisions of the section of the act having to do with the calling of the election, together with the reference therein contained to the act of 1901, page 27, are broad enough to cover the matter of giving notice of the election, the general provisions of the act in question relating to the time within which ordinary ordinances passed by the board of directors of the respondent corporation shall take effect must give way, and permit the special provision for giving notice of the election to take effect and be controlling in the premises.

In the case entitled In re Rouse, Hazard & Co., 91 F. 96, 100, 33 C. C. A. 356, 360, it was said:

"It is an elementary principle of construction that where there are in one act or in several acts contemporaneously passed specific provisions relating to a particular subject, they will govern in respect to that subject as against general provisions contained in the same act."

The same principle is announced in State v. Washburn Waterworks Co., 182 Wis. 287, 292, 196 N. W. 537, 539, as follows:

"That rule is that a specific provision in a statute relating to a particular subject must govern in respect to that subject as against general provisions in other parts of the statute which might otherwise be broad enough to include it."

And in Sanford v. King, 19 S. D. 334, 339, 103 N. W. 28, 30, the language used by the court is:

"It is an old and familiar rule that where there is in the same statute a particular enactment and also a general one, which in its most comprehensive sense would include what is embraced in the former, the particular enactment must be operative, and the general enactment must be taken to affect only such cases within its general language as are not within the provisions of the particular enactment."

To the same effect, see Estate of Hellier, 169 Cal. 77, 82, 145 P. 1008; King v. Armstrong, 9 Cal. App. 368, 371, 99 P. 527; Miller v. Engle, 3 Cal. App. 325, 330, 85 P. 159; Los Angeles v. Los Angeles Pacific Co., 31 Cal. App. 100, 159 P. 992; D'Esterre v. City of New York, 104 F. 605, 610, 44 C. C. A. 75; State v. Hobe, 106 Wis. 411, 82 N. W. 336, 340; Dahnke v. People, 168 Ill. 102, 48 N. E. 137, 140, 39 L. R. A. 197; Kepner v. United States, 195 U. S. 100, 125, 24 S. Ct. 797, 49 L. Ed. 114, 1 Ann. Cas. 655.

In addition to the reference in the act under consideration to the act of 1901, page 27, which reference has been quoted herein, the act in question contains the following provision (section 15, subd. 4):

"All matters and things pertaining to the issuance of bonds by such district including the form, limit of denomination, interest, redemption and sale of said bonds, not otherwise provided herein, shall be in accordance with the provisions of said last named act as near as the same may be made applicable."

Considering such language, together with that part of the section of the act here under consideration heretofore set forth herein, and, furthermore, taking into consideration therewith the fact that all that part of said first quoted language to, but not including, the reference to the Statutes of 1901, page 27, is an exact copy of the language of that act which immediately precedes the part thereof which provides for the notice of the election to be given, it is apparent that it was the intention of the Legislature, in passing the act in question, that the entire procedure with reference to the calling of an election for the authorization of the issuance of bonds in a municipal utility district should be identical with the procedure outlined in the Municipal Bond Act, as provided in the Statutes of 1901, page 27. As heretofore stated, that statute is the successor of the Municipal Bond Act of 1889 (Stats. 1889, p. 399), as amended in 1891 (Stats. 1891, p. 94), the importance of which fact, so far as the question now before the court is concerned, being shown by the decision of this court in the case of Derby v. City of Modesto, 104 Cal. 515, 38 P. 900. In that case the validity of certain bonds issued by the city of Modesto was the matter before the court. That city was a city of the sixth class, to which, at least generally speaking, in the matter of the adoption of said ordinances, the provisions of section 861 of the Municipal Government Act (Stats. 1883, pp. 93, 269) applied. That section, so far as is here applicable, provides that:

"No ordinance, and no resolution granting any franchise for any purpose, shall be passed by the board of trustees on the day of its introduction, nor within five days thereafter, nor at any other than a regular meeting."

The provisions of the municipal Bond Act (Stats. 1889, p. 399, as amended by Stats. 1891, p. 94), relating to the adoption of an ordinance with reference to the "acquisition, construction, or completion" of any municipal improvement and the calling of an election for the purpose of determining whether or not the city should incur an indebtedness on account of such improvement, were as follows:

"Section 2. Whenever the legislative branch of any city, town, or municipal corporation shall, by ordinance passed by a vote of two-thirds of all its members, and approved by the executive of said city, town, or municipal corporation, determine that the public interest or necessity demands the acquisition, construction, or completion of any municipal buildings, bridges, waterworks, water rights, sewers, or other municipal improvements, the cost of which will be too great to be paid out of the ordinary annual income and revenue of the municipality, they may, after the publication of such ordinance for at least two weeks in some newspaper published in such municipality, and at their next regular meeting after such publication, or at an adjourned meeting, by ordinance passed by a vote of two-thirds of all its members, and also approved by the said executive, call a special election and submit to the qualified voters of said city, town, or municipal corporation, the proposition for the purpose set forth in the ordinance, and no question other than the incurring of indebtedness for said purpose shall be submitted."

It will thus be seen that the requirement of the general law to the effect that no ordinance should be passed on the day of its introduction, nor within five days thereafter, conflicted with the provision, contained in the act there in question, that the ordinance might be passed at the next regular meeting, or at an adjourned meeting, of the board of trustees of the city. Each of the necessary ordinances relating to and preceding the election was passed by the board of trustees on the day on which it was introduced, and it was contended in this court by counsel appearing against the validity of the bonds that such fact rendered each of such several ordinances void, and, consequently, that neither

of such ordinances constituted a valid step in the proceedings leading up to the issuance of the bonds. In affirming the validity of the bonds, and, incidentally, the legality of the ordinances, the court said (page 520 [38 P. 902]):

"Ordinance No. 111 providing for the issue, sale, and redemption of the bonds, ordinance No. 113 amending No. 111, and No. 115 approving and confirming the execution of the bonds and the sale thereof to the respondent, the Oakland Bank of Savings, were all proper steps taken by the board in carrying out the expressed will of the voters and authorized under the act of 1891, and were not affected by the supposed restriction in section 861 of the act of 1883. The purpose of said section 861, so far as it requires ordinances to be introduced at least five days before their passage, is to give time for consideration, with a view to prevent hasty and ill-considered legislation; but the act of 1891 goes far beyond this requirement by providing that the first ordinance, which has no effect whatever unless followed by the other steps required by the statute, must be published for two weeks. The whole machinery of the act is framed with a special view to the intelligent action of the voters of the municipality in whose hands rests the power to authorize or refuse to authorize the incurring of the proposed indebtedness. The whole proceeding from beginning to end is a single special proceeding for the accomplishment of a single special purpose, though consisting of a series of acts; while section 861 of the Municipal Government Act relates to the ordinary and general legislation passed by the government of the municipality, if it be true, as appellant contends, that it applies to ordinances other than those granting franchises."

The analogy between that case and the case at bar is evident. In each of them the question of whether the general law or the provisions of the special act should prevail is paramount. Unless the language employed by the section of the act here in question, in the reference to the provisions of the statute of 1901, page 27, is limited in its intent and meaning to something considerably less than is apparent on its face, the decision in the case of Derby v. Modesto should control the ruling by this court.

The statute of 1921, page 245, which is here being considered, contains requirements identical with the statute of 1901, page 27, with reference to the matters to be stated in the ordinances providing for the calling of the election—following which (still identical with the provisions of the act of 1901, page 27) it provides that "in all particulars not recited in such ordinance, such election shall be held as provided in the act * * * of 1901, page twenty-seven."

Counsel for appellants point to the word "held," as contained in the phrase "such election shall be held as provided in the act" (Stats. 1901, p. 27), and seek to have it construed as meaning that the procedure outlined in said statute for the conduct of an election be limited to the very day on which the election took place. If there were nothing else, the additional language of the act occurring in the second sentence, that "all matters and things pertaining to the issuance of bonds by such district * * * shall be in accordance with the provisions of said last named act" (Stats. 1901, p. 27), would seem sufficient to indicate that a proper construction of the word, to which attention has been directed by appellants, would not confine its reference simply to the day of the election, but would include as well the several necessary steps leading thereto.

But even assuming that which seems unjustified, to wit, that the Legislature intended the reference to the Statutes of 1901, page 27, to be applied merely to the procedure on the day on which the election was to be held, in view of the admission by appellants in their brief that the sole purpose of the provision found in the detached section of the act in question, to the effect that no ordinance passed by the board of directors of the plaintiff organization should take effect within less than 30 days after its passage, was to supply "a definite period for the consideration and deliberation of the electorate," the fact that a very large percentage of the registered voters voted at the election, and that the proposition carried by a vote of 81,919 in favor thereof, as compared with 31,998 opposed thereto—and also taking into consideration the further provision of the statute in question, that "the court hearing any proceeding or action inquiring into the regularity, legality or correctness of the proceedings leading up to the issuance of bonds or the validity of such bonds must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said action or proceeding"—it would seem that appellants' contention cannot be sustained, at least so far as the point that the election was void because of the fact that 30 days had not elapsed between the time the ordinance was passed and the date of the election.

[2] It is a settled rule of law, as announced in principle in the cases of Chase v. Trout, 146 Cal. 350, 358, 80 P. 81, and Watkinson v. Vaughn, 182 Cal. 55, 186 P. 753, and cases therein cited, that the legislative power which prescribes the procedure to be pursued in any given proceeding may also legally provide that an irregularity ("jurisdictional" or otherwise, where it does not involve "due process"), consisting of a failure to carry out the directions in the legislative act as to such procedure, will not render void the object sought to be attained. See, also, Los Angeles County Flood Control District v. Hamilton, 177 Cal. 119, 131, 169 P. 1028; Miller & Lux v. Board of Supervisors, 189 Cal. 254, 275, 208 P. 304; Miller & Lux v. Secara, 193 Cal. 755, 770, 227 P. 171; City Street Imp. Co. v. Watson, 50 Cal. App. 687,

691, 195 P. 967; Chapman v. Rudolph, 58 Cal. App. 233, 236, 208 P. 370.

The provision of the act, in substance, that, in determining the legality of the proceedings leading up to the issuance of the bonds, the court must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to the proceeding, would seem broad enough, considering the evidence covering the matter (hereinafter set forth in part), to cover any defect in the procedure adopted which might affect the "definite period for the consideration and deliberation of the electorate" on the question submitted to it.

It is beyond question that the general provision of the statute, that "no ordinance passed by the board shall take effect within thirty days after its passage," if at all applicable to the ordinance calling the election, was for the purpose of allowing a sufficient time to elapse in order that the qualified voters might have knowledge or notice of the election.

The section of the act which appellants claim has application to the notice of the election provides for the 30-day notice by publication. There were, however, but 21 days intervening between the date of the passage of the ordinance calling the election and the date of the election. Of those 21 days no complaint is made. It is to the remaining 9 days which, in addition to the 21 days, it is claimed, should have preceded the election, that attention is directed, and which, it is contended, resulted in an insufficient notice being given to the electors of the district.

[3] The requirement of the statute is that the court "must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said action or proceeding." The trial court found on the evidence that:

"No error or irregularity or omission in the proceedings for the authorization of or leading up to the issuance of said bonds of the said district of the par value of $39,000,000 affects or has affected any substantial right or rights of the parties defendant, or any of them. Each of the defendants had full notice that the said proposition for the issuance of said bonds was submitted to the electors of the district at the election to be held on said 4th day of November, 1924, and voted upon the said proposition at said election. The said vote at the said election in favor of the said proposition for the incurring of the said indebtedness of $39,000,000 by the said district was a full and fair expression of the will of the electors of said district, qualified to vote at said election upon said proposition."

Such finding was, in part, based upon evidence that the county clerk in each of the counties of Contra Costa and Alameda (being the counties in which the district is situate) mailed to each registered elector in the district a sample ballot, together with a card showing the precinct of the voter, a copy of the official ballot for the general election, and a pamphlet containing proposed constitutional amendments. Upon the ballot were stated the bond proposition and the date of the election.

Evidence was also submitted on the trial that, between September 24, 1924, and the date of the election on November 4, 1924, general publicity of the election was given in all parts of the district through the medium of the newspapers circulating within the district, and through public meetings and discussions held therein; also that 90,000 copies of the summary of the engineers' report on the project and its approval by the board of directors of the district were distributed at residences within the district, and approximately 10,000 copies of such report were circulated at public meetings held therein. It also appeared that between said dates some 40 or 50 public meetings were held in the district for the purpose of discussing the advisability of the project and the issuance of bonds for the acquisition thereof; that a canvass of the opinions of prominent men of the community relative to the desirability of incurring the bonded indebtedness for the acquisition of the project was made, and the results thereof published in the newspapers circulated in the district; and that the newspapers at all times after the filing of the report of the engineers, on September 22, 1924, up to the time of the election, contained numerous articles and editorials relating to the election. Moreover, the election returns showed that a much heavier vote was cast on the bond proposition than was cast at the same time within the said district for any state official or on any other proposition of any sort; also that the vote on the bonds was approximately three times as great as was the total vote cast at a preceding election in the district for the formation thereof and the election of the first board of directors.

It is a well-known fact that the ordinary newspaper notice of a forthcoming election does not, in fact, have the desired effect of notifying the electors thereof. The ordinary qualified voter is so busy attending to his private affairs, and is so apathetic regarding matters touching the public welfare, that a printed newspaper notice of an election to be held, whether in the near or the distant future, even if seen by such voter, excites in him no particular interest. But in the matter now under consideration, the direct notice of the election received by each registered voter of the district, and the public meetings and discussions, "privately and by the newspapers," regarding the proposition of the issuance of bonds would lead to the conclusion, as indicated by the court's findings, that each person in the district entitled to vote at the election not only had constructive notice but actual notice as well that the election was to be held. Such being the case, it is indisputable that the result of the elec-

tion was not prejudicially affected by the failure to give the extra 9 days' notice of the election as provided, in effect, by the statute, nor did the "error, irregularity, or omission * * * affect the substantial rights of the parties to said action or proceeding."

In the case of People v. Hoge, 55 Cal. 612, it was ruled that even though the election had been improperly called, if it actually had been held (syllabus in part), "the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken." Touching the matter at issue the court said (pages 618, 619):

"It is argued in the first place, that the power to call the election resided in the board of supervisors, and the point is also taken, that action on the part of the Legislature was essential to enforce and give effect to the provision of the Constitution. The first point has already been disposed of, and the second is not, in our opinion, well taken. Legislative action was not necessary to enable the inhabitants of the city and county of San Francisco to act, under section 8, art. xi, of the Constitution, in the matter of framing a charter. * * *

"In this connection, the language of the Supreme Court of Iowa appears applicable: 'Upon considerations like this, the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have in truth been called upon and have spoken. In the present case, whether there was notice or not, there was an election, and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise.' Dishon v. Smith, County Judge, 10 Iowa, 218.

"We have arrived at the conclusion that the election of March 30, 1880, should be declared valid, the more willingly for the reason that no possible injury can result from such a determination. The people of the city and county of San Francisco have, after a fair and full election, regularly and honestly conducted, expressed their wish that a charter should be prepared for their ratification, and the charter so prepared by the respondent and his associates must, before it can become a law, receive such ratification, and, after that, the approval of the Legislature."

In Rideout v. Los Angeles, 185 Cal. 426, 197 P. 74, it appeared that in a bond election the provisions of the statute had been violated as to the size of type of the ballots, the space for printed instructions to the voters, and the printing of the words "municipal ticket" on the ballots. It was held that the election was legal.

In People v. Prewett, 124 Cal. 7, 56 P. 619, which involved an election to fill vacancies on the board of trustees of a school district, it appeared that the notice of the election failed to state the exact purpose, but merely stated that it was to elect trustees. The court ruled that, in view of the fact that a fair election had been held, the defective notice thereof would not vitiate it. It was said:

"There is no claim that any one was prevented from voting either because of the notice or because the polls were kept open a little less than four hours."

In Preston v. Culbertson, 58 Cal. 198, an election was declared legal where it appeared that in one precinct the election was not held at the place specified in the notice. The court said:

"The important question in such cases is, Have the qualified electors been deprived of a fair opportunity of expressing their preference? Mere irregularities which do not affect the final result should be disregarded."

In McCrary on Elections, on page 134, it is said:

"While it is true that notice is essential to the validity of an election, it is not always essential that the particular form or manner of giving notice which may be prescribed shall be followed. It is essential that the electors should have notice of the time, place and objects of the election—that is, they should have knowledge of them; but an omission to follow the particular mode provided by statute for publishing such notice may not render the election void, and will not, if the electors have actual notice, and do, in fact, take part in the election."

The point is covered in 20 Corpus Juris, page 96, as follows:

"The test for determining whether an election is invalidated for want of a notice prescribed by statute is whether, on the one hand, the voters generally have had knowledge of the election and full opportunity to express their will, or whether, on the other hand, the omission has resulted in depriving a sufficient number of electors of the opportunity to exercise their franchise to change the result of the election."

In Lewis and Putney's Handbook on Election Laws, the rule is stated as being:

"* * * Even in the case of special elections, or elections to fill vacancies, while a notice is invariably required to be issued, still, if there is no notice or proclamation made, but if the size of the vote shows that the voters had general knowledge of the election, the election will be upheld. Where the statute required a certain number of days' notice to be given of the election or designated what facts shall be set out in the notice, these provisions should be complied with, but a substantial compliance with the statute is sufficient."

In the case of Weisgerber v. Nez Perce County, 33 Idaho, 670, 197 P. 562, it appears that an action was commenced to enjoin the issuance of bonds on the ground, among other things, that notice of the election had not been given for the time provided by the statute. After citing some authorities said to hold that a strict compliance with the statutory requirement was an essential prerequi-

site to the validity of the election, the court said:

"However, we are of the opinion that the correct rule, and the one supported by the great weight of authority, may be stated as follows: Statutory directions as to the time and manner of giving notice of elections are mandatory upon the officers charged with the duty of calling the election, and will be upheld strictly in a direct action instituted before an election; but after an election has been held, such statutory requirements are directory, unless it appears that the failure to give notice for the full time specified by the statute has prevented electors from giving a full and free expression of their will at the election, or unless the statute contains a further provision, the necessary effect of which is that failure to give notice for the statutory time will render the election void. [Citing 30 authorities.]

"The court found that the electors of the county were fully informed as to the time, place, and purpose of holding the election, and as to the polling place in each precinct where the votes would be received. The court also found that none of the defects above referred to affected the result of the election. It is not averred in the complaint, nor shown by the record, that any elector was deprived of his vote by reason of the fact that notices were not posted the statutory length of time in the five precincts. The court further found affirmatively that none of the electors failed to vote by reason of any of the irregularities mentioned in the complaint.

"We are of the opinion that the election was not illegal or void on account of the defects in the posting of notices in the five precincts of the county."

Each of the cases of Dishon v. Smith, 10 Iowa, 212, and that of State v. Doherty, 16 Wash. 382, 47 P. 958, 58 Am. St. Rep. 39, involved the question of the effect of a defective notice of election. In the former case, among other things, it was said:

"Upon considerations like these the courts have held that the voice of the people is not to be rejected for a defect, or even a want of notice, if they have, in truth, been called upon and have spoken. In the present case, whether there were notices or not, there was an election and the people of the county voted, and it is not alleged that any portion of them failed in knowledge of the pendency of the question, or to exercise their franchise."

In the latter case, as appears in the opinion of the court:

"The clerk complied with section 4 of the ordinance in all particulars, except that he did not post certified copies of the proposed amendments in the different polling places within the city. But the court found that newspaper clippings containing copies of the proposed amendments 'were duly posted in all of the voting booths of the city of Tacoma by the election officers at said voting places.' The court also found that notice of the election signed by the city clerk was published in the Tacoma Daily Ledger, the Tacoma Morning Union, and the Evening News—all daily newspapers published in said city—from the 28th of March to the 7th day of April, inclusive, and that no other or further notice of such election, nor the election on said proposed amendment, was given. The court found that these newspapers circulated throughout the political divisions of the city of Tacoma, and 120,000 copies were distributed in each and every one of the political divisions and precincts; also, 'that the said amendments were discussed by the people generally in their homes, from the platform and from the pulpit in the various churches of the city to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city.'"

The court continued:

"Having ascertained 'that the amendments were discussed by the people generally in their homes * * * to such an extent that the pendency of said election for the adoption or rejection of said proposed amendments was a matter of public notoriety throughout said city,' and having further ascertained by the vote actually polled that the great body of the electors expressed their will upon these amendments, which it was their province to adopt or reject, the conclusion is inevitable that the result of the election was not affected by the fact that a literal compliance with the formalities prescribed by law for giving notice was not observed. The very purpose for which the statute directed the posting of notices was accomplished when actual knowledge of the election was brought home to the voter, it matters not by what means the knowledge was imparted to him. To hold otherwise would be to disregard the expressed will of the people in a matter which the law has confided to them."

Other cases which are of like effect are City of Ardmore v. State, 24 Okl. 862, 104 P. 913; Town of Grove v. Haskell, 24 Okl. 707, 104 P. 56; Ellis v. Karl, 7 Neb. 381; Wheat v. Smith, 50 Ark. 266, 7 S. W. 161; Demaree v. Johnson, 150 Ind. 419, 50 N. E. 376; City of Albuquerque v. Water Supply Co., 24 N. M. 368, 174 P. 217, 5 A. L. R. 519; Bauer v. Board, 157 Mich. 395, 122 N. W. 121; 1 Dillon on Municipal Corporations (5th Ed.) § 213, p. 431; Hill v. Smithville, etc. (Tex. Civ. App.) 239 S. W. 987; Hearn v. Court of Comm'rs, 182 Ala. 392, 62 So. 535. And for further authorities, see Gollar v. City of Louisville, 187 Ky. 448, 219 S. W. 421, where a bond election was sustained although notice of election was not published the full ten days as prescribed by the statute; Smith v. State, 84 Okl. 283, 203 P. 1046, and Ratliff v. State, 79 Okl. 152, 191 P. 1038, in each of which cases it appeared that there was a failure to give the prescribed notice; Fike v. State, 25 Ohio Cir. Ct. R. 554, where there was a failure to publish proclamation of election for the statutory time.

It is thus apparent that the election itself is the controlling feature and the ultimate objective of the statute. If the election has been honestly and fairly conducted, and no

one has been injured by the manner in which the preliminary steps leading thereto have been taken, no reason exists for declaring it invalid. In the instant case there was no evidence offered on the part of the defendants tending to show that they had been prejudicially affected by the procedure which had been adopted and followed leading up to the election. As heretofore set forth, the findings by the court were to the effect that no error or irregularity or omission in the proceedings affected any of the substantial rights of the defendants; that they had full notice that the proposition for the issuance of the bonds would be submitted to the electors of the district at an election to be held on the said 4th day of November, 1924; and that the vote at such election was a full and fair expression of the will of the electors of the district who were qualified to vote at said election upon said proposition. Those findings, while in some respects possibly subject to appellants' criticism that they are but conclusions of law, nevertheless speak the truth as an ultimate expression by the court of the conditions surrounding the situation.

[4] The books are filled to overflowing with statements of the rule, in substance, that, wherever possible from a standpoint of legal justice to validate an election, it is the duty of the court to do so. In Rideout v. City of Los Angeles, 185 Cal. 426, 430, 197 P. 74, 75, it is said:

"It is a primary principle of law as applied to election contests that it is the duty of the court to validate the election if possible."

In Law v. San Francisco, 144 Cal. 384, 394, 77 P. 1014, 1019, occurs the following:

"Universally, courts have been reluctant to defeat the fair expression of the popular will in elections, unless the plain mandate of the law permitted of no alternative."

And in People v. Prewett, 124 Cal. 7, 10, 56 P. 619, 620, the court says:

"Elections should never be held void unless clearly illegal. It is the duty of the court to give effect to them, if possible."

To the same effect, see 20 Corpus Juris, page 230; Cooley's Constitutional Limitations (7th Ed.) p. 928.

It would follow, as a conclusion from what has been said, that, as applied to the facts of this case, notwithstanding some authorities to the contrary, as cited in appellants' brief, the failure to give the full 30 days' notice of the election in nowise affected the substantial rights of the defendants in the premises.

[5] It is urged by appellants that because the statute which provides for the calling of the election contains the provision "that no public utility shall ever be acquired or contracted for unless the acquisition of said utility has first been approved by a majority of the electors of said district," an election at which less than a majority of the "registered electors of the district" cast their votes in favor of the issuance of the bonds, does not constitute a compliance with the requirements of the statute so as to authorize the bonds to be issued.

Much might be said in support of appellants' contention. Excerpts from different portions of the statute under consideration would seem to indicate that in the use by the Legislature of the words, "a majority of the electors of said district," that body was fully aware of the legal significance to be attached thereto, and consequently used such language with discrimination, and adopted it advisedly. It is, however, unquestionable that a literal compliance with such direction would be wholly impracticable, if not impossible. The registry of qualified voters, as provided by law, would not cover the situation. It is plain that electors of a district do not necessarily consist only of all voters who have registered. Many persons who are entitled to vote fail to register. A great public catastrophe, such as, for example, a flood, or a fire, might possibly occur which might destroy the whole, or the greater part, of the district. Many registered voters might lose their lives, and many of the living who remained might be forced to remove from the district in order that they might be properly housed or earn a livelihood; and, in the happening of such an untoward event, the registration list, while showing perhaps thousands of electors entitled to vote, would be utterly unreliable.

The result of a strict interpretation of the provision of the statute would be that, in this particular district containing 196,899 registered electors, without weeks or months of inquiry and special investigation as to who, on the day of the election, were electors of the district, as distinguished from registered electors thereof, the outcome of the election could not be ascertained. It was undoubtedly within the province of the Legislature to lay down any reasonable conditions for the purpose of ascertaining whether or not a public utility should be acquired; but it would seem unlikely, at least, that any obstacles were intentionally placed in the act for the express purpose of rendering it useless. The difficulties which would attend such situation, while possibly not insurmountable, would be so great that, from a practical standpoint, with full advance knowledge by the electors of the district of the literal requirements of the statute, no election would ever be held, and the act of the Legislature would, therefore, become a nullity. Such an absurdity—that the Legislature "with malice aforethought" perpetrated such an outrage on the utility district—is unthinkable. The intention of the Legislature was undoubtedly that its laudable endeavor should bear fruit, and not that its labors should be in vain.

In 1 Dillon on Municipal Corporations (5th Ed.) § 383, it is stated:

"* * * That when by statute a vote of 'a majority of the voters' or of 'a majority of the legal voters' or of 'a majority of the qualified voters' of a municipality is required for election to office or for any other municipal purpose, those who do not vote, acquiesce in the result, and a majority of those actually voting is, unless otherwise specially provided, sufficient, though in point of fact it may not be a majority of all who are entitled to vote. * * *"

And in section 891, volume 2, the same author states:

"In other cases where the requirement is that the issue be approved by a prescribed majority of the qualified voters of the municipality, or other language of similar import, the decisions usually hold that a vote of the majority of all the qualified voters of the municipality is not required, but only the requisite majority of the qualified voters voting at the election."

In 2 McQuillin on Municipal Corporations, § 418, p. 925, it is said:

"Unless the law provides otherwise, either in express terms or by necessary implication, the preponderance of judicial decisions hold that, if the officer or proposition receives the required number of legal votes cast at the particular election (whether a majority, two-thirds, three-fourths or any other named proportion), the officer will be declared legally elected or the proposition duly carried, notwithstanding such votes do not constitute the required number when all the qualified voters of the electorate are counted."

In Simonton on Municipal Bonds, page 94, the rule is thus stated:

"The Constitution or statute usually requires that the matter submitted for popular approval shall receive a majority or some other proportion of the legal or qualified voters. The courts in almost every instance have construed this to mean, without reference to any constitutional provision on the subject, a majority or other required proportion of the legal voters, voting at the election when the question is submitted, unless otherwise provided."

The authorities sustaining the principle thus announced by the text-writers are very numerous. Amoung them may be cited the following: County of Cass v. Johnston, 95 U. S. 360, 24 L. Ed. 416; St. Joseph Township v. Rogers, 83 U. S. (16 Wall.) 644, 21 L. Ed. 328; Douglass v. Pike County, 101 U. S. 677, 25 L. Ed. 968; Carroll County v. Smith, 111 U. S. 556, 4 S. Ct. 539, 28 L. Ed. 517.

In Taylor v. Taylor. 10 Minn. 107 (Gil. 81), a provision was required to be adopted by "a majority of such electors." The court said, in part (page 88):

"The plaintiff claims that this section requires an absolute majority of those qualified to vote in the county at the time of the election. This construction is perhaps in accordance with the letter of the Constitution, but it leads to such practical inconvenience, hardship, and absurdity, we cannot believe it to be in accordance with the spirit and meaning of that instrument. * * * In every case it would be necessary, if this construction is correct, to show by legal evidence the actual number of persons legally qualified to vote in the county at the time of such election, and we are unable to see how this could be determined except by a suit or proceeding in a court qualified to decide authoritatively and finally such questions. The difficulty of making such proof in many cases would be so great as to make it impracticable. * * * When a particular construction of an instrument leads to hardship, inconvenience, or absurdity, the respect due from courts to a coordinate branch of the government or to a constitutional convention, will not permit them readily to presume that such construction was intended, and they will under such circumstances a little deviate from the received sense of the words, not because they have a right to disregard the will of the framers of the instrument, but for the purpose of truly arriving at and carrying out their will."

The same construction was placed on similar provisions in the following cases: Bayard v. Klinge, 16 Minn. 249 (Gil. 221), where the provision was "majority of such electors"; Everett v. Smith, 22 Minn. 53 ("majority of such electors"); Shearer v. Board of Supervisors, 128 Mich. 552, 87 N. W. 789 ("by a majority vote of the electors of said county"); Attorney General v. Common Council, 164 Mich. 143, 129 N. W. 44 ("in case the electors shall by majority vote"); Pickett v. Russell, 42 Fla. 634, 28 So. 764 ("a majority of the qualified electors"); Green v. State Board of Canvassers, 5 Idaho, 130, 47 P. 259, 95 Am. St. Rep. 169 ("a majority of the electors"); Foy v. Gardiner Water District, 98 Me. 82, 56 A. 201 ("a majority vote of the legal voters"); Citizens and Taxpayers v. Williams, 49 La. Ann. 422, 21 So. 647, 37 L. R. A. 761 ("by a vote of a majority of the property taxpayers"); Taylor v. McFadden, 84 Iowa, 262, 50 N. W. 1070 ("a majority of the voters"); Town of Southington v. Southington Water Co., 80 Conn. 646, 69 A. 1023, 13 Ann. Cas. 411 ("a majority of the legal voters"); People v. Warfield, 20 Ill. 160 ("a majority of the voters"); Fabro v. Town of Gallup, 15 N. M. 108, 103 P. 271 ("two-thirds of the qualified voters"); Walker v. Oswald, 68 Md. 146, 11 A. 711 ("majority of voters"); Smith v. Proctor, 130 N. Y. 319, 29 N. E. 312, 14 L. R. A. 403 ("majority of all the inhabitants * * * entitled to vote"); Cronly v. City of Tucson, 6 Ariz. 235, 56 P. 876 ("two-thirds of qualified voters"); City of Rome v. Whitestown, etc., Co., 113 App. Div. 547, 100 N. Y. S. 357 ("majority of the voters"); Bradshaw v. Marmion (Tex. Civ. App.) 188 S. W. 973 ("majority of the qualified voters"); Vance v. Austell, 45 Ark. 400 ("a majority of the qualified voters"); Louisville, etc., R. R. v. County Court, 1 Sneed. (Tenn.) 637, 62 Am. Dec. 424 ("majority of voters"); Morse v. Granite County, 44 Mont. 78, 119 P. 286 ("majority of electors"); Harby v. Jennings, 112 S. C. 479, 101 S. E. 649 ("majority of the electors"); Mobile Savings Bank

v. Oktibbeha (D. C.) 22 F. 580; Id. (D. C.) 24 F. 110 ("two-thirds of qualified voters"); Madison County v. Priestly (C. C.) 42 F. 817 ("two-thirds of qualified voters"); Pacific Imp. Co. v. City of Clarksdale, 74 F. 528, 20 C. C. A. 635 ("two-thirds qualified voters").

There can be no denial of the fact that in several well-considered cases it has been held that, notwithstanding the obvious and extreme difficulties which the situation presents, where the Legislature has spoken, and thereby expressly directed that an election to be valid must be carried by a majority of the electors of any given locality, such mandate must be given full observance. The great weight of authority, however, is to the effect that, because of the utter impracticability of carrying out the legislative fiat as strictly construed, the common sense meaning of the words "majority of the electors" should be applied, and consequently construed, as "majority of the electors voting on the proposition."

[6] The third point suggested by appellants as a reason why the judgment of the trial court should be reversed is that, according to the provisions of the act "only revenue producing utilities shall be acquired, owned or operated by a district;" whereas the utility sought to be acquired by the plaintiff organization is not revenue producing.

It is urged by appellants that, when the contemplated utility in question has been fully constructed and in operation, water will be brought only to the boundary of the district, and, as the district is not the owner of a distribution system, and as the statute further provides that "each public utility owned and operated by the district shall be self-sustaining," the statutory requirement will not have been complied with, and, consequently, that the utility district is without power to carry out the project or, as incidental thereto, to issue and sell bonds for the purpose of thereby financing the proposition.

The first subdivision of the section of the act here under consideration (section 15) provides that "whenever the board of directors by resolution shall determine that the public interest or necessity of the district demands the * * * construction * * * of any public utility," etc., certain steps outlined in the act may be taken to accomplish the desired end; and there are many references contained within the statute showing that the intention of the Legislature included the construction of a public utility, rather than limiting the district to the purchase of a completed plant.

In the construction of a new public project, while it may be most earnestly hoped or believed, from a careful survey of the situation, that the operation of the completed plant will result in a net revenue producing utility, no man with certainty can foresee the result from a standpoint of financial gain. It may be a profit producing enterprise, or, on the other hand, there is a possibility of loss arising from its operation. If profitable, the utility will be "self-sustaining"; but, if unprofitable, to the extent that the losses exceed the gains, manifestly it will not meet the literal requirements of the statute. It would be unreasonable to demand that, before the proposition to vote bonds for the purpose of eventually financing the project may be submitted, the promoters thereof—that is to say, the citizens of the district—should guarantee that it will be "revenue producing" in the sense that no loss will accrue to the district. The language of the act should receive a construction to the effect that only such utilities as in their nature are revenue producing should be acquired by the district, which would, perhaps, exclude such improvements as public parks, libraries, etc. So construed, the project to be constructed would be "self-sustaining," dependent largely upon its management and the support which it received from the owners thereof, to wit, the inhabitants and taxpayers of the district. But, as tending to show that the Legislature realized that there was no absolute certainty that the project would be "self-sustaining," the act further provides (section 20):

"If from any cause the revenues of the district shall be inadequate to pay the principal or interest on any bonded debt as it becomes due, the board of directors must, or if funds are needed to carry out the objects and purposes of the district, which cannot be provided for out of the revenues of the district, then the board of directors may, levy a tax for such purposes as herein provided. * * *"

The objection that the district has no distribution system, and consequently, would be unable to sell its product, is met by the reply that, because of the vastness of the proposition, necessarily much time would elapse before the project would be completed, and before that time will arrive, the district, acting within its powers, may either construct a distribution system within its boundaries, or may acquire one already there constructed, either by lease or by purchase. If an outright purchase or the construction of a new distribution plant should be deemed advisable, it is not beyond the realms of possibility that, instead of relying upon a bond issue for the necessary funds with which to make payment therefor, the district might, through the medium of at present unrevealed sources, make compensation in cash, or possibly finance the proposition by means of assessments levied against the taxpayers of the district. Tested by the rule that every presumption favors the validity of the bond issue, we are constrained to hold that appellants' objection regarding the revenue producing ability of the utility, together with its asserted nonself-sustaining qualities, cannot be sustained.

[7] Appellants' final assault upon the judgment rendered by the trial court is that, be-

cause "no distribution system is provided with this project, or as part of it, its construction cannot benefit the district or the district's inhabitants, and therefore the project is not within or for any of the public purposes of the district."

For the reason that the utility intended to be constructed has no present method of becoming revenue producing from business to be transacted by it within the district, but that necessarily "it will serve only the needs of persons or industries outside the boundaries" thereof, it is urged that the taxpayers within the district cannot be called upon, either by taxes or by assessments upon their property, to meet the obligation incurred for the payment of the project.

The plan proposed to be followed is set forth in a condensed form in the proposition submitted to the electors of the district, to be voted upon at the election to which reference herein has so frequently been had, as follows:

"Shall the East Bay municipal utility district incur a bonded debt in the amount of thirty-nine million dollars ($39,000,000) for the construction, completion, and acquisition of a source of water supply from the Mokelumne river and other properties and facilities to be used by said district for acquiring and impounding water for said district and conveying the same thereto and for disposing of any surplus waters thereof?"

It thus appears that the purpose was at least to obtain a water supply and facilities to be used by the district, "and for disposing of any surplus waters." The evidence shows that the intention was to take the water to the boundaries of the district and there impound it in a reservoir, which is already connected with a distribution system which now supplies the inhabitants of part of the district. As before stated, under certain sections of the act the plaintiff organization is empowered either to acquire that system by purchase or by lease, or it may construct a new distribution system. The consummation of the entire plan of furnishing an adequate supply of water to the district may take a number of years for its accomplishment. Before the system contemplated by the present plan to bring the water to the boundaries of the district may be constructed, the district, by one of the means heretofore suggested, may have acquired a distribution system to connect with the plant already authorized to be constructed. The record herein discloses the fact that proceedings already have been commenced by the district for that very purpose.

[8] The trial court found that, at the inception of the proceedings looking to the construction of the project herein mentioned, the board of directors of the plaintiff organization, at a regular meeting thereof, adopted a resolution by which it was "determined that public interest and necessity demanded the acquisition of a source or sources of water supply for said district and other properties to be used by said district for acquiring and impounding water for said district and for conveying the same thereto."

In the absence of fraud and of any attack upon said finding, it thus appears conclusively and beyond question by the appellants that the district will be benefited by the proposed improvement. Platt v. City and County of San Francisco, 158 Cal. 74, 93, 110 P. 304; Pool v. Simmons, 134 Cal. 621, 625, 66 P. 872; Santa Ana v. Harlin, 99 Cal. 538, 540, 34 P. 224. Such being the legal status of the question suggested by appellants, it follows that their point is not well taken.

The judgment is affirmed.

We concur: MYERS, C. J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.; KNIGHT, Justice pro tem.

---

196 Cal. 757

In re BAUER'S ESTATE.

BAUER et al. v. BAUER et al.

(L. A. 8482.)

(Supreme Court of California. Aug. 27, 1925. Rehearing Denied Sept. 24, 1925.)

Executors and administrators ⇐214 — Claim for reinterment of remains of deceased not proper "funeral expense."

Where an elder son of deceased, without authority from executors of the estate, ordered the remains of deceased to be transferred, a claim of such reinterment *held* not to be proper funeral expense, as defined in Code Civ. Proc. § 1646, funeral expenses having reference to those necessary and in fact compulsory expenditures necessary immediately after the death of decedent, and embracing coffining, embalming, arraying, and sepulture or cremating of the body, together with the accustomed forms and ceremonies attending the disposition of the remains.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Funeral Expenses.]

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Proceeding for the allowance of a claim by the Cypress Lawn Cemetery Association and another against the estate of Emile Bauer, deceased. From a judgment in favor of Lloyd C. Bauer and another, executors, denying the claim, claimants appeal. Affirmed.

C. Franklin Baxter, of Los Angeles, for appellant Cypress Lawn Cemetery, etc.

Hamilton A. Bauer, of San Francisco, in pro. per.

J. W. Morin and Morin, Newell & Brown, all of Pasadena, for respondents.

RICHARDS, J. This appeal is from an order of the superior court of the county of Los Angeles, sitting in probate, denying the application of the appellants herein for an order directing the allowance and payment of a claim which had theretofore been presented by the appellant Cypress Lawn Cemetery Association, embracing certain charges and expenditures made by it in removal of ashes of the decedent several months after the death and funeral and cremation of the remains of said decedent from their primary place of deposit to another and, it is claimed, more fitting and suitable niche in the said appellant's new columbarium, solely upon the request and direction of its coappellant Hamilton A. Bauer, an elder son of said decedent. The additional facts preceding and attending the application for the allowance of said claim and the denial thereof by said court are in substance the following: Emile Bauer, the decedent referred to in appellants' said application, died in the city of Pasadena on June 15, 1923, where for many years he had resided. He had been twice married. He left surviving him his widow by his second marriage and a younger son, the offspring of said marriage. He also left surviving him an elder son by his first marriage, viz., Hamilton A. Bauer, one of the appellants herein. The deceased left an estate of the approximate value of $100,000. Some years prior to his death he had selected a receptacle for the ashes of his deceased children by his former marriage and for his own remains, which in his will he directed should be cremated. The selected custodian of the ashes of his deceased children and himself was the Cypress Lawn Cemetery Association, one of the appellants herein, and prior to his death the ashes of his said deceased children had by his direction been deposited in a niche in an older columbarium of such association. Upon his decease and after his funeral and the cremation of his remains, his surviving widow, who with his said younger son had been named as the executrix and executor, respectively, of his estate, directed the local undertaker to transmit the ashes of her deceased husband to the Cypress Lawn Cemetery Association for deposit in said niche. Her direction in that respect was complied with and the deposit accordingly made. Several months went by, when Hamilton A. Bauer, the elder son of the decedent, and one of the appellants herein, deeming the place of deposit of the ashes of his deceased father unsuited to a man of his wealth or station, went upon his own initiative to the said cemetery association, selected another niche in its new columbarium, directed an inscription to be prepared and placed upon the urn containing his father's ashes, and upon their transference to the new place of deposit at considerable expense ordered the bill sent to the executrix and executor of his father's estate, whom he had not consulted nor sought the concurrence or acquiescence of in making the foregoing arrangements, and in incurring the expense incident thereto. It was the bill of expense thus incurred which, upon presentation, the executrix and executor of said estate refused to pay. Upon the hearing on the application of the appellants for an order compelling the allowance and payment by the estate of said claim, Hamilton A. Bauer was the only witness examined, and it was upon his testimony to substantially the foregoing facts that the order denying said application was predicated.

The claim for the payment of which the appellants made their aforesaid application to the probate court formed no proper part of the "funeral expenses" of the decedent within the meaning of that term as employed in the Code of Civil Procedure, § 1646. The term "funeral expenses" has reference to those necessary and, in fact, compulsory expenditures, the necessity for which arises immediately upon and after the death of the decedent, and which embrace the coffining, embalmment, arraying, and sepulture or cremation of his body, together with those accustomed forms and ceremonies which attend upon the present disposition of his remains. 2 Woerner, Administration (3d Ed.) § 358. The term has been held to include the expense of a monument or tombstone over the grave of the deceased (Fairman's Appeal, 30 Conn. 205; Pease v. Christman, 158 Ind. 642, 64 N. E. 90), but not to include the cost of subsequently inclosing the burial lot (In re Meyer's Estate, 18 Phila. [Pa.] 42), nor to include the making of a portrait of the deceased (Appeal of McGlinsey [Pa.] 14 Serg. & R. 64), nor to embrace the cost of reinterment unless the first place of interment was found to be improper (Watkins v. Romine, 106 Ind. 378, 7 N. E. 193). In the instant case we must assume in support of the order of the probate court that it made the implied finding that the original place of deposit of the ashes of the deceased was not improper, especially in view of the admitted fact that it was the place selected by the decedent in his lifetime for the deposit of the ashes of his deceased children and of his own ashes upon his decease. The expenditure upon which the appellants' claim is predicated not being properly classed as "funeral expenses," under the particular circumstances of this case, it follows that it was not such an expenditure as might have been ordered by the friends or relatives of the deceased prior to the appointment of an executor or administrator of his estate, and which, if reasonable, considering the amount of the estate of the deceased and the circumstances surrounding his death and burial, would be a proper charge against his estate. Estate of Hincheon, 159 Cal. 755, 763, 116 P. 47, 36 L. R. A. (N. S.) 303; 2 Woerner, Administration (2d Ed.) § 357; France's Estate, 75 Pa. 220. Not being such, it is clear

that the appellant Cypress Lawn Cemetery Association would have no right to charge against the estate of said decedent the expenses of removing the ashes of the decedent to another place than that of their primary deposit if such removal had been undertaken upon its own initative, and it would seem to be equally clear that it could not do so when it had taken such action upon the initiative or direction of a son of the deceased, who bore no official relation to those in immediate charge of the affairs and properties of the estate, and who had no other authority than that of his own initiative to direct the removal of his father's ashes, long after their primary interment, to another place of repose. The question as to who is entitled to the remains or ashes of a deceased person is one to which much learning has been applied, particularly in the more ancient precedents, as may be seen from the notes to Wynkoop v. Wynkoop, 82 Am. Dec. 506; but this is not so much the question here as is the inquiry as to who may be entitled to create a charge against the estate of a decedent by incurring or directing an expenditure for the transfer of the latter's remains or ashes, long after his decease, from one place of sepulture to another. It is our view that there were two courses open to the appellant Hamilton A. Bauer in the premises as presented by him upon the hearing upon the application to the probate court. One of these was to secure the prior order or subsequent acquiescence of the executrix and executor of the estate in the removal of the ashes of the deceased to another place of deposit as directed by him; or, as the other alternative, to pay the expense of such removal himself.

The order is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; WASTE, J.; SEAWELL, J.; LENNON, J.; KNIGHT, Justice pro tem.

---

73 Cal. App. 504

NOBLE v. NOBLE et al. (Civ. 5099.)

(District Court of Appeal, First District, Division 2, California. July 6, 1925. Hearing Denied by Supreme Court Aug. 31, 1925.)

1. Executors and administrators ⟸221(4) — Finding of trial court that claim had not been paid sustained by evidence.

In an action against an executor on a rejected claim, a finding by the trial court that rents and interest on property were not paid by decedent *held* sustained by claimant's testimony.

2. Executors and administrators ⟸443(5) — Complaint held not to set out cause of action for recovery of specific interest on property.

A complaint alleging that property had been turned over to deceased who agreed to give proceeds to the plaintiff, with no allegation of agreement to pay a specific rate of interest, does not state a cause of action either for a hiring of property at 7 per cent. for its use or on an oral promise to pay interest.

3. Trusts ⟸371(3)—The complaint for breach of trust must plead a breach.

A complaint, to set out a cause of action for breach of trust, must plead a breach.

4. Trusts ⟸371(2)—Complaint held not to state cause of action on continuing trust to pay interest on property.

A complaint alleging that property was turned over to deceased, who agreed to pay proceeds to plaintiff, but which fails to allege a promise to pay any rate of interest, *held* not to state a cause of action on a continuing trust to pay 7 per cent. interest on such property.

5. Trial ⟸396(3)—Findings of agreement to pay interest on a sum certain held not supported by pleadings.

A complaint alleging an agreement to pay plaintiff proceeds of property does not support a finding that deceased agreed to pay plaintiff 7 per cent. on a sum certain.

6. Appeal and error ⟸293 — Objection that finding not supported by pleading proper on appeal, though there was no motion for new trial under amendment to Code.

An objection that finding is not supported by pleading may be made on appeal, though no motion for a new trial was made, in view of amendments of 1915 (St. 1915, pp. 205, 328) to Code Civ. Proc. §§ 939, 956.

7. Executors and administrators ⟸221(4)—Finding of agreement to pay "good interest" on property held not supported by the evidence.

A finding that deceased obligated himself to pay "good interest" on property turned over to him *held* not supported by the evidence.

8. Limitation of actions ⟸102(4)—Statute of limitations no bar to action on unrepudiated continuing trust.

In an action against an executor on a rejected claim based on a continuing trust which was not repudiated, the statute of limitations is not a bar.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by Floride Noble against Edward B. Noble and another, executors of the last will and testament of Patrick Noble, deceased. Judgment for plaintiff, and defendants appeal. Reversed.

Goodfellow, Eells, Moore & Orrick, of San Francisco, for appellants.

Mervyn R. Dowd and John E. Bennett, both of San Francisco, for respondent.

STURTEVANT, J. Plaintiff commenced an action against the defendants as executors of the last will and testament of Patrick

Noble, deceased, to recover a judgment based on a rejected claim, or rather a claim not allowed by the defendants. The defendants answered, a trial was had in the trial court, the court sitting without a jury, and judgment went for the plaintiff. The defendants have appealed, and have brought up the judgment roll and a bill of exceptions.

In her complaint the plaintiff alleged that the defendants are executors; that on the 21st day of July, 1908, the plaintiff deeded two houses and a lot at Santa Monica to her brother, Patrick Noble; that the property was then of the value of $7,500; that the plaintiff was the only surviving sister of Patrick, and that she deeded the property to him on the agreement that he would manage the same and would invest and reinvest the proceeds of the property for her benefit and would deliver to her the proceeds of the property at such time as might be agreeable to Patrick or to herself; that the agreement was oral, and was made by reason of the trust and confidence reposed by the plaintiff in her brother, and by reason of the brotherly interest and affection of the said Patrick to the plaintiff; that Patrick continued to hold the trusteeship of the said property up to the time of his death in October, 1920, without making to plaintiff any accounting or paying to plaintiff any interest upon the amount of the value of the property or any of the rents, issues or profits thereof; that on the 29th day of June, 1921, plaintiff presented a claim for $6.225.25, the amount of interest at 7 per cent. from the 21st day of July, 1908, to the date of filing the claim upon the principal sum of $7,500; that the claim was not allowed, and that there is now due $6,225.25.

[1] The trial court made a finding to the effect that Patrick did not pay to the plaintiff any of the rents or proceeds of the property, or any interest upon the value of the property. The appellants attack the finding as not being supported by the evidence. We think that the attack cannot be sustained. The record discloses that Patrick made many payments to his sister during the period mentioned, but the real controversy between the parties is as to what those payments were made in liquidation of. The contention of the appellants as made in the trial court and as made in this court is that the said payments were made by Patrick to discharge the indentical claim which the plaintiff presents in this action. On the other hand, the plaintiff claims that the payments were made by reason of other obligations. She so testified in the trial court. Assuming that the trial court accepted her testimony as true, then and in that event there was evidence to support the finding against which the attack is made.

[2] The appellants also contend that the complaint does not state facts sufficient to constitute a cause of action. In reply to that attack it will be noted at once that the complaint is susceptible of several different interpretations. It might be urged that the complaint purports to plead that the plaintiff hired to her brother Patrick her property, and that he undertook to pay for the use thereof 7 per cent. interest on its value. Again, it may be claimed for the pleading that it purports to be a cause of action based on an oral promise to pay interest. After being served with process the defendants demurred to the complaint on the ground that it did not state facts sufficient, and also on the ground that it was uncertain because it could not be ascertained what were the terms or conditions on which Patrick entered into the obligation. It is earnestly contended by the defendants that the pleading did not allege that Patrick agreed to pay 7 per cent. or any other rate of interest on the value of the property as of the date of plaintiff's deed. An examination of the complaint discloses that the allegation is not present. It is patent, therefore, that the pleading may not be sustained on either of the theories just above mentioned.

[3, 4] There are allegations in the complaint which might be considered as showing that the pleader was attempting to plead a breach of trust. However, that theory cannot be applied, because there is no attempt whatever to plead a breach. Such an allegation is necessary under such a theory. Burke v. Maguire, 154 Cal. 456, 468, 98 P. 21. The respondent contends that she has pleaded a continuing trust. In other words, as we understand her claim, it is that Patrick received her property of the value of $7,500 which he agreed to hold as her trustee, and that he made the flat promise or guarantee that the property in his hands would earn 7 per cent. per annum, which he would accumulate and hold for the plaintiff as her trustee; that he did so, and so held the same at the date of his death, and that the principal sum and the proceeds thereof passed into the hands of the defendants as Patrick's executors, and that she duly filed a claim therefor against Patrick's estate. True it is that the pleading contains allegations not consistent with the theory just stated. But in support of the judgment we will assume for the sake of argument that such was the theory of the pleader. Turning now to the allegations of the pleading and specially examining the same under the theory last stated, the plaintiff did not allege directly or inferentially, nor by recital, that her brother promised to guarantee that the rents, issues and profits would amount to 7 per cent. per annum or any other exact sum, stating it. Nor did he make the flat promise that the rents, issues, and profits should take the form of interest, and that he should be charged with interest, and that he would accumulate and hold said interest moneys for the plaintiff. When the plaintiff presented her claim against the estate it was worded on the in-

terest theory, but the body of the complaint was not so worded. Weighing the allegations of the pleading under and pursuant to the respondent's theory, it was insufficient, because it did not aver that Patrick promised to pay interest nor any certain rate of interest. Nor does the pleading contain the clear allegation that Patrick was to accumulate and hold the interest, and that he did so accumulate and hold the same down to the date of his death. The complaint therefore does not state a cause of action, and the trial court should have sustained the demurrer. The prejudicial nature of the error will more fully appear as we proceed.

[5, 6] The next point made by the appellants is that the findings and judgment are not supported by the pleadings. In this connection the appellants point out that the complaint alleged an agreement on the part of Patrick that he would pay to the plaintiff the proceeds of her property. The appellants then point out that the trial court made findings and entered a judgment on the theory that Patrick had agreed to pay the plaintiff 7 per cent. interest on a certain sum of money—the value of plaintiff's lot and houses at Santa Monica as of the date of plaintiff's deed. The record does not disclose any answer to the point. The respondent's reply is that the point may not be considered in this court because the appellants did not make a motion for a new trial, and respondent cites several cases that were decided prior to the amendments of 1915 (St. 1915, pp. 205, 328) to sections 939 and 956 of the Code of Civil Procedure. Since those amendments were enacted the decisions cited do not control. Smith v. Lightston, 182 Cal. 41, 186 P. 769.

[7] The trial court made a finding:

"That said Patrick in taking the property in his own name under the agreement that he would make it pay her, plaintiff, good interest, and that he would relieve her of all care concerning it, and his handling the property throughout as his own, and taking to himself the proceeds of the property, which were the fruits of his own handling, the value of the property as he received it being $7,500, obligated himself to pay plaintiff good interest for the same."

The appellants contend that the said finding is not supported by the evidence. It is not. The plaintiff did not allege that Patrick guaranteed interest as proceeds, and she did not tender any evidence to that effect. In testifying as to the fact, true it is that the plaintiff used the word "interest" in telling the story as she remembered it, but the statement of the deceased wherein he used the word "interest" fell far short of creating a guaranty to the amount of 7 per cent. per annum. The plaintiff testified that her brother said:

" 'Under the will I am obligated to support you, and you do not need the income from your property, and if you will let me have it in my own name, I will handle it to an advantage for you and give you good interest.' * * * At these conversations he said he could handle it to so much better advantage if he had it in his own name, that he was a good business man, and that he would make more out of it than I was doing."

That language shows that Patrick assured the plaintiff that in his hands her property would bring in a profit and not a loss, but the language fell far short of stating a flat guaranty of 7 per cent. over an indefinite period of time extending over 13 years, more or less. The plaintiff in this connection adverts to many things which would constitute a breach of trust and therefore justify an award of interest, but, as has been shown above, the plaintiff's case does not rest on a breach of trust.

[8] The appellants also contend that the action is barred by the statute of limitations and by the laches of the plaintiff. If, as stated by us, the theory of the plaintiff's complaint is that of specifically enforcing a continuing trust, then and in that event, as there was no repudiation, the statute of limitations is not a bar. Under the same theory of the plaintiff's pleading the application of the doctrine of laches is far more serious. The principle that was before the court in Kleinclaus v. Dutard, 147 Cal. 245, 81 P. 516, seems to be in all respects parallel to the principle that is involved in the plaintiff's case. In this case the plaintiff asserts that the declaration of trust was made by the alleged trustee 13 years before she commenced her action. In the case cited the declaration was made 35 years before the action was commenced. In both cases the action was not commenced until the alleged trustee, the only person who could refute the testimony given by the alleged beneficiaries, was dead. As this case must go back for a new trial, and as the application of the doctrine of laches is one addressed to the chancellor in the first instance, we think that it is advisable that we should withhold an expression of opinion on that feature until the trial court shall have ruled upon it.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

73 Cal. App. 695

NEWTON v. COX (two cases). (Civ. 4391.)

(District Court of Appeal, Second District, Division 2, California. July 22, 1925.)

1. **Trial ⇐165—Court determines if evidence supports complaint on motion for nonsuit.**

On motion for nonsuit, only office of court was to determine if evidence was sufficient to support allegations of complaint.

2. **Municipal corporations ⇐706(5)—Finding of negligence and lack of contributory negligence in automobile accident supported by evidence.**

In action for damages resulting from automobile collision at street intersection, where view was obstructed by another car, evidence *held* sufficient to show defendant guilty of negligence under Motor Vehicle Act, § 22, and plaintiff not guilty of contributory negligence.

Appeal from Superior Court, Orange County; R. Y. Williams, Judge.

Separate actions by Noel Newton and by Blanche E. Newton against A. N. Cox. From judgments for the plaintiffs, defendant appeals. Affirmed.

Scarborough, Forgy & Reinhaus, of Santa Ana, and W. I. Gilbert, of Los Angeles, for appellant.

Woodruff & Shoemaker, of Los Angeles, for respondents.

WORKS, J. These two actions were brought to recover damages arising from a collision of automobiles. The respective plaintiffs were husband and wife. They were driving together in a Hupmobile which was struck by a Cadillac car driven by defendant. The two actions were consolidated for hearing in the trial court, and they are presented together on this appeal. In the disposition of the appeal they may be considered as if there were but one action instead of two. The plaintiffs each had judgment, and the defendant appeals.

The only contentions upon which a reversal is asked are these: It is claimed that a motion for nonsuit which was made and denied should have been granted. It is insisted that the evidence was insufficient to support the verdict, for the trial was had before a jury. It is contended, under both these heads, that the evidence showed that appellant was not negligent and that respondents were guilty of contributory negligence; or, if those claims are not justified, that the evidence shows negligence on both sides, and that therefore respondents should not have recovered, as the doctrine of comparative negligence does not obtain in this state.

The accident which gave rise to the litigation occurred at the intersection of thoroughfares known as Grand avenue and Seventeenth street. The former ran north and south, and the latter ran east and west. Respondents were driving north on Grand, and appellant was proceeding east on Seventeenth. The collision occurred in the northeasterly quarter of the intersection, where the Cadillac, appellant's car, struck the Hupmobile, respondents' car, near its rear and upon the left rear fender. Respondents' vehicle was overturned by the impact. There were trees on the property at the southwest corner of the intersection, but they were so placed that they did not interfere with an unobstructed view by appellant of the part of Grand from which respondents came, or by respondents of the part of Seventeenth from which appellant came; that is, there was, so far as the trees were concerned, an unobstructed view for all parties at such a distance back from the intersection that both cars, if they had been driven at a proper rate of speed, and the drivers had seen each other, could have been stopped before the intersection was reached. A Franklin automobile was approaching the intersection along Seventeenth immediately preceding the accident, and it was coming from the same direction from which came appellant's car. Respondent Blanche Newton testified:

"My husband was driving about his usual rate of speed on the highway; he usually travels between 25 and 30 miles. * * * Away back there I imagine he was going 25 or 30 miles an hour; at the intersection he wasn't going over half that fast; he probably was going 12½ or 15 miles an hour."

Respondent Noel Newton testified:

"As * * * I came * * * somewhere in the neighborhood of 100 feet from the center of Seventeenth street and Grand avenue, I began to slow down for the intersection. I slowed down until I had my car in perfect control, which is about in the neighborhood of 15 miles an hour, at the intersection—that is, where the highways come together—and as I passed on up, I should judge, half that distance, I noticed a Franklin car coming from the west going east, and he slowed down and I looked to the east and saw everything was clear, and I went on into the intersection, and just as I passed the center of the intersection going north all of a sudden a Cadillac loomed up not over 15 to 20 feet away in my vision, coming at a terrific rate of speed, and just as I saw him, or just after I saw him, he swerved right into me and hit me at the north side of Seventeenth street at about the north line. * * * When I was struck by the Cadillac I was going somewhere in the neighborhood between 12 and 15 miles an hour; not to exceed 15 miles. * * *

"Q. And right there you know you were going under 15 miles an hour and didn't look at your speedometer—that is true, isn't it? A. Yes, sir."

On cross-examination the same witness said:

"When I was 50 feet away from the intersection I can't say exactly how fast I was travel-

ing, I should judge not to exceed 20 miles. When I got to the intersection I was going about 15 miles an hour, not to exceed 15 miles an hour. When I passed this street corner I should judge I wasn't going more than 15 miles an hour there. When I passed this line going from one corner to the other, I was going not to exceed 15 miles an hour; I drive all the time—just my impression. * * * I should judge the speed of the Cadillac automobile as it approached me, when I first observed it, was not less than 35 miles an hour."

A witness for respondents who witnessed the accident testified:

"Mr. Cox was going east on Seventeenth. He was driving a Cadillac; he went very fast. I think he was going again as fast as I saw Mr. Newton's car. The Franklin wasn't going very fast, and he went by terribly fast. * * * I watched both machines as they continued on; they were going on an angle. Mr. Newton wasn't going very fast. I have driven an automobile for ten years. I think Mr. Newton was going between 15 and 20 miles * * * say about 17 miles an hour. I didn't see him change his speed; it happened so quick. * * * I said I thought Mr. Cox was going about again as fast. He was more apt to be going 35. He continued his speed. I know he was going awfully fast. * * *"

Another observer of the accident testified:

"When Mr. Cox passed me I was about 75 feet from the intersection. * * * I think Cox was going about between 30 and 35 miles. * * *

"Q. When he got to the intersection how fast do you think Mr. Newton was going? A. I don't think he was going more than 15 miles an hour. * * *

"Q. Well, who got into the intersection first? A. Mr. Newton was across the intersection when Cox struck him—just past.

"Q. You mean past the center of the street? A. The center of the street."

[1] We learn this much concerning the facts from a perusal of appellant's brief, without reference to the record and without an examination of the brief filed by respondents. The showing of facts made by appellant plainly confutes the argument advanced by him. Why he himself does not perceive this result can be shown by a brief consideration of the argument he makes. Several times he refers to "disputed" testimony. He insists that the evidence "preponderated" in his favor. He asks us to consider the fact that at an earlier trial of the actions respondents gave testimony different from that given by them at the trial which resulted in the judgment from which the present appeal is taken. Under authorities really "too numerous to mention" these things are beyond our ken. Upon the motion for nonsuit the only office of the trial court was to determine whether there was substantial evidence to support the material allegations of respondents' complaints, no matter how strenuously it was disputed. On the appeal our powers are the same. Upon the question whether the evidence was sufficient to support the verdict, we must bow to the finding of the jury, if there was a conflict in the evidence—and there was a most substantial one—no matter how sharp the conflict was; no matter if we might conclude from the record that the testimony preponderated in favor of appellant. Appellant argues the case from an utterly false premise.

In order to "make assurance doubly sure," we now state a little of the testimony to which respondents call our attention. Respondent Noel Newton testified that the Cadillac "hit me with such force that he knocked me right through a guy wire as big as my little finger and turned my car over twice and into a walnut tree so hard they had to pry it loose"; that when "I saw the Cadillac I was just passing the center of the intersection, just past the center"; that "I was on the right-hand side of Grand avenue—the east side"; that appellant "made a total wreck of the body of the machine—three new wheels and three new fenders, and a new running board, a new top and windshield, and had to be lined up all over and practically a new body and new doors;" that "I couldn't get out of his way; I couldn't step on it and get up any speed and get out of the way, and I was clear on the right-hand side of the pavement, and couldn't get over any further without getting in the mud;" and that, referring to a telephone pole at the northeast corner of the intersection, the Cadillac "splintered the post and broke the tire rack on the automobile and shoved up a big bunch of mud here, I should judge, anywhere from ten inches to a foot of mud and grass where he slid through the mud and grass there." This witness had a conversation with appellant immediately after the collision.

He testified concerning it:

"I spoke to him and asked him what in the world he was trying to do. He told me he was coming up the boulevard and the machine in front of him was slowing down, and he thought he was going to stop, and he looked around and saw the intersection was clear, and pulled out to the side and stepped on it, and went on around. I asked him, 'What are you going to do about it?' And he said, 'I am insured, and the insurance company will take care of it.' I said, 'Who are you insured with?' And he said, 'The Orange County Automobile Club.'"

[2] It is useless to quote further from the evidence. Considering the denial of the motion for nonsuit, it is evident that respondents had made a prima facie case when the motion was presented. Considering the contention that the evidence fails to support the verdict, it is plain that the members of the jury were amply justified in concluding that the following was the story of the accident: The view of each of the colliding cars by the occupants of the other was obscured by the Franklin car, which was directly between the other two as they approached the intersection

of the highways. Respondents entered the intersection, and continued through it until their car was struck, at a reasonable rate of speed, in a careful and prudent manner, having regard to the traffic and use of the highway, and not so as to endanger the life or limb of any person or the safety of any property, all as required by section 22 of the Motor Vehicle Act (Stats. 1919, p. 220), which is relied on by appellant, as it was in effect at the time the collision occurred. Appellant approached the intersection, and continued through it until the cars collided, at a reckless and excessive rate of speed, in a careless and imprudent manner, in such a way as to endanger the life and limb of persons on the highway and the safety of property thereon, and in direct violation of the provisions of the act. The jury was therefore justified in concluding that appellant was guilty of negligence, and that respondents were not guilty of contributory negligence.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

73 Cal. App. 655

RICE et ux. v. McCARTHY. (Civ. 4264.)

(District Court of Appeal, Second District, Division 2, California. July 17, 1925.)

1. Contracts ⟸138(4) — Validity cannot be given to void contract by estoppel.

Validity cannot be given to contract by estoppel if it is prohibited by law or is against public policy.

2. Estoppel ⟸54, 56—To constitute "estoppel in pais," party estopped must have knowledge of the facts, and should leave party asserting estoppel to do what he otherwise would not.

To constitute "estoppel in pais," party estopped should have knowledge of the facts, and should so act as to lead party asserting estoppel to do what he otherwise would not have done.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel in Pais.]

3. Husband and wife ⟸267(8)—Statute authorizing conveyance by husband holding record title construed; "presumed."

The word "presumed," as used in Civ. Code, § 172a, as added by St. 1917, p. 829, that conveyance by husband holding record title to community real property to purchaser in good faith without knowledge of marriage relation shall be presumed to be valid, is used in the sense that such shall be conclusively presumed.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Presume.]

4. Husband and wife ⟸267(1)—Conveyance by husband not void as prohibited by law.

Conveyance of community real estate by husband without the joining of wife is not void as prohibited by law, but may be avoided by wife's bringing action within time prescribed by Civ. Code, § 172a, as added by St. 1917, p. 829, except where property is homestead, in which case conveyance is nullity under Civ. Code, § 1242.

5. Husband and wife ⟸267(1)—Wife's right to avoid transfer by husband is privilege of no interest to state.

A wife's right to avoid an instrument transferring community real property, executed by her husband alone, is a privilege in which the state has no interest apart from that of the wife herself.

6. Husband and wife ⟸267(1) — Wife may waive right to avoid conveyance by husband.

Provision in Civ. Code, § 172a, as added by St. 1917, p. 829, recognizing wife's right to avoid a conveyance by husband, was intended solely for the wife's benefit, and she is under no obligation to exercise the right but may waive it.

7. Husband and wife ⟸267(9)—Public policy does not prevent purchaser from husband setting up estoppel against wife.

Public policy does not forbid a purchaser of community real estate, in transfer of which wife did not join, from setting up conduct of wife as an estoppel against her right to avoid it.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by John K. Rice and wife against Justin McCarthy. From a judgment for plaintiffs, defendant appeals. Reversed.

Randall, Bartlett & White and Walter J. Little, all of Los Angeles, for appellant.

Allen, Allen & Eagan, of Los Angeles, for respondents.

FINLAYSON, P. J. This is an action to quiet title to a lot in the city of Los Angeles. Judgment passed for plaintiffs, and defendant appeals.

Plaintiffs are husband and wife. The interest which they obtained in the property, or, more accurately speaking, the interest which the husband obtained therein, is such as was acquired under a written contract executed on September 1, 1919, by the owner, the California Security Loan Corporation, as the vendor, and the plaintiff John K. Rice as the vendee, whereby the former agreed to sell and the latter agreed to buy the lot for a valuable consideration. This contract was never recorded. The interest thus acquired under the husband's contract with the owner is conceded to be community property. On November 3, 1919, the husband, as the vendor, and defendant, as the vendee, executed a contract in writing, whereby the former

agreed to convey the property to the latter for the sum of $2,500, payable in monthly installments of $25 each. Immediately upon the execution of this contract, defendant entered into possession of the premises. He has continued in possession ever since, and has made all of the payments due under his contract. The plaintiff Sallie G. Rice did not join with her husband in the execution of the instrument by which he agreed to convey the property to defendant. Plaintiffs brought the action upon the theory that the husband's contract to convey the property to defendant is void under section 172a of the Civil Code. The action was commenced within one year after the execution of the instrument by the husband.

Defendant, invoking the doctrine of estoppel to defeat plaintiffs' claim that the husband's contract with him is void, alleged in his answer that when he entered into his contract with Rice he did not know or have any information that his vendor and Sallie G. Rice were husband and wife; that he did not have any information of their matrimonial relation until January 3, 1920; that he has duly performed all the conditions of his contract; that when he purchased the property Sallie G. Rice knew that the lot was sold to defendant, and that it was the subject of the contract between him and her husband; that subsequently to the execution of the husband's contract to convey the property to defendant, the wife received payments made by defendant on the contract, well knowing that the same were made by defendant under his contract with her husband; that the wife used the moneys thus received by her and enjoyed the benefit thereof; that at no time prior to the commencement of the action did the wife object to her husband's sale of the property to defendant; and that by accepting such payments she is now estopped from asserting that defendant's claim to the property is without right. By a supplemental answer defendant further alleged that subsequently to the commencement of the action, and within the time provided by his contract, he paid the monthly installment due under the terms of his contract for each of the four months commencing on the 3d days of August, September, October, and November of the year 1920; that each of these payments was made to and accepted by the husband; and that by reason thereof the husband is estopped to claim that the contract entered into by him with defendant is of no force or effect.

Respondents do not claim that the facts so alleged in defendant's answers are not sufficient to work an estoppel against plaintiffs if the doctrine of estoppel in pais is invocable to support a transfer of community real property in which the wife did not join. What they do claim is that no matter what the wife's conduct may have been, if she did not join with the husband in executing the transfer, the doctrine of equitable estoppel cannot be invoked to defeat an action brought to avoid the transfer.

There was evidence, either introduced by defendant or offered by him, which tended to establish the allegations of fact upon which he relies to make good his claim of estoppel. To the introduction of some of this evidence the court sustained objections upon the grounds of irrelevancy and immateriality. These rulings are assigned as error. These assignments present a question which, like the one next to be mentioned, depends for its answer upon whether or not the doctrine of estoppel is invocable in cases of this character.

Instead of making findings upon the facts specifically pleaded by defendant to support his claim of estoppel, the trial court simply found that "it is not true that John K. Rice or Sallie G. Rice were at any time estopped from claiming that plaintiffs are entitled to the possession of said property." This is but the mere statement of a conclusion of law, which leaves us in utter ignorance as to what facts, if any, the trial court considered as constituting an estoppel. "The rule is that the facts constituting the estoppel must be pleaded. * * * By the same rule the facts constituting the estoppel must be found." Fritz v. Mills, 12 Cal. App. 118, 106 P. 727. It follows, therefore, that defendant was entitled to findings upon the facts pleaded by him, and which he claimed raised an estoppel, unless, as contended by respondents, the doctrine of estoppel never can be invoked by the husband's transferee in an action of this character.

The code section which inspired plaintiffs to bring this action reads:

"The husband has the management and control of the community real property but the wife must join with him in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed, or encumbered; provided, however, that the sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or encumbrancer, in good faith without knowledge of the marriage relation shall be presumed to be valid; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate." Civ. Code, § 172a, adopted July 27, 1917 (St. 1917, p. 829).

Prior to the adoption of this section it was the established doctrine in this state that during the marriage the husband is the sole and exclusive owner of all community property, and that the wife has no claim thereto nor any interest or estate therein other than a mere expectancy as heir if she survive him. Spreckels v. Spreckels, 172 Cal. 775, 158 P. 537, and cases there cited. Whether this

doctrine has suffered any modification by reason of the adoption of section 172a is a question which was purposely left open in Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22, the court there saying that, because the property in that case was acquired before the section was adopted, "it is unnecessary to consider the question * * * whether, with reference to after-acquired property, the section creates an estate in the wife which she had not theretofore possessed." Nor do we find it necessary here to consider that question, for both parties to this appeal have expressly conceded that it is the power of alienation, and not the nature of the estate, which is affected by the statute. Therefore, for the purposes of this appeal, we shall adopt counsel's concession as embodying a correct statement of the law.

If, as counsel concede, the section affects only the power of alienation and not the nature of the estate, then the legislative intent may best be carried out by regarding the transfer as being good as against the husband but voidable at the option of the wife. In Spreckels v. Spreckels, supra, Dargie v. Patterson, 176 Cal. 714, 169 P. 360, and Italian American Bank v. Canepa, 52 Cal. App. 619, 199 P. 55, it was held that under section 172 of the Civil Code, prior to its amendment in 1917 (St. 1917, p. 829), a gift by the husband of community property without the wife's written consent thereto, or a conveyance by him of such property without a valuable consideration and without such consent, is good as against the husband; that the wife is the only person who has the right to complain; and that she possesses no more than an optional right to avoid the gift or conveyance, and if necessary to sue to recover the property, not as her separate estate, but to reinstate it as a part of the community property, with the title vested in her husband and subject to his management and control as before. We think that what was said in those cases as to the nature of the right possessed by the wife under section 172 is substantially a correct statement of the nature of the wife's right under section 172a after a transfer by her husband in which she did not join; for, as we later shall show when analyzing section 172a, the husband's transfer is not void but merely voidable.

[1] The question, then, is this: May the wife by her conduct estop herself from asserting the right which is given her by section 172a, i. e., the right to avoid her husband's conveyance of community real property in which she did not join? As a general rule, estoppel cannot vitalize a transfer which is void because prohibited by law or because it is against public policy. In the eye of the law such a transfer has no existence whatever, and neither action nor inaction can validate it or estop a party against asserting its utter invalidity. The rule is announced in Ruling Case Law as follows:

"It is generally considered that, as between the parties to a contract, validity cannot be given to it by estoppel if it is prohibited by law or is against public policy." 10 R. C. L. p. 801.

[2] Respondents contend that a conveyance of community real property in which the wife does not join is void, both because it is prohibited by law and because it contravenes public policy. Is such a conveyance so far prohibited by section 172a as to be an absolute nullity, wholly ineffective for any purpose whatever? That section, as we have seen, contains a proviso which declares that:

"The sole lease, contract, mortgage or deed of the husband, holding the record title to community real property, to a lessee, purchaser or incumbrancer, in good faith without knowledge of the marriage relation, shall be presumed to be valid."

This proviso cannot be regarded as an application of the doctrine of equitable estoppel to the limited class of transfers specifically referred to therein, because it declares, in effect, that such transfers as fall within the proviso are presumed to be valid—without regard to the wife's conduct or knowledge. To constitute estoppel in pais it is axiomatic that the party estopped should have knowledge of the facts, and should so act as to lead the party asserting the estoppel to do what he otherwise would not have done.

[3] The word "presumed," as used in the declaration of the proviso that every lease, contract, mortgage or deed which is under its protecting ægis "shall be presumed to be valid," is doubtless used in the sense that it is conclusively presumed that every such lease, contract, mortgage, or deed is valid. We have, then, in this part of the section, what is tantamount to an express statutory recognition of the passing of the title to the lessee, grantee, vendee, or mortgagee whenever those conditions exist which are defined in the proviso.

The proviso is sandwiched between the first and concluding portions of the section. The concluding clause declares that:

"No action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

Obviously, the words "such instrument" where they last occur—i. e., in the provision to the effect that suit shall not be commenced after one year from the filing of "such instrument" for record—do not refer to the instrument by which the husband acquired the record title. It evidently was the intention of the Legislature that the year within which the action could be brought should not commence to run until the wife could be charged with at least constructive notice tha

her husband had alienated or incumbered the title. But the recording of the instrument whereby the husband acquired the record title would not afford notice to the wife that he had alienated or incumbered the title so acquired by him. Equally obvious is it that the words "such instrument," where they first occur in the last clause of the section—i. e., in the provision to the effect that no action to avoid "such instrument" shall be commenced after the expiration of one year—refer back to the words "any instrument" in the first part of the section, the part which immediately precedes the proviso, and are not restricted to the " sole lease, contract, mortgage or deed" mentioned in the proviso. One reason for so concluding is that the word "instrument" nowhere occurs in the proviso. Another and more cogent reason is that it would lead to an absurdity to hold that the words "such instrument" in the last clause of the section refer to the "sole lease, contract, mortgage or deed" mentioned in the proviso. In the proviso it is declared that the "sole lease, contract, mortgage or deed" there referred to "shall be presumed to be valid." But a lease, contract, mortgage, or deed which the law presumes to be valid cannot be the subject of a successful action to avoid it. The statute does not contemplate so vain a thing as an action to avoid an instrument which the law itself declares shall be presumed to be valid.

These considerations lead irresistibly to the conclusion that, so far as the meaning of the words "such instrument" is concerned, the first and last parts of the section should be read as though the proviso which separates them had been omitted. So read, the section would provide that:

"* * * The wife must join with him [the husband] in executing any instrument by which such community real property or any interest therein is leased for a longer period than one year, or is sold, conveyed or encumbered; but no action to avoid such instrument shall be commenced after the expiration of one year from the filing for record of such instrument in the recorder's office in the county in which the land is situate."

[4] From the foregoing analysis of the section, it will be seen that it fixes a limitation of one year from the recording of an instrument executed by the husband alone, and which is not within the saving grace of the proviso, within which to bring an action to avoid the husband's instrument. But a statutory provision which prescribes a time limitation within which a wife may bring an action to avoid her husband's instrument of conveyance enwombs the necessary implication that the title passes by the instrument even though the wife did not join with her husband in executing it—that the title passes, but that the instrument which passes it may be invalidated or avoided if the proper action be brought within the prescribed time. In other words, even those instruments which are not under the shield of the proviso are only voidable and are not void. And that is precisely what was said of such instruments in Goodrich v. Turney, 44 Cal. App. 516, 519, 186 P. 806, 807, the court there remarking that if it be assumed that a contract to exchange properties is within the purview of section 172a, "that does not make the writing absolutely void, but voidable only at the instance of the wife." The Supreme Court in that case denied a petition for a hearing by it after judgment of the District Court of Appeal. We conclude, therefore that the instrument here sought to be avoided is not void because prohibited by law.

[5] Nor is there any reason why it should be held that "public policy," a term of vague and uncertain meaning, forbids the wife from waiving her right to avoid a transfer of community real property executed solely by her husband. A wife's right to avoid an instrument transferring community real property, or an interest therein, executed by her husband alone, is a privilege in which the state has no interest apart from that of the wife herself. There is no duty, perfect or imperfect, on the part of a wife to contest the validity of her husband's transfer of community real property. It is true that the claim of a surviving wife to her share of the community property upon the death of her husband is one which, from the nature of the marriage relation, appeals to the courts and to society; but it has repeatedly been held that the wife may by contract relinquish her expectancy as heir in such property. Estate of Sloan, 179 Cal. 393, 177 P. 150; Estate of Brix, 181 Cal. 667, 186 P. 135. In Spreckels v. Spreckels, supra (decided prior to 1917), the court, speaking of the provision in section 172 to the effect that the husband cannot make a gift of community property or convey the same without a valuable consideration unless the wife, in writing, consents thereto, said: "The provision was manifestly intended solely for the benefit of the wife." 172 Cal. 784, 158 P. 540.

[6] We think it equally manifest that the provision in section 172a which recognizes the wife's right to avoid an instrument which is within the purview of that section was intended solely for the wife's benefit, and that she is under no obligation to the state to exercise the right. It is generally held that statutory provisions designed solely for the benefit of individuals may be waived by the persons for whose benefit they are designed. 6 Cal. Jur. p. 120. See In re Garcelon, 104 Cal. 570, 38 P. 414, 32 L. R. A. 595, 43 Am. St. Rep. 134, where an agreement between nephews and the testatrix not to contest the latter's will was sustained against the plea that the contract was opposed to public policy. In section 172a the Legislature itself, by allowing the wife the short period of one

year from the recording of her husband's instrument of conveyance within which to bring an action to avoid it, evinces an unmistakable intention to regard her right as one to which no special sanctity attaches.

In the state of Washington, which has a statutory provision similar to that contained in section 172a of our Civil Code, it frequently has been held that the doctrine of estoppel may be invoked against the wife. Thus, in Magee v. Risley, 82 Wash. 178, 143 P. 1088, the court, having under consideration a case involving the application of the statute, said:

"Assuming, without deciding, that Wright's wife would have been actually entitled to a community interest in the property as against a purchaser with notice of the marriage, still, the facts found in this case would, under the doctrine announced in Sadler v. Niesz, 5 Wash. 182, 31 P. 630, 1030, forever estop her from claiming any interest as against the respondent here, who was a purchaser in good faith and without notice."

[7] Our conclusion from the foregoing is that there is no "public policy" which forbids the transferee in cases such as this from setting up the wife's conduct as an estoppel against her right to avoid her husband's transfer of community real property.

The cases relied upon by respondent, of which Hart v. Church, 126 Cal. 471, 58 P. 910, 59 P. 296, 77 Am. St. Rep. 195, and Freiermuth v. Steigleman, 130 Cal. 392, 62 P. 615, 80 Am. St. Rep. 138, are the most conspicuous examples, are not in point. They are cases where one of the spouses alone executed a deed to or a mortgage upon the homestead. Under the homestead law of this state an absolute interdiction is placed upon the alienation or incumbrance of the homestead by one of the spouses only, the statute containing a positive declaration that the homestead of a married person "cannot" be conveyed or incumbered unless both spouses execute and acknowledge the instrument of conveyance or incumbrance. Civ. Code, § 1242. Such being our law relative to homesteads, it is apparent at once that any attempted conveyance or incumbrance of the homestead in which both spouses do not join is not merely voidable but is absolutely void. It is "the merest nullity"—to quote the language of Hart v. Church, supra, 126 Cal. 477 (58 P. 912). And because it is a nullity it cannot be validated by estoppel. "Neither" [spouse], says the court in Hart v. Church, "could separately ratify it so as to give it validity, nor be estopped by conduct from asserting its invalidity, because, under no circumstances, could the act or conduct of either separately be held to validate such a void instrument without doing violence to the claim letter of the law." In the Freiermuth Case the court employed this language: "There is no estoppel here; the mortgage was absolutely void." 130 Cal. 395 (62 P. 616). This language is not applicable to cases arising under section 172a for the reason that, as we have shown, an instrument executed by the husband only, whereby community real property which has not been selected as a homestead is alienated, is not void but voidable. The title passes, but the wife has the right to restore it by avoiding her husband's instrument of transfer. Without doubt this is a right which the wife may waive or lose by estoppel.

Holding, as we do, that estoppel is a defense which may be pleaded by the husband's vendee or grantee in an action such as this, it follows that the trial court erred in sustaining objections to evidence offered by appellant in support of the facts pleaded by him by way of estoppel, and that it also erred in failing to make specific findings upon the facts so pleaded.

The judgment is reversed.

We concur: WORKS, J.; CRAIG, J.

---

73 Cal. App. 565

JOHNSTON v. BENTON et al. (Civ. 4926.)

(District Court of Appeal, First District, Division 1, California. July 13, 1925.)

1. Venue ⊂⊃68—Evidence held to sustain order changing venue to residence of defendant.

In an action to recover real estate commissions, where issue was whether defendant had changed his residence while living away from home during military service, evidence *held* to show no change of residence, and to sustain order changing venue to residence of defendant.

2. Domicile ⊂⊃4(2)—Domicile not lost by entrance into military service in absence of intent.

Domicile is not lost or affected by entrance into military service, where there is no intention of adopting place of service as a residence.

3. Domicile ⊂⊃9—Change of domicile depending on intent may be proved by direct testimony of person effecting change.

Question of change of domicile depends largely on intent of party changing residence, which may be proved by direct testimony of such person whether he be a party to the action or not.

4. Domicile ⊂⊃4(2)—Living in another city when on military duty does not establish legal residence there.

Where defendant, on entering military service, was stationed at San Francisco and other military points, but he intended to return to his home eventually, the fact that he "lived" in San Francisco did not establish his legal residence there.

5. Domicile ⊂⊃10—Evidence held not sufficient to show intention to change residence.

Evidence that defendant gave his residence as San Francisco in application to join a lodge and in a power of attorney *held*, under evidence,

not to establish intent to change domicile to that place.

6. Venue ⟸68 — Affidavits of others, made without knowledge of defendant's intent, of little weight.

Affidavits of others, on motion for change of venue, as to defendant's residence, *held* of little weight, since necessarily but conclusions made without knowledge of defendant's intent as to domicile.

7. Domicile ⟸10—Failure to register to vote not important.

That defendant never registered or voted in county claimed as domicile *held* not important, where he never registered to vote anywhere.

8. Appeal and error ⟸1011(1)—Where evidence is in conflict, finding of trial court not disturbed.

Where there is a conflict in the evidence as to residence of a party, the finding of trial court will not be disturbed.

Appeal from Superior Court, City and County of San Francisco; George H. Cabaniss, Judge.

Action by Robert Johnston against Kate L. Benton and others. From an order granting a motion for change of venue in an action to recover real estate commissions, plaintiff appeals. Affirmed.

See, also, 239 P. 63.

Wallace & Ames, of San Francisco, for appellant.

Dozier, Kimball & Dozier, of San Francisco, for respondents.

KNIGHT, J. An appeal by plaintiff, Robert Johnston, from an order granting defendants' motion for a change of place of trial from the city and county of San Francisco to Shasta county, upon the ground of the residence of the defendants. The action is based upon an alleged agreement to pay real estate commissions to plaintiff's assignor. The single question involved relates to the residence of the defendant John W. Benton, appellant having made no point on this appeal as to the residence of the other defendants Kate L. and Harry L. Benton, who are, respectively, the mother and the brother of defendant John W. Benton. The evidence offered in support of the motion consisted of an affidavit made by defendant John W. Benton to the effect that for more than 20 years immediately preceding, and at the time of the commencement of this action, he was a resident of Shasta county, which affidavit was supplemented by his oral testimony given at the time of the hearing of the motion, and by the affidavit of Benton's mother, Kate L. Benton, in which she stated, in substance, that, although her son had been absent in the military service, he had "never changed his residence" from Shasta county, and had "at all times resided therein." It appears from the testimony given by the defendant John W. Benton that at the time of the hearing of this motion he was 27 years of age and an officer in the United States Army, with rank of lieutenant; that he was born and reared in the county of Shasta; that in 1917 he entered the military service of the United States, was discharged in February, 1919, returned to Shasta county, and, after spending some time in Shasta and Siskiyou counties, went to San Francisco; that in July, 1920, he visited Reno, Nev., remained there until the early part of the following September, then returned to San Francisco, where, on September 5, 1920, he re-entered the army, being attached to the aviation branch of the service. After spending a few days in San Francisco, he again went to Reno for two weeks, then returned to San Francisco and obtained a leave of absence for 30 days, which time he spent visiting in Reno and San Francisco. In October, 1920, he was assigned to duty at Riverside, Cal., was afterwards tranferred to Marsh Field, and from there to San Antonio, Tex., and then to Hampton, Va. In September, 1921, he was transferred back to San Francisco. Later, the exact date not appearing, but apparently in July, 1923, he was sent to the Panama Canal Zone, where he remained until December, 1923. He was then ordered back to the Presidio, San Francisco, on account of an impaired condition of one eye, and was assigned to domestic duty for one year.

This action was commenced on November 22, 1923, one month prior to his arrival from Panama. At the time, Benton testified in support of this motion he had been living for about two months with his wife and two children at the Presidio, occupying a house maintained by the government on the military reservation. He testified that during his entire service in the army he had always lived in homes maintained by the government; that he had not intended to and did not in fact establish a residence in San Francisco, or any other place except Shasta county; that he had never given up his residence there, had always regarded that county as his residence, and that he intended to return there to enter business in the event that he was invalidated from further military service; that he had never at any time registered as a voter. It further appears from the record before us that the estate of defendant's father, at the time said motion was heard, was pending settlement in Shasta county, and that it was the owner of certain valuable timber lands, including a millsite, in that county, in which these defendants were interested. In reference to the value and extent of those timber holdings, plaintiff alleges in his complaint that a purchaser agreed to pay the sum of $30,000 for certain timber and water rights thereof. Benton further testified that he had been "brought up" in

the timber, and timber business, and knew something of forestation, and that if he were compelled to retire from the army he intended, as above stated, to return immediately to Shasta county to follow that business. Benton's mother and brother were also, at the time of the commencement of this action, residents of Shasta county, and had been so for many years.

[1, 2] We are of the opinion that the evidence above set forth abundantly sustains the order appealed from. It is well settled that the domicile of a person is in no way affected by his enlistment in the civil, military, or naval service of his country; and he does not thereby abandon or lose his domicile which he had when he entered the service, nor does he acquire one at the place where he serves. 9 R. C. L. 551; Stewart v. Kyser, 105 Cal. 459, 39 P. 19; People ex rel. Budd v. Holden, 28 Cal. 124; Estate of Gordon, 142 Cal. 125, 75 P. 672; Percy v. Percy, 188 Cal. 768, 207 P. 369. True, the fact of his being on military duty does not preclude him, if he so desires, from establishing residence where he is stationed (Percy v. Percy, supra); but the uncontradicted evidence here is that such was not Benton's desire—that he never had any intention of doing so.

[3] The question of whether a person has changed his residence from one place to another must depend largely upon his intention, and that intention is often manifested by the purpose that impelled him in taking up a new place of abode. Whenever the question of the intention of a person is at issue, it may be proved by the direct testimony of such person whether he is a party to the action or not. Gilmour v. North Pasadena Land Co., 178 Cal. 6, 171 P. 1066; Horton v. Winbigler, 175 Cal. 149, 165 P. 423; Runo v. Williams, 162 Cal. 444, 122 P. 1082; Byrne v. Reed, 75 Cal. 277, 17 P. 201.

[4] The testimony given by Benton, to the effect that he never intended to abandon Shasta county as his place of residence, is undisputed, and it is likewise uncontradicted that he did not, of his own volition, select any particular military station as a place of abode, but that he was required to live in those different places temporarily, under military orders which were subject to change at any time, and which were, in fact, changed several times so as to transfer him from one military station to another. Benton knew better than any other person whether he had established a residence at any other place than Shasta county, for he knew or must be assumed to have known what his intentions were with respect to becoming or not becoming a resident in a legal sense of the place to which he moved. The fact that he "lived" in San Francisco did not by any means prove that he was a resident thereof. A person may "live" at a place and still not be a resident thereof in the legal sense of that term. O'Brien v. O'Brien, 16 Cal. App. 103, 116 P. 692; McKune v. McKune, 48 Cal. App. 204, 191 P. 958. And in this connection it may be added that Benton's own affidavit, in which he stated that he was a resident of Shasta county, must be considered in corroboration of his oral testimony because it was the statement of a probative fact to which he was qualified to testify. O'Brien v. O'Brien, supra.

[5] The two points developed by the counter-showing of appellant before the trial court, and upon which he mainly relies as proof to establish the fact that Benton was not a resident of Shasta county, were that four years prior to the commencement of this action Benton joined a fraternal society in San Francisco, and in doing so stated in his application for admission thereto that his residence was in San Francisco; and secondly, that in June, 1923, prior to his departure for Panama, and approximately five months before this action was filed, he signed a power of attorney, prepared by his attorney, containing the recital "I, John W. Benton, of the city and county of San Francisco. * * *" Aside from the question of the remoteness of these transactions from the time this action was commenced, which, we think, must be taken into consideration, the record shows that these two matters were fully and evidently satisfactorily explained to the trial court. In reference to the application for admission to said society, Benton testified that he told his friend who prepared and sponsored his application that he was not a resident of San Francisco, but that his friend advised him that it was "merely a technicality on jurisdiction," and would have nothing to do with his residence; and, regarding the recital in the power of attorney, it was proved that the same was inserted by the attorney who prepared the document, without instructions or suggestion from Benton in that regard; and, moreover, the recital relied on was not a declaration that Benton was a resident of San Francisco, its terms fairly indicating that it was intended merely to designate the city in which Benton was living at the time said document was prepared and signed.

[6, 7] The counter affidavit of appellant, to the effect that Benton was a resident of the city and county of San Francisco and had no place of residence in Shasta county, was of little value, for the reason that the bare statement of a plaintiff or of a third party as to a defendant's residence, no matter how unqualifiedly made, is but a conclusion, the affiant knowing nothing of the defendant's intentions with respect to the establishment of his place of residence. O'Brien v. O'Brien, supra; Bernou v. Bernou, 15 Cal. App. 341, 114 P. 1000. This rule applies with equal force against the affidavit made by Kate L. Benton as to her son's residence. The fact that Benton did not register to vote in Shasta county is not important. It will be noted that

he never registered to vote anywhere. The matter of voting was a right which he might, or might not, exercise as he saw fit. Estate of Gordon, 142 Cal. 129, 75 P. 672.

[8] In any event, the matters relied upon by appellant as furnishing reasons for holding that Benton was a resident of San Francisco do no more than raise a conflict in the evidence upon the question at issue, which conflict was one to be resolved by the court in which the action was instituted and to which the motion was addressed, and therefore the finding of the trial court thereon, according to the well-established rule, will not be disturbed. Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521; Bradley v. Davis, 156 Cal. 267, 104 P. 302; Bowers v. Modoc Land Co., 117 Cal. 50, 48 P. 979; Lakeshore Cattle Co. v. Modoc Land Co., 108 Cal. 261, 41 P. 472.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 571

JOHNSON v. BENTON et al. (Civ. 5113.)

(District Court of Appeal, First District, Division 1, California. July 13, 1925.)

1. Brokers ⟸92—Broker incurring legal expenses in sale of lands not personally liable therefor.

Where attorneys dealt with broker as agent of other defendants to sell their lands, and knew he had no personal interest in lands, and joined him in his capacity as agent only in suit for attorney's fees, he could not be charged with personal liability.

2. Principal and agent ⟸188—Party sued as agent not personally liable under Code, not properly joined as defendant.

In action to recover attorney's fees, where one of defendants was sued as agent of other defendants, and did not come under provision of Civ. Code, § 2343, making an agent personally liable in enumerated instances, he was improperly joined as a defendant.

3. Venue ⟸68—Finding of trial court that agent was joined to have trial in his jurisdiction justified by evidence.

Where plaintiff joined a known agent as defendant, who under allegations of complaint was not personally liable and resided in a different county than other defendants, the trial court was justified in finding that agent was joined merely for purpose of having trial in jurisdiction of his residence.

4. Venue ⟸22(3) — That nominal defendant was joined to prevent trial at residence of real defendants may be shown on motion for change of venue.

Real defendants, on motion for change of venue, may show that there is no cause of action against a codefendant, but that he was joined for fraudulent purpose of preventing them from obtaining trial at their place of residence, without necessity of demurrer and hearing thereon in county of codefendant's residence.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Action by E. R. Johnson against Thomas H. Benton, as executor of the estate of T. H. Benton, deceased, and others, and Robert Johnston. From order granting defendants' motion for change of venue in an action for attorney's fees, plaintiff and defendant Robert Johnston appeal. Affirmed.

See, also, 239 P. 60.

Water E. Hettman and Simeon E. Sheffey, both of San Francisco, for appellant Johnson.

Wallace & Ames, of San Francisco, for appellant Johnston.

Dozier, Kimball & Dozier, of San Francisco, for respondents.

KNIGHT, J. An action to recover the sum of $5,000 alleged to be due upon an assigned claim for attorney's fees. All defendants excepting Robert Johnston joined in a motion for change of place of trial from the city and county of San Francisco to the county of Shasta, upon the ground that they were residents of the latter county, and that the remaining defendant, Robert Johnston, had been improperly joined as a defendant solely for the purpose of having the action tried in the jurisdiction wherein Johnston resided. In this connection it is averred by the moving defendants that no cause of action ever existed in favor of plaintiff's assignors as against their codefendant Johnston, and that no judgment could be rendered against him in said action. The evidence offered in support of said motion consisted of certain affidavits and of the testimony of the defendant John W. Benton, given in the form of a deposition. The motion was granted, and two separate appeals were taken and are being separately presented, one by plaintiff, E. R. Johnson and the other by the defendant Robert Johnston.

It appears that on April 6, 1923, the defendants Kate, Harry L., and John W. Benton entered into a written contract with the firm of Johnston & Criteser, real estate brokers, of which firm the said defendant Robert Johnston was a partner, for the purpose of effecting a sale of certain timber lands in Shasta county in which the Bentons were interested. Suit was afterward brought on said contract in the superior court of the city and county of San Francisco by said Robert Johnston as assignee against the parties to that contract to recover real estate commissions. The place of trial of that action was, upon motion of the defendants, changed to said county of Shasta, upon the ground of residence of said defendants. The present ac-

tion was commenced to recover fees claimed to be due for legal services rendered in connection with negotiations carried on for the sale of said timber lands, under said real estate contract. Plaintiff's complaint is in two counts: One is based upon an express agreement to pay the sum of $5,000, and the other upon a quantum meruit. In both counts defendant Johnston is sued, not as a principal, but as the "agent and employee" of the Bentons, the complaint in this respect alleging, after setting forth that plaintiff's assignors are practicing attorneys at law, and that the Bentons, as heirs at law of T. H. Benton, deceased, are the owners of said tract of land:

"That Robert Johnston is a real estate broker actively engaged in such business in the city and county of San Francisco, state of California, and at all the times herein mentioned *was the agent and employee of the other defendants above named for the purpose of selling and disposing of the above described real estate.*" (Italics ours.)

[1, 2] The evidence adduced at the hearing of the motion shows without conflict that plaintiff's assignors knew that Johnston had no personal interest in the title to said property, and was acting merely in the capacity of an agent for the sale thereof; accordingly, plaintiff's assignors dealt with and treated him as an agent and not as a principal, and, as already pointed out, he was sued only as an agent. That being so, he could not, under well-settled law, be charged with a personal liability. Tevis v. Savage, 130 Cal. 411, 62 P. 611; Jewell v. Colonial Theater Co., 12 Cal. App. 681, 108 P. 527; Hall v. Crandall, 29 Cal. 568, 89 Am. Dec. 64. True, an agent may be held personally liable to a third party when he fails to make known his principal, or contracts in his own name, or where he exceeds his authority as such agent; but otherwise it is the contract of his principal, upon which he cannot be held personally liable. Story on Agency, §§ 261, 263, 264, 267; Bogart v. Crosby & Van Haren, 80 Cal. 195, 22 P. 84. Or, to state the rule in the language of the code section:

"One who assumes to act as an agent is responsible to third persons as a principal for his acts in the course of his agency, in any of the following cases, and in no others: 1. When, with his consent, credit is given to him personally in a transaction; 2. When he enters into a written contract in the name of his principal, without believing, in good faith, that he has authority to do so; or, 3. When his acts are wrongful in their nature." Civ. Code, § 2343.

[3] The complaint alleges none of those contingencies upon which the personal liability of an agent can rest, and therefore, as agent, Johnston was improperly joined as a party defendant. According to the testimony of defendant John W. Benton, it was clearly understood between plaintiff's assignors, Johnston and himself, that Johnston had no authority whatsoever to incur any liability against any of the Bentons for the payment of attorney's fees. If, despite such understanding, plaintiff's assignors believed that the Bentons were liable for attorney's fees incurred by their agent, the action should have been confined to the Bentons without joining the agent. Clearly, under such circumstances, the Bentons would have been entitled to have the action tried at the place of their residence. The fact that plaintiff did not pursue that course, but instead joined with them as a party defendant the agent, who was a resident of another jurisdiction, and against whom, under the allegations of the complaint, no personal liability existed, was sufficient to justify the trial court in holding that the agent was joined as a defendant merely for the purpose of having the action tried in the jurisdiction of his residence. The ultimate liability of the defendants Benton, under any theory, for the payment of attorney's fees is, of course, not a question that has been or can be determined in this proceeding. Nor are we at present concerned with the proposition of whether or not Johnston, as principal, is liable for attorney's fees. We are here dealing with him as agent, in which capacity he was sued, and our problem has not included the question of his liability as principal.

[4] The defendant Johnston, in support of his appeal, does not deny the claim advanced by his coappellants that as agent he is not liable, or that he was improperly joined as a party defendant; but he contends that, inasmuch as he can be formally dismissed upon that ground only by an order sustaining demurrer to the complaint, he is entitled to have that question passed upon in the jurisdiction of his residence. In answer thereto it is sufficient to say that the course adopted by respondents Benton in demanding a change of venue has been approved in several cases, which hold that the real defendants may show, by affidavits or otherwise, that plaintiff has actually no cause of action against one of the parties who was made nominally a defendant simply for the fraudulent purpose of depriving the real defendants of their right to have the action tried in the place of their residence. Sourbis v. Rhoads, 50 Cal. App. 98, 194 P. 521; Karst v. Seller, 45 Cal. App. 623, 188 P. 298; Lachman v. Berry Growers' Ass'n, 58 Cal. App. 748, 209 P. 379.

The moving papers of the respondents Benton were legally sufficient for the purposes intended, and we are of the opinion that the evidence, of which the deposition of John W. Benton must be considered a part (Henderson v. Cohen, 10 Cal. App. 580, 102 P. 826), was ample, in view of the allegations of the complaint, to sustain the ruling of the trial court in granting the motion.

The order appealed from is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

73 Cal. App. 687

SCHROEDER et al. v. SUPERIOR COURT OF CALIFORNIA IN AND FOR ALAMEDA COUNTY et al. (Civ. 5347.)

(District Court of Appeal, First District, Division 1, California. July 22, 1925. Rehearing Denied Aug. 21, 1925.)

1. Appeal and error ⟹71(4)—Order appointing receiver, held final appealable order.

An order appointing a receiver to take possession of partnership property pending accounting and until dissolution, with power to dispose of property under direction of the court and render accounting thereof, after his giving a bond, *held* to be a final appealable order.

2. Judgment ⟹297—Mere recital of inadvertence in amended judgment does not warrant review by trial court.

Where amended judgment recited that, through inadvertence, there was inserted in the record of the judgment a direction and order that a receiver be appointed, such recital cannot justify review by the court of its own judicial act without showing to justify it.

3. Appeal and error ⟹440—Judgment cannot be corrected after notice of appeal.

Judgment cannot be corrected on grounds specified in Code Civ. Proc. §§ 663, 663a, after appeal, since during pendency of the appeal court loses all jurisdiction except to correct judgment to make it speak truth.

4. Judgment ⟹273(3)—Judicial error cannot be corrected by judgment nunc pro tunc after appeal.

Trial court cannot correct judicial errors by judgment nunc pro tunc, entered after notice of appeal but as of date before, since the object of such judgment is only to supply matters of evidence and correct clerical misprisions.

Application by Dorothy Schroeder and another for writ of prohibition to be directed to the Superior Court of California in and for the County of Alameda and James G. Quinn, the Judge thereof, to prevent the enforcement of a judgment. Writ granted.

Stanley R. Sterne, Richard Liebman, and Frank M. Carr, all of Oakland, for petitioners.

L. D. Manning and W. E. Harvent, both of Oakland, for respondents.

TYLER, P. J. Petition for writ of prohibition. It appears therefrom that on July 31, 1924, there was filed in the Superior Court in and for the county of Alameda a complaint entitled Harry Brown v. Dorothy Schroeder and Herman Christ, petitioners herein. The action was one for the dissolution of a partnership and an accounting. On August 7th following, both defendants filed their answer thereto. The cause came on regularly for trial before respondent Hon. James G. Quinn, as judge of said superior court, and thereafter on the 25th day of February, 1925, the said court made and filed its findings of fact and judgment therein.

The findings, among other things, recited "that the appointment of a receiver is not necessary." Notwithstanding this finding the judgment recited that an accounting was necessary, and it ordered "that John Meillette be and he is hereby appointed a receiver, to take and hold possession of the partnership property pending the accounting and until the partnership business is wound up on dissolution, with power to liquidate and dispose of said business under the order and direction of the court and to render an accounting thereof, on giving a bond in the sum of $1,000."

Pursuant to these terms of the judgment, Meillette, on the same day the judgment was rendered, gave and filed his bond and oath and was duly appointed receiver. He immediately demanded of the defendants possession of the property, and his demand was refused. He thereupon prayed for an order of the court directing the defendants to deliver the same. The order was granted, and they were directed to turn over the property to the receiver or show cause why they should not be punished for contempt in failing so to do. On February 26, 1925, the day following, both defendants served and filed their notices of appeal from the judgment, and on February 28th following they likewise filed and served their notices of intention to move for a new trial. These motions were denied. Thereafter, and on March 4, 1925, the plaintiff Harry Brown filed a notice of motion to vacate the interlocutory judgment and enter a different judgment, upon the ground that the interlocutory decree made and given was not consistent with or supported by the findings. This motion came on for hearing, and the defendants interposed the objection that the court was without jurisdiction to entertain the same by reason of the appeal. The objection was overruled, and the court heard, and on April 25, 1925, granted, the motion. An appeal was taken from this order. On May 4th following there was filed an order correcting the judgment as entered, which order recited, among other things, that the interlocutory decree theretofore entered was not a correct memorial of the judgment and order rendered in so far as the appointment of the receiver was concerned, and it further recited that "plaintiff is entitled to the possession of the partnership property pending the accounting and until the partnership business is wound up on dissolution, with power to liquidate and dispose of the business, under the order and direction of the court and to render an accounting thereof. * * *" This judgment was ordered entered nunc pro tunc as of February 25, 1925.

Pursuant to this attempted amendment the court, on the 13th day of May following, issued a writ of possession, directing the sheriff to "place the said plaintiff Harry Brown in quiet and peaceable possession of the premises said judgment describes," etc. This writ was delivered to the sheriff for execution, whereupon the present proceeding was instituted.

It is here claimed that in making and filing the orders of May 4, 1925, the said judge of said superior court acted in excess of his jurisdiction, and did not regularly pursue his authority in this: that at the time said orders and purported judgment, as amended, were made, an appeal had been taken and perfected in the Supreme Court, and all matters relating to said judgment had been removed from the jurisdiction of said superior court. That said order and judgment and each of them were further in excess of the court's jurisdiction in that no motion was ever made by the plaintiff upon the ground that such judgment was inadvertently made, nor was such judgment in fact inadvertently made; that upon the hearing of plaintiffs' motion no evidence whatsoever was introduced showing any inadvertence in the entry of the judgment, but on the contrary, it appeared that the original judgment was not inadvertently made, for the reason that after its rendition the court cited defendant Christ to show cause why he should not be punished for contempt in failing to admit the receiver into possession as directed by that portion of the judgment attempted to be set aside. We are of the opinion that petitioners are correct in their contention.

[1] The judgment of February 25, 1925, and from which defendants appealed, was a final appealable order. Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. By the filing of the notice of appeal the trial court lost jurisdiction of the subject-matter of the judgment appealed from, including all questions going to the validity or correctness of such judgment. Baker v. Slocum, 49 Cal. App. 56, 192 P. 551. It is true courts have power at all times to allow amendments to judgments for the purpose of having the judgment as entered express that which was rendered, and this regardless of the fact that an appeal has been perfected, but it is only where the correction is made so as to have the judgment speak the truth that the jurisdiction to make the correction is retained. Jackson v. Dolan, 58 Cal. App. 372, 208 P. 315.

[2] Here the judgment attempted to be altered was signed by the judge, and is the exact judgment ordered to be entered. While the purported amendment recited that through inadvertence there was inserted in the record of the judgment a direction and order that a receiver be appointed, such recital cannot justify a review by the court of its own judicial act without a showing to justify it. Dolan v. Superior Court, 47 Cal. App. 240, 190 P. 469.

[3] The record here shows conclusively that the judgment sought to be corrected was not made through inadvertence, but was the exact judgment rendered. The receiver was expressly appointed by the court and his bond approved. He entered upon his duties, and the court through contempt proceedings sought to have defendants turn over the property in litigation to him. The motion of the plaintiff to have the judgment corrected upon grounds specified in sections 663 and 663a, Code of Civil Procedure, after the appeal was taken, came too late. Pending the appeal the Superior Court had lost all power to amend or correct its judgment except to make it speak the truth. Vosburg v. Vosburg, 137 Cal. 493, 496, 70 P. 473; Parkside Realty Co. v. MacDonald, 167 Cal. 342, 139 P. 805; Takekawa v. Hole, 170 Cal. 323, 149 P. 593. Nor does the fact that the amendment was ordered to be entered nunc pro tunc as of February 25, 1925, alter the situation. The object of entering judgments and decrees as of some previous date is to supply matters of evidence and to rectify clerical misprisions, but not to enable the court to correct judicial errors.

[4] If the court has not rendered a judgment that it might or should have rendered, or if it has rendered an imperfect or improper one, it has no power to remedy such errors by ordering a judgment nunc pro tunc of a proper or desired judgment. Estate of Potter, 141 Cal. 426, 75 P. 850.

The amendment here attempted to be made is one governed by the limitation and prohibition of this principle. It was an entirely different judgment, both in form and effect, to the one originally entered, and it can in no manner be viewed as a correction.

For the reasons given, it is ordered and adjudged that the writ issue prohibiting said superior court and the judge thereof as prayed for in the petition.

We concur: KNIGHT, J.; CASHIN, J.

73 Cal. App. 704

NELSON v. YONGE et al. (Civ. 4015.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1925.)

1. Bailment ⟸18(2) — Money advanced for freight charges and tires not lien on automobile.

Party advancing money for freight charges and purchasing tires to be placed upon automobile does not have a lien thereon under Civ. Code, § 3051.

2. Replevin ⟸96—Value of property estimated as of day of trial.

In action for recovery of automobile alleged to have been converted, jury must assess the value of the property as of the day of trial.

3. Appeal and error ⟸1172(3)—Error as to only one issue does not necessitate new trial of entire cause.

Where in action for recovery of personal property the trial court erred in instructing the jury to assess the value as of the date of demand therefor, the trial of the entire cause will not be required, since the error only affected one issue.

Appeal from Superior Court, Orange County; Z. B. West, Judge.

Action by Clinton Nelson against O. W. Yonge. From a judgment for plaintiff, defendant appeals. Reversed and remanded, with directions.

Alex P. Nelson, of Santa Ana, for appellant.

John A. Harvey and S. M. Davis, both of Santa Ana, for respondent.

FINLAYSON, P. J. This is an action to recover possession of an automobile, or its value in case a delivery cannot be had, together with damages for its unlawful detention. Defendant claimed to have a lien upon the car, dependent upon his possession, and for that reason he asserted a right to retain it. The case was tried before a jury, which rendered a verdict in favor of plaintiff for the possession of the property, assessed his damages for the unlawful detention at $500, and found the value of the automobile, in case a delivery thereof to him could not be had, to be $1,000. From a judgment entered upon this verdict the defendant has appealed. The automobile was in defendant's possession at the time of the trial.

Some time prior to the month of August, 1920, plaintiff, who resides in Nebraska, shipped the automobile to Long Beach, in this state, where it was delivered into the possession of one John O'Connor. O'Connor, an old acquaintance, paid the freight for plaintiff as well as certain other charges. The aggregate of the sums so advanced by O'Connor for plaintiff amounted to $196.68. Defendant, a salesman engaged in selling automobiles at Santa Ana, in this state, wrote plaintiff a letter telling the latter that, if agreeable he would endeavor to find for him a purchaser of the car. Plaintiff mailed to defendant a reply in which he assented to the latter's offer to sell the car. To effect this purpose it was necessary that defendant should have the car in his possession. O'Connor refused to deliver it to defendant unless the latter would pay him the amount which he had advanced for plaintiff. Defendant accordingly paid to O'Connor $196.68 about the 10th of December, 1920, and immediately thereafter received possession of the car for the purpose of selling it for plaintiff. About this time defendant, claiming to have authority therefor from plaintiff, purchased at retail certain new tires and caused them to be placed upon the wheels in lieu of the old tires which were upon the vehicle when it came into his possession. He claims to have paid for these tires the sum of $230. It seems that defendant, instead of seriously endeavoring to find a purchaser for plaintiff as he had agreed, used the car in his own business. Wherefore plaintiff, on or about May 31, 1921, through an authorized agent, demanded possession of his property. Defendant, claiming that he was entitled to a lien for his expenditures under section 3051 of the Civil Code, refused to deliver the car to plaintiff unless he were paid the amount for which he claimed to have a lien. Plaintiff's agent, when he made the demand for possession, tendered defendant the sum of $250, which the latter refused, asserting that the amount tendered was insufficient to satisfy his lien. The court instructed the jury that the value of the car, for the purpose of an alternative money judgment in the event that delivery could not be made, is the value which it possessed at the time when plaintiff made his demand, and that they should find the value as of that date. The action was tried in March, 1922.

Appellant claims (1) that, under the provisions of the code section above mentioned, he has a lien on the automobile to the extent of $426.68, the aggregate of the two sums above mentioned, and that therefore the verdict is unsupported by the evidence; (2) that in actions of this class the value of the property, to be paid to the successful party in case delivery cannot be had, should be determined as of the date of the trial; and (3) that if the value be determined as of that date, the evidence is insufficient to support that part of the verdict which finds the value of the automobile to be $1,000. The part of section 3051 upon which appellant relies to sustain his claim to a lien reads:

"Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement,

safekeeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service; a person who makes, alters, or repairs any article of personal property, at the request of the owner, or legal possessor of the property, has a lien on the same for his reasonable charges for the balance due for such work done and material furnished, and may retain possession of the same until the charges are paid."

[1] It will be noticed that so much of this code section as is invoked by appellant deals with two classes of lienholders. The first class includes those who render a service to the owner "by labor or skill, employed for the protection, improvement, safekeeping or carriage" of the personal property lawfully in the possession of the lien claimant. The lien given by this part of the section is limited to a lien for compensation due "for labor or skill." Johnson v. Perry, 53 Cal. 353. It is manifest that neither of the sums for which appellant claims a lien is within the purview of this part of the section. In paying O'Connor the $196.68 to reimburse the latter for his outlays, and likewise in purchasing the new tires for the sum of $230 and in causing them to be adjusted to the wheels of the automobile, appellant did not himself perform any service of "labor or skill." The money paid O'Connor was not even paid by appellant "while lawfully in possession of the car." It was paid before appellant acquired possession. The other class of lienors provided for in the code provisions invoked by appellant are those who come within the second clause, namely, those who make, alter, or repair any article of personal property at the request of the owner or legal possessor of the property. This clause was a part of section 3052 prior to 1907. With the exception that it extends the right to a lien to any person who makes, alters, or repairs an article of personal property at the request of the owner or legal possessor, it "simply declares the common-law rule as to the right of a mechanic or artisan *performing labor* on an article of personal property to a lien thereon dependent on possession for payment of his services." Quist v. Sandman, 154 Cal. 755, 99 P. 207. (Italics ours.) Continuing, the court in the case last cited says that—

"While the Code has extended the right to a lien in general to all persons performing the prescribed labor concerning an article of personal property at the request of the owner or legal possessor thereof, it is in other respects but declaratory of the common-law rule and the right to a lien must be governed by the same rules which prevailed at common law. It can only be asserted under the same circumstances and conditions as it could be asserted at common law and the right to do so must be interpreted in accordance with common-law principles."

There is no evidence that appellant performed the labor of installing the tires, and we doubt whether it correctly can be said that he acquired a lien for their value as one who has made, altered, or repaired an article of personal property. At common law the lien was given to one who bestows labor upon an article of personal property. The person performing such labor could rightfully retain the article until he should be reimbursed for his labor and for the reasonable value of such material, if any, as may have been supplied by him, and upon which he bestowed labor and skill. Or, as it is expressed in section 3051, he has a lien for the "work done *and* materials furnished." Appellant would read the section as though it gave a lien for "work done *or* materials furnished." However, we do not find it necessary to decide whether appellant acquired a lien for the reasonable value of the tires purchased by him. It is quite obvious that, as to the item of $196.68 which he paid to O'Connor, he cannot be regarded as one who has made, altered, or repaired an article of personal property. Therefore, even if we should concede that he acquired a lien for the reasonable value of the tires, nevertheless, since the amount thereof, $230, was less than the sum tendered to him by respondent's agent at the time when the latter made his demand for possession, he was deprived by that tender of all right to a lien. Miller v. Price, 4 Cal. Unrep. 983, 39 P. 781; Civ. Code, § 2905. We conclude, therefore, that appellant had no lien when the action was commenced which entitled him to retain possession of respondent's automobile.

[2] The court erred in giving the instruction to the effect that the value of the automobile should be determined as of the date when respondent made his demand for its return—May 31, 1920. There is a marked diversity of opinion respecting the time when the value of the property sued for in a replevin action should be determined for the purpose of fixing the amount of the alternative money judgment. In some jurisdictions the courts have adopted the view that in such actions the amount is to be measured by the value of the property at the time it was taken if the original taking was wrongful, or at the time of the demand for and the refusal of possession if the property originally came rightfully into the defendant's possession. These decisions hold that, for the purpose of ascertaining such value, the rule which obtains in actions of trover to recover damages for a conversion of the property should be followed. In other jurisdictions, and California is one of them, the courts have adopted what seems to us to be the more logical and reasonable view, namely, that where, in an action for replevin, the plaintiff recovers a judgment for the property, or for its value in case delivery cannot

be had, the value should be that which the property had at the date of the trial. These decisions proceed upon the theory that, the money being but a substitute for the property, the amount of the alternative money judgment should be fixed by ascertaining it as of the date nearest to the time when the property would be delivered. This rule was adopted by our Supreme Court in Phillips v. Sutherland, 2 Cal. Unrep. 241, 2 P. 32, the court there saying:

"The money value is a substitute for the property, and the amount can be approximately fixed by ascertaining it as of the date (when the value can be judicially determined) nearest to the time when the property would be delivered."

The rationale of the rule is well stated by the New York Court of Appeals in Allen v. Fox, 51 N. Y. 562, 10 Am. Rep. 641:

"In the action of replevin, under the Code, the jury are required to assess the value of the property, and damages for its detention. The value here intended is the value at the time of the trial. In case the prevailing party can obtain a delivery of the property, he must take it as it then is; if he cannot obtain such delivery, then the value is intended as a substitute and precise equivalent of the property. The damages for detention are the same, whether the party recover the property or its value. Now, suppose the property has been badly depreciated, intermediate the wrongful taking and the trial, still the prevailing party is obliged to take it if he can obtain it, and he is indemnified for the depreciation by the damages assessed to him. But he recovers the same damages if he cannot obtain the property and is obliged to take its value, and then if the value has been assessed as it existed at the time of the taking, before the depreciation, it is clear that he gets more than an indemnity. Hence there is no way of administering this law, except by holding that the value required to be assessed by the jury means the value at the time of the trial."

See, also, Luedde v. Hooper, 95 Tex. 172, 66 S. W. 55; Chemical Co. v. Nickells, 66 Mo. App. 686; Chapman v. Kerr, 80 Mo. 158; O'Meara v. North American Min. Co., 2 Nev. 112, 117, 126. So far as we are advised the rule announced by our Supreme Court in Phillips v. Sutherland, supra, has never been questioned by that court. Page v. Fowler, 39 Cal. 412, 2 Am. Rep. 462, is not in point. In that case the successful party, the defendant, was entitled to damages for conversion, the property having been disposed of by the plaintiff shortly after it had been taken by him under a writ of replevin. There the court was dealing with a rule of damages. Nor is Hartnett v. Wilson, 31 Cal. App. 678, 161 P. 281, in point. In that case the District Court of Appeal based its ruling to a large extent upon a stipulation or concession made by the appellants in the course of the trial. In Tully v. Harloe, 35 Cal. 302, 95 Am. Dec. 102, the Supreme Court affirmed the judgment without adverting to appellant's claim that the value of the property should have been determined as of the date of the wrongful taking. So far as we are advised, these are the only decisions in this state which have any bearing upon the question now under consideration, and of these cases Phillips v. Sutherland is the only one which is directly in point. Not only are we satisfied that the doctrine of that case is supported by cogent reasoning, but it is, moreover, binding upon us here.

Respondent, who took the witness stand in his own behalf, testified that the value of the car on December 10, 1920, the day when it came into appellant's possession, was $2,000, and that at the date of the trial, March 28, 1922, its value was but $600. No witness placed the value of the automobile at more than $600 at the date of the trial. It is obvious that the jury, following the court's erroneous instruction to ascertain the value of the property as of the date of the demand therefor, fixed a value which has no basis in the evidence under the rule announced in Phillips v. Sutherland, supra.

[3] The only substantial errors which we find are those which are involved in the improper instruction above mentioned, and in the unsupported finding that the value of the property is $1,000. Since these only affect one issue—the issue as to value of the property for the purpose of ascertaining the amount of the alternative money judgment—a retrial of the entire cause will not be required. Pearsall v. Henry, 153 Cal. 330, 95 P. 154, 159.

The judgment is reversed and the cause remanded, with directions to the trial court to retry the issue regarding the value of the automobile, for the purpose of ascertaining the amount of the alternative money judgment to which plaintiff is entitled if for any reason a delivery of the property to him cannot be had.

We concur: WORKS, J.; CRAIG, J.

73 Cal. App. 700

GREEN v. DARLING. (Civ. 4001.)

(District Court of Appeal, Second District, Division 2, California. July 23, 1925.)

1. **Appeal and error ⟸931(3)—Findings being waived, all issues made by pleadings presumed to have been found for successful party.**

Findings having been waived, all issues made by pleadings are presumed to have been found in favor of successful party.

2. **Pleading ⟸8(2)—Allegation that parties to agreement rescinded held statement of ultimate fact.**

Where complaint alleged contract of purchase of trailer in hæc verba, with additional fact that it was returned to seller and demand made by buyer for moneys paid on account, allegation that parties to agreement rescinded was not conclusion but statement of ultimate fact; "rescission" being a fact.

3. **Sales ⟸92—On rescission of sale of trailer, seller was required to return money received.**

Where minds of parties met on proposition that they would rescind sale of trailer, it was unnecessary that seller stipulate to return money received, law requiring him to do this as consequence of having agreed that contract be abrogated.

4. **Pleading ⟸205(2)—Objection that essential fact appears as conclusion only not reached by general demurrer.**

Objection that essential fact appears in pleading only in form of conclusion of law cannot be reached by general demurrer.

5. **Appeal and error ⟸192(1)—Criticism of pleading as stating essential fact in form of conclusion not first urged on appeal.**

Criticism of pleading as stating essential fact in form of conclusion comes too late when raised for first time on appeal.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Action by S. B. Green against Frank L. Darling. Judgment for plaintiff, and defendant appeals. Affirmed.

Denio & Hart and Swaffield & Swaffield, all of Long Beach, for appellant.

G. M. Spicer and Herbert Moore, both of Long Beach, for respondent.

CRAIG, J. The complaint in this action alleged that on September 21, 1920, the defendant was engaged in the business of selling automobile trucks and automobile trailers in the city of Long Beach, Cal.; that on said date the defendant, through his authorized agent, entered into a contract in writing with the plaintiff, by the terms of which the defendant agreed to sell to plaintiff one Utility trailer, tires and body. Said complaint consisted of three separate causes of action in each of which the alleged written instrument was embraced. It was further alleged that on or about October 5, 1920, the parties supplemented said contract by a further instrument in writing; that the trailer was delivered to the plaintiff, and that he began to use the same, but that it commenced to break down; that the defendant agreed to repair the same, but that it continued breaking down on an average of twice a week, and that the plaintiff finally returned said vehicle to the defendant, notified him that it was not suited to plaintiff's business, and had not given satisfaction as it was guaranteed to do, and demanded the return of $1,024.40 which had been paid on account of the purchase price thereof; that no part of said sum had been refunded, and that the same was due and owing from the defendant to the plaintiff. In the second count the principal allegations of the first count were repeated, with a further allegation that said trailer had become wholly useless; that it was returned; that the consideration for the execution of the contract failed in part before being rendered to plaintiff. In said second count it is also averred that "said contract mentioned in paragraphs 2 and 3 was rescinded by plaintiff on or about the 17th day of December, 1920; that plaintiff has returned to defendant the Utility trailer and everything of value received by reason of said contract." In the third count it is averred that "the parties hereto mutually agreed to rescind said contract contained in paragraphs 2 and 3"; it is then alleged that said trailer and everything of value received from the defendant was returned to him, and said amount demanded. In each of the last two counts it is alleged, as in the first, that the breaking of said vehicle was not the fault of the plaintiff.

No demurrer was filed by the defendant. He answered, admitting the execution of the contract, but denying that there was any warranty or guaranty, or that the trailer broke down, and denying that the consideration had failed; the defendant further denied that said parties mutually agreed to rescind, or that they did rescind, said contract.

The case went to trial before the court without a jury; findings were waived, and judgment was rendered for the plaintiff, specially reciting that "the contract mentioned in plaintiff's complaint was rescinded on the 17th day of December, 1921, and that the plaintiff do have and recover from the defendant" the amount demanded.

This appeal is brought up on the judgment roll alone, upon the sole contention that no count of said complaint states facts sufficient to constitute a cause of action. Appellant cites authorities to support his claim that the extent of a warranty is limited to the language of the contract, and that the buyer in bringing suit upon an alleged warranty must aver that he relied thereon in order to main-

tain an action for breach. It is further contended that the complaint did not sufficiently allege a mutual rescission, but that the allegations thereof constituted "purely a conclusion of law, unless the terms of the agreement to rescind are alleged."

[1] If the contract was mutually rescinded, as found by the court below, and as alleged in the second count, and if the rescission was sufficiently pleaded by the plaintiff in said count, it must follow that it is immaterial whether or not the trailer was sold upon a warranty or was defective. If the parties in fact canceled their contract, and everything of value was returned to the defendant in pursuance of such cancellation, it would be his legal duty to refund whatever consideration he may have received therefor; and the judgment of the trial court should be affirmed. The plaintiff alleged that the parties mutually rescinded the contract, and that everything of value received from the defendant was returned to him; these allegations were denied by the defendant, but upon the introduction of oral and documentary evidence the court adjudged and decreed that the contract mentioned in plaintiff's complaint was rescinded—extinguished. Findings having been waived, all the issues made by the pleadings are presumed to have been found in favor of the successful party. Antonelle v. Board of C. H. Com'rs, 92 Cal. 228, 28 P. 270.

[2] The complaint having alleged the contract in hæc verba, together with the additional facts that the trailer was returned to defendant and demand made by the plaintiff for moneys paid on account, the allegation that the parties to the agreement rescinded was not a conclusion, but it was a statement of ultimate fact. "Rescission is a fact." Seanor v. McLaughlin, 165 Pa. 150, 30 A. 717, 32 L. R. A. 467; Reliance Life Ins. Co. v. Russell, 208 Ala. 559, 94 So. 748. No other terms of the contract of rescission need to have been made or alleged.

[3-5] If the minds of the parties met on the proposition that they would rescind, it was not necessary that the defendant stipulate to return to the plaintiff the money which he had received, for the law requires him to do this as a consequence of having agreed that the contract be abrogated; and to require more of the pleader would make it necessary that he plead the evidence rather than the ultimate fact. The objection that an essential fact appears in the pleading only in the form of a conclusion of law cannot be reached by general demurrer. Santa Barbara v. Eldred, 108 Cal. 294, 41 P. 410. In the instant case no demurrer was filed, and it is therefore even more apparent that this criticism of the complaint comes too late when raised for the first time on appeal.

The facts alleged in the second count are sufficient as a pleading for the purposes of the action in the absence of a special demurrer.

The judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

73 Cal. App. 627

DELANNOY et ux. v. QUETU et al.
(Civ. 4468.)

(District Court of Appeal, Second District, Division 2, California. July 16, 1925. Rehearing Denied Aug. 13, 1925. Hearing Denied by Supreme Court Sept. 10, 1925.)

1. Appeal and error ⟸931(1)—In reviewing record and sufficiency of evidence to support finding, evidence establishing correctness thereof accepted as true with inferences therefrom leading to same conclusion.

In reviewing record on appeal and in examining sufficiency of evidence to support questioned finding, District Court of Appeal must accept as true all evidence tending to establish correctness of finding as made, taking into account all inferences which might reasonably lead to same conclusion.

2. Trusts ⟸372(3) — Evidence held not to warrant finding that defendant caused corporation to convey ranch land without consideration.

Under allegations that defendant induced plaintiffs to emigrate from France to help pay off his ranch, agreeing to give them a one-third interest therein, evidence that defendant thereafter incorporated ranch, and corporation exchanged parts thereof for other lands, and thereafter conveyed land to grantee, who conveyed to defendant's sister, *held* not to warrant finding that defendant caused ranch to be disposed of without consideration.

3. Corporations ⟸684—Trial court not without jurisdiction because of statute requiring commencement of suits for receiverships in county where corporation had office and principal place of business.

Where plaintiffs were not stockholders of corporation which had no creditors, and suit was not commenced to effect dissolution, trial court was not without jurisdiction because of Code Civ. Proc. § 565, requiring suits for receiverships to be commenced in county where corporation maintained office and principal place of business.

4. Corporations ⟸684—Suit for receiver of foreign corporation held triable in county where corporation owned or was entitled to land.

In suit for accounting and receivership, where plaintiffs alleged that defendant induced them to emigrate from France to help pay ranch off, and thereafter incorporated it under law of foreign state, and caused corporation to transfer it without consideration, issues were properly triable under Code Civ. Proc. §

564, subd. 7, in any county where corporation was alleged to have owned or been entitled to land.

5. Receivers ⊂⊃16—Generally courts may appoint receivers to preserve property pendente lite.

Generally, courts have jurisdiction to appoint receivers to preserve assets pendente lite.

6. Trusts ⊂⊃372(3)—Claim, if any, of plaintiffs to ranch fully satisfied by conveyance to them of other lands.

Plaintiffs alleged that defendant induced them to emigrate from France to help pay off ranch for interest therein. *Held*, under evidence, that if plaintiffs had any legal claim in corporation organized to take over ranch, it was satisfied by conveyance to them of other lands.

7. Estoppel ⊂⊃75—Plaintiffs, by transferring stock, were divested of interest regardless of failure to have transfer entered on books, and estopped to claim title thereto.

Plaintiffs alleged that defendant induced them to emigrate from France to help pay off ranch for interest therein, and defendant thereafter incorporated ranch and caused corporation to convey it without consideration. *Held*, under evidence, and in view of Civ. Code, § 324, that, even if plaintiffs were owners of stock in ranch corporation, by transferring it, they were divested of interest regardless of failure to have transfer entered on corporation's books, and were effectively estopped from claiming any title in stock transferred.

8. Trusts ⊂⊃372(3)—Property, under evidence, not held by or in trust for corporation of which receiver or trustee might be appointed.

Plaintiffs alleged that defendant induced them to emigrate from France to help pay off ranch for interest therein, and that defendant thereafter incorporated ranch and caused corporation to transfer property without consideration. *Held*, under evidence, that, no irregularity in transfers having been established, none of the property was held by or in trust for corporation, of which receiver or trustee might be appointed.

9. Appeal and error ⊂⊃1071(1, 6)—Erroneous finding or failure to find not affecting judgment is not ground for reversal.

Erroneous finding or failure to find which does not affect judgment rendered is not ground for reversal.

10. Appeal and error ⊂⊃110—No appeal from order denying new trial.

There is no right of appeal from order denying motion for new trial.

11. Appeal and error ⊂⊃1010(1)—Trial court's determination of questions, supported by substantial evidence, is conclusive.

As determination of questions by trial court was supported by substantial evidence, its action is conclusive on appeal.

On Motion for Rehearing.

12. Appeal and error ⊂⊃1011(1)—District Court of Appeal's only inquiry is whether trial court had evidence before it on which unprejudiced mind would reach same conclusion.

The District Court of Appeal will not weigh conflicting evidence, but its duty begins and ends with inquiry whether trial court had before it evidence on which unprejudiced mind might reasonably have reached same conclusion.

Appeal from Superior Court, San Bernardino County; J. W. Curtis, Judge.

Action by Samuel Delannoy and wife against Alfred Quetu and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

Walter Eden, of Santa Ana, for appellants.

J. Wiseman Macdonald and W. W. Wallace, both of Los Angeles, for respondents.

CRAIG, J. Early in the year 1909, the respondent Alfred Quetu, a native of France, who had for many years resided in California, owned an option to purchase a ranch consisting of about 400 acres in Orange county. In the month of May of said year he visited his mother, Hermance Quetu, and his brothers and sisters, all of whom were then residing in France. During his stay abroad, his mother delivered to him 60,000 francs for investment in this country, and which he testified that he did invest in Arizona mining property. It appears that Quetu, upon his departure for the old country, had left a foreman by the name of Butler in charge of the ranch, and that prior to his return he paid for the same through Butler. During his visit abroad Quetu advised the plaintiff Julienne Delannoy, a sister, and her husband, Samuel, as he did Frank Dupre, a cousin, and Augustin Quetu and Gabrielle Quetu, a brother and sister, respectively, to come to America. Previously to Alfred Quetu's return they came here, and all commenced to live and work upon the Orange county ranch. The five immigrants continued working together on said ranch until each was allotted possession of a portion thereof, which respondent Alfred Quetu testified was thereafter operated for him on a profit-sharing basis. At some time after Alfred Quetu purchased said property, he mortgaged the same as security for the repayment of $45,000 which he testified he was compelled to borrow when forced to pay a note which he indorsed for another party. On April 24, 1914, he incorporated the Valencia Ranch Company, under the laws of the state of Arizona, with Phœnix designated as the principal place of business, and the said Alfred Quetu, Samuel Delannoy, and Augustin Quetu were named in the articles of incorporation as directors. On June 3, 1914, said ranch property, described as

consisting of 407.1 acres, was deeded by Alfred Quetu to the corporation, for which he testified that all of the capital stock, of the par value of $1 per share, was issued to himself. There were 300,000 shares of authorized capital stock, 30,000 shares (the stockbooks actually indicated 31,000 shares) of which were thereafter caused to be reissued to Samuel Delannoy, and the other parties also received various amounts thereof. On January 29, 1915, copies of said articles were filed with the secretary of state in California, and with the clerk of Orange county, the principal office and place of business in this state being situated at or near San Juan Capistrano, in said county.

It appears that on March 27, 1915, the Valencia Ranch Company deeded to A. J. Visel and others 50.457 acres of said ranch lands; on March 22, 1916, said corporation deeded to the same grantees 333.03 acres thereof; on March 27, 1915, Visel and his cograntees deeded to the corporation certain lands in the county of Riverside, which on August 24, 1915, said corporation deeded to one White, who, in turn, conveyed the same to the defendant Gabrielle Quetu on March 9, 1916; and on May 17, 1916, one Carrie Williamson and her husband conveyed to the plaintiff Samuel Delannoy two lots at Downey, in Los Angeles county.

Appellants instituted this action in San Bernardino county on June 16, 1920, alleging that at some time subsequent to March 27, 1915, the corporation exchanged the Riverside property for lands in San Bernardino county, which latter the defendant Alfred Quetu had caused to be deeded to his sister, Gabrielle, without consideration. Appellants contend that Alfred Quetu while in France promised them that if they would come to America and work on the Orange county ranch, and help "pay it off," he would give them a one-third interest therein; that after Delannoy had complied with his part of such alleged agreement and the corporation had acquired said property, it forfeited its right to do business in California, and that the defendants Alfred Quetu, and Augustin Quetu, former directors, are sued as trustees of the property of the corporation, together with Gabrielle Quetu, to whom the San Bernardino property is alleged to have been conveyed at the instance of the defendant Alfred Quetu. The complaint demands that a decree be entered adjudging that the defendant Gabrielle Quetu holds title to said last-mentioned lands, and to the Riverside property, in trust for the stockholders and creditors of the corporation; that a trustee be appointed in lieu of the directors who held their offices as such at the time said corporation forfeited its California rights; that the Riverside and San Bernardino properties be restored to the corporation; and that such trustee account for the rents, issues, and profits thereof, and close up the affairs and distribute the assets.

The defendants denied that plaintiffs were promised any interest in said property, or in the corporation, and denied that any of the property was conveyed to or by the corporation without consideration. It is contended by them that Alfred Quetu suggested that plaintiffs could make more money in America than in France, and that if they desired to work on his ranch he would pay them for their services; that he and the corporation did pay the plaintiffs for all such services, and advanced other moneys to them, until 1911, when they commenced working a portion of the ranch on shares; and the defendants also pleaded the statute of limitations, of frauds, and insist in their briefs that the superior court of San Bernardino county had no jurisdiction of the suit because section 565 of the Code of Civil Procedure requires that the appointment of a receiver or trustee of a foreign corporation be made in the county in which the corporation maintains its office and principal place of business.

The trial court found for the defendants upon all grounds set forth in their answer, and the plaintiffs appeal, asserting that the evidence was not sufficient to support the findings or the judgment based thereon.

[1] Much of the evidence in this case is not contradicted, but we are bound by the rules heretofore announced by the Supreme Court in reviewing a record presented upon appeal, and "in examining the sufficiency of the evidence to support a questioned finding, * * * must accept as true all evidence tending to establish the correctness of the finding as made, taking into account, as well, all inferences which might reasonably have been thought by the trial court to lead to the same conclusion." Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157. As expressed also in Woodard v. Glenwood Lumber Co., 171 Cal. 513, 153 P. 951:

> "We must be understood to be setting forth the evidence, in so far as it is conflicting or subject to opposing inferences, in the light most favorable to the support of the judgment under review. This is the right in which the evidence must be deemed to have been regarded by the court below, and represents, therefore, that view of the facts which is binding on this court on appeal."

It appears that Alfred Quetu's investment of his mother's money in the Arizona project was ill advised, and that her funds were lost, but that she passed away shortly thereafter, and her estate was not probated; that while he did not consider the plaintiffs or his codefendants legally entitled to any portion of the ranch, or to an interest in the corporation, he did believe that, except for the loss suffered through the Arizona investment, each of them would have received a share of his mother's estate, and that he should protect them. Quetu testified that he at no time agreed to give any of the parties an interest as the plaintiffs alleged and that

they were fully compensated for all their services; that Gabrielle Quetu invested money in the Orange county ranch and continuously worked thereon, much of the time without wages or other compensation, until the property was sold and the Riverside ranch was deeded to her in March, 1916. It was shown that previously to Alfred Quetu's return to America he completed paying for the Orange county ranch, and that nothing remained to be "paid off," as plaintiffs contended it was part of the agreement that they should assist in accomplishing. Some time after Quetu's return he mortgaged said property for the sum of $45,000, but he testified that this was necessary in order to raise sufficient funds with which to meet a promissory note which he had indorsed for another person, not a party to this suit.

The fact is in evidence that, although plaintiffs assert that Quetu controlled the affairs of the corporation, and dictated all transactions, none of which was understood by them, he discussed all business matters with them in the French language before any important action was taken, and that all corporate acts were voted upon and authorized by the full board of directors, with the complete understanding and acquiescence of all the parties concerned.

[2] Despite the contention of appellants that Alfred Quetu caused the Orange county ranch to be conveyed to the corporation, and subsequently to be disposed of without consideration, we find no evidence that would warrant a finding to such effect. The property in Orange county, as heretofore stated, was conveyed by the Valencia Ranch Company to Visel and others in 1915 and 1916, and the latter conveyed Riverside county property to the corporation in 1915; both 1915 transfers were dated March 27th. The property received by the corporation in 1915 was situated near Hemet, Cal., and was subsequently exchanged for a one-half interest in a ranch near Loma Linda; the 1916 conveyance was made in exchange for the remaining half of said Loma Linda ranch, all of which was deeded by the corporation to Ben White by deed dated August 24, 1915, and on March 9, 1916, this latter property was conveyed by White to Gabrielle Quetu. In May, 1916, Alfred Quetu purchased and caused to be conveyed to the Delannoys a residence and orange grove near Downey, in Los Angeles county, which they accepted subject to a mortgage, and moved thereon. It was testified that when the plaintiffs left Orange county they also received and took with them to the Downey property household furniture, farming implements, and five valuable imported Belgian horses that had belonged to Alfred Quetu.

It affirmatively appears that the expense of operation, together with interest on the $45,000 mortgage, rendered the burden of maintaining the corporation unprofitable, and that all the parties interested therein after united consultation decided that it should be dissolved and the property disposed of, which was done, as we have indicated above. All the outstanding certificates of capital stock were indorsed by the various holders thereof, including appellants, and were delivered back to Alfred Quetu, who testified that as soon as he was advised both from Sacramento and from Phœnix, Ariz., that the corporation had been finally dissolved, he destroyed the entire issue, though it does not appear that the surrender and transfer was entered upon the books of the corporation.

The trial court found "It is not true that plaintiffs had any agreement of any kind or character to help Alfred Quetu pay for said ranch, but it is true that said ranch was fully paid for by the said Alfred Quetu prior to the time that the plaintiffs came to America"; and as a conclusion of law it was determined that the defendants were not indebted to the plaintiffs or either of them in any sum whatsoever; that the plaintiffs were not entitled to an accounting of the rents, issues or profits of the real property described in the complaint, and that there was no necessity for the appointment of a receiver or trustee.

It was testified that when Quetu caused the Downey ranch to be conveyed to the plaintiffs he informed them that they must accept the same in full satisfaction of any claims they might have, and that they replied "All right," and that Delannoy thereafter said, "I understand that you are not obliged to furnish us any more property since we have accepted the Downey property in full settlement."

Appellants assign many grounds upon which they seek a reversal of the judgment below.

[3] The respondents urged that the trial court was without jurisdiction of the action for the reason that section 565 of the Code of Civil Procedure required suits for receiverships to be instituted in the county where the corporation maintained its office and principal place of business. Said section provides that:

"Upon the dissolution of any corporation, the superior court of the county in which the corporation carries on its business or has its principal place of business, on application of any creditor of the corporation, or of any stockholder or member thereof, may appoint one or more persons to be receivers or trustees of the corporation, to take charge of the estate and effects thereof and to collect the debts and property due and belonging to the corporation, and to pay the outstanding debts thereof, and to divide the moneys and other property that shall remain over among the stockholders or members."

It was not alleged nor attempted to be shown that the defendant corporation when in existence did business in the state of Arizona, or had an office or filed its articles in any California county other than Orange

county. From what has been said, however, it becomes manifest that the section in question does not here apply. Appellants' suit was not commenced for the purpose of effecting the dissolution of the corporation, they were not then stockholders, and there were no creditors; and, as we have indicated, we are of opinion that the property described in the complaint was no longer subject to an action against said corporation or its former stockholders.

[4] We think, however, that the issues presented were properly triable in any county wherein the corporation was alleged to have owned or been entitled to real property, by virtue of subdivision 7 of section 564 of the Code of Civil Procedure, as argued by the appellants. It is there provided that:

"A receiver may be appointed by the court in which an action is pending, or by the judge thereof: * * * 7. In all other cases where receivers have heretofore been appointed by the usages of courts of equity."

Respondents apparently unduly stress the importance of the receivership in these proceedings, which were instituted, not primarily for the purpose of dissolving the corporation or marshaling the assets of its estate, but praying a decree that the plaintiffs were the owners of properties alleged to have been alienated by the corporation without consideration, and that it be reconveyed and distributed to them, as an incident to which result a receivership would have been appropriate had appellants established the facts as they alleged them to exist.

In Cunliffe v. Consumers' Ass'n, 280 Pa. 263, 124 A. 501, 32 A. L. R. 1348, the Pennsylvania Supreme Court, in discussing the question here presented, said:

"It would seem strange to say that the courts of Pennsylvania have no jurisdiction to appoint a receiver for a corporation where all of the assets, all of the business, all of the officers and directors, and all of the books and records of the corporation are in this state, merely because the promoters of the corporation for some purpose went to another state to have the company incorporated."

In Acken v. Coughlin, 103 App. Div. 1, 92 N. Y. S. 700, applying the same rule upon the authority of previous like holdings, it was said:

"The courts of this state, at the suit of an officer, director, stockholder or creditor of a foreign corporation, have jurisdiction to compel the officers or directors of the corporation, over whom jurisdiction has been acquired by the service of process, to account to the corporation for property of the corporation in their hands or which they have misapplied."

[5] This rule is generally recognized, that courts have jurisdiction to appoint receivers for the purpose of preserving assets pendente lite. McAtamney v. Comm. Hotel Constr. Co. (D. C.) 296 F. 500; Natl. Guar. Credit Corp. v. Worth & Co., 274 Pa. 148, 117 A. 914; Starr v. Bankers' Union, 81 Neb. 377, 116 N. W. 61, 129 Am. St. Rep. 684, 5 Thomp. on Corp. § 6861; 3 Cook on Corp. (5th Ed.) § 865.

But there are at least three of the more prominent features presented by the record, either one of which would require an affirmance, to which we shall devote attention, namely: (1) Upon the theory that Samuel Delannoy received stock in the corporation merely as security for the moral obligation to pay his wife her share in her mother's estate, we think that if appellants possessed any legal claim it was fully satisfied by the conveyance to them of the Downey ranch; (2) assuming that Delannoy was the legal owner of said shares of stock, he accepted the real property, and to all intents and purposes transferred his stock, regardless of a failure to have the same entered upon the books of the corporation, divesting himself of all interest in the corporation; and (3) the action having been based upon the theory that a receiver or trustee should be appointed to take charge of and distribute the real property described in the complaint, and no irregularity in the above-mentioned transfers having been established, none of said property is held by, or in trust for, the corporation, of which a receiver or trustee might be appointed.

[6] Accepting the evidence in support of the findings and judgment below as true, appellants received $250 during the first three or four months after their arrival in California, and were paid each month thereafter for their services. When they commenced operation of a portion of the Orange county ranch on shares, they also received the amount of proceeds due them after the payment of taxes, interest, and other expenses. Up to the time of their removal therefrom, therefore, no unpaid balance remained due them for their share of the labor and management of said property. Thereafter, assuming that they held said stock as security, it is obvious that, upon acceptance of the Downey property and surrender of such security "in full settlement," they were no longer entitled to demand a further consideration for the same obligation, whether it be a moral or legal one, on the part of Alfred Quetu. It was not claimed by appellants, nor was there any showing attempted to be made by them, that Alfred Quetu was legally indebted to them on account of the loss of moneys invested by him for the mother; on the contrary, it does appear that Quetu had never agreed to pay them any amount in behalf of said estate, and that Hermance Quetu gave him the funds, without restriction, to invest as he might desire; and he testified that he had returned to her a considerable amount of her money previously to her demise. However, it is conceded by the respondents that Alfred Quetu may have as-

sumed at least a moral obligation to divide the portion of the estate which was intrusted to him, and, adopting such theory for the purposes of this case, we think appellants were precluded, by their acceptance of the Downey property, from successfully seeking other equitable relief.

[7] If it be said that Delannoy was the legal owner of 31,000 shares of the stock of said corporation, and that as such he should be entitled to one-tenth of its property upon the forfeiture of its right to do business in this state, and its dissolution in the state of its creation, he was not such stockholder at the time this suit was instituted. He was therefore estopped to maintain such an action as a stockholder, and it does not appear that there were any creditors of the corporation. It has been repeatedly held in most jurisdictions, including our own, that, regardless of the emphatic requirements of the statute, by-laws or charter, requiring that transfers of stock be entered on the books of a corporation, an assignment and delivery of certificates effectually estops the transferor from claiming any title to the stock so transferred. 4 Thomp. on Corp. (2d Ed.) § 4355.

Section 324 of the Civil Code expressly provides that as to the parties, shares of corporate stock "may be transferred by indorsement by signature of the proprietor, his agent, attorney, or legal representative, and the delivery of the certificate." An alleged gift of the capital stock of a corporation, without consideration, was involved in Calkins v. Equitable B. & L. Ass'n of the United States, 126 Cal. 531, 59 P. 30. One Daniel Calkins assigned certain certificates of stock to F. G. Calkins and others, which were thereafter under his instructions held by the assignees without notice to or transfer upon the books of the corporation. Upon the death of the assignor the assignees presented said stock to the corporation for transfer upon its books, which was refused, whereupon they brought an action for the purpose of obtaining a mandatory decree directing such transfer. The executor of Daniel Calkins' estate intervened, claiming that the attempted assignment was void. Judgment was rendered in favor of the plaintiffs, and from such judgment and an order denying a new trial the intervener appealed. The Supreme Court, after reciting the facts, and following the quotation of section 324 of the Civil Code, said:

"Everything necessary to a complete transfer of the stock, as between the parties, was found by the court to have been done by them in the lifetime of Daniel Calkins, and it is also found that these things were done with the intent to make a present transfer, and not with the intent to make a testamentary disposition. We think these findings are fully warranted by the evidence, and that the conclusion of the trial court that a valid transfer of the stock was effected is fully supported. * * * The gift and transfer of the stock was accomplished by the written assignment and delivery of the stock with the intention to make a gift thereof to plaintiffs. The donor thereby gave up to plaintiffs the title and control of the stock, and he could not thereafter revoke the gift."

The same rule was announced and applied in Pacific Natl. Bank v. Western Pac. R. Co., 157 Cal. 573, 108 P. 676, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391; Spreckels v. Nevada Bank, 113 Cal. 272, 45 P. 329, 33 L. R. A. 459, 54 Am. St. Rep. 348, and Strout v. Natoma Water, etc., Co., 9 Cal. 78.

In Riverside Land Co. v. Jarvis, 174 Cal. 316, 327, 163 P. 54, 59, it was said, that the provisions of section 324 of the Civil Code are not exclusive, and that:

"This language does not forbid the making of agreements to transfer, nor the making of contracts, good between the parties, that a certificate shall pass with the transfer of certain other property. Corporate stock would be transferable without such provision. Civ. Code, § 1044. The provision merely prescribes a mode by which the transfer may be made. It does not prohibit a transfer by other methods, nor declare that when made in another manner a transfer may not be enforced by the party entitled to the shares."

Young v. New Pedrara Onyx Co., 48 Cal. App. 1, 15, 192 P. 55, 60, citing the case last mentioned herein, held "that a transfer of title, good as between the parties, may be made in any manner appropriate to the assignment of choses in action or intangible personal property."

The obvious conclusion therefore follows that, although the record does not disclose the exact date of Delannoy's transfer to Quetu of the 31,000 shares of stock previously received, it appears that long before this suit was begun he parted with all his right, title, and interest in said shares by a legal present assignment and delivery of the certificates. The appellants having disposed of their stock, for a consideration which we think was ample, they were therefore not stockholders when this action was instituted, and were not, as such, entitled to recover, or, in fact, to maintain the suit.

[8] The third and most strenuously urged ground upon which appellants founded their asserted right to recover, is, we think, likewise without merit. As we have shown, the corporation parted with its Orange county properties, and the lands in suit were conveyed to Gabrielle Quetu for a sufficient consideration to preclude the corporation or its representatives from reclaiming them. It is the positive testimony of some of the witnesses that she invested her money in the corporate enterprise, and that she labored during many years in its interest, without compensation other than the final conveyance to her of the lands in controversy upon abandoning the Orange county lands and the surrender of her corporate stock in the man-

ner and with the intent which accompanied the Delannoy settlement. No fraud was shown to have entered into any of the transfers, nor does the evidence disclose any apparent dissatisfaction of appellants with their settlement at the time it was consummated, though it does appear that following their unequivocal admission that their claim, if any they had, was fully adjusted with Quetu, they later reconveyed the property which they had accepted to the original vendor; that they then pressed Quetu with further demands, whereupon he again and again at no little effort and expense attempted to pacify them, but without success. We are convinced from the evidence here presented that appellants not only failed to establish any legal or equitable claim against Quetu or the corporation, but that their contention that the properties described in their complaint belonged to the corporation, or were held in trust by Gabrielle Quetu therefor because of illegal transfers, is without foundation. And, this being true, the subject-matter of the attempted receivership did not exist; hence, in the absence of corporate or trust property, the appointment of a receiver or trustee would have been an idle act which the courts cannot be called upon to perform, and there was no cause of action.

[9] A number of the findings are attacked as not being supported by the evidence, and in several instances this criticism is justified, for instance: That the plaintiff Samuel Delannoy was not called upon to act as an officer of the corporation, that Alfred Quetu did not sell the crops, and that the plaintiff Samuel Delannoy never was a stockholder of the corporation. But from the view we take of other legal questions involved, it is not necessary to consider these assignments of error. Although such findings are contrary to the evidence and erroneous, we think that correct findings in these respects would not alter the result reached by the court below if the judgment appealed from were reversed and the same evidence adduced upon a new trial. Such errors must therefore be disregarded, since an erroneous finding, or a failure to find, which does not affect the judgment rendered is not a ground for reversal. Hall v. Crowley, 12 Cal. App. 30, 106 P. 426; Ramboz v. Stansbury, 13 Cal. App. 649, 110 P. 473; Forestier v. Johnson, 164 Cal. 24, 127 P. 156; Gallatin v. Corning Irr. Co., 163 Cal. 405, 126 P. 864, Ann. Cas. 1914A, 74; McRae v. Ross, 170 Cal. 74, 148 P. 215; Eastman v. Piper (Cal. App.) 229 P. 1002.

[10] The judgment below is affirmed. There is no right of appeal from the order denying motion for new trial, and the appeal from such order is therefore dismissed.

We concur: FINLAYSON, P. J.; WORKS, J.

On Motion for Rehearing.

CRAIG, Acting P. J. The judgment of the superior court herein having been affirmed, appellants petition for a rehearing, and assign two grounds upon which they assert that it should be granted.

It is said, first, that the opinion of this court was founded principally upon the fact that after Delannoy became a stockholder of the Valencia Ranch Company he redelivered to Quetu his stock in consideration for property situated at Downey, and that Delannoy therefore was no longer a stockholder, and had no further interest in the corporation or the land in suit; that the trial court found "that said land was conveyed to Samuel Delannoy, but expressly made no finding as to whether or not said property was conveyed in full satisfaction of all claims of plaintiff against defendant," and that this amounted to a finding in favor of the plaintiffs.

We think the appellants misinterpret the finding of the lower court, and seek to restrain the holding here within bounds far narrower than its language permits. It should be borne in mind that real property alleged to have been situated in San Bernardino and Riverside counties constituted the subject of the action, and that appellants claimed an interest therein as a basis for their prayer for the appointment of a receiver. The trial court found that appellants had no interest in said property, and that there was no necessity for the appointment of a receiver. Beyond the issues presented the court could not venture, and it did not attempt to do so, but, confining itself within those limits, it found that the parties had no agreement such as alleged by appellants, and concluded that the defendants were not indebted to the plaintiffs, or either of them, in any sum whatsoever. It was testified that Delannoy admitted having received the Downey property in full settlement, and stated in the original opinion, that we "must accept as true all evidence tending to establish the correctness of the finding as made." The exact language of the finding referred to by petitioners was as follows:

"The court expressly makes no finding as to whether or not the said property was conveyed in full satisfaction of all claims of the said plaintiff Samuel Delannoy against the said Alfred Quetu."

[11] Whether or not the plaintiffs had or might have some claim against Alfred Quetu could not possibly be determined, but as to the main issues presented by the pleadings in this case—being the existence of the alleged verbal contract, the indebtedness of the defendants to the plaintiffs and the interest of the latter in certain specified corporate property—the trial court found adversely to appellants. These questions were the principal ones presented, and, as their determina-

tion by the trial court was supported by substantial evidence, its action is conclusive here.

[12] The only remaining point advanced by petitioners is the contention that, notwithstanding testimony that a ranch was conveyed to Gabrielle Quetu in consideration for money advanced and services rendered by her, and the finding of the court below that she paid a valuable consideration therefor, this court should review the conflicting evidence and hold that which favors respondents to be unworthy of belief after it has been accepted as true by the judge who tried the case. This court's duty begins and ends with the inquiry whether the trial court had before it evidence upon which an unprejudiced mind might reasonably have reached the same conclusion which was reached. Wallace v. Sisson, 114 Cal. 42, 45 P. 1000; Cronenwett v. Underwriters, 44 Cal. App. 568, 186 P. 826; Dunphy v. Dunphy, 161 Cal. 380, 119 P. 512, 38 L. R. A. (N. S.) 818, Ann. Cas. 1913B, 1230.

The petition is denied.

I concur: WILLIS, Justice pro tem.

---

73 Cal. App. 667

HARVEY v. MACHTIG. (Civ. 4392.)

(District Court of Appeal, Second District, Division 2, California. July 18, 1925. Hearing Denied by Supreme Court Sept. 14, 1925.)

1. Negligence ⟸32(3)—Resort keeper liable for injury to customer in car parked as usual by concessionaire.

Where plaintiff was injured by collapse of defective amusement device in defendant's resort while sitting in a car being driven by concessionaire to dining hall, who had stopped near such amusement to unload packages for his stand, *held* defendant was not relieved of liability by his concessionaire so parking where it was customary for people generally to park there.

2. Negligence ⟸32(1)—Resort keeper under duty to test apparatus frequented by invitees.

A resort keeper is under duty to protect invitees against injury from latent defects in frequented apparatus, and a failure to frequently and properly test such apparatus is not exercise of due care.

3. Negligence ⟸54—Resort owner responsible for safety of structures erected by predecessors.

An owner who has operated a resort for a month, but who visited place frequently for several years, is responsible for safety of structures erected by predecessors.

4. Negligence ⟸48—Resort owner liable for injury from decayed tree, though not knowing of decay.

Owner of a resort to which public is invited is liable for injury from collapse of tree used as an amusement place, though he did not know tree was decayed.

5. New trial ⟸70—Where verdict is only one under evidence, it should not be set aside and new trial ordered.

Where undisputed evidence shows verdict to have been only one possible, it should not have been set aside and new trial ordered under Code Civ. Proc. § 657, subd. 6, for insufficiency of evidence to justify verdict.

6. Appeal and error ⟸1015(3)—Order granting new trial reversed when no evidence on which to base contrary finding.

Though appellate court is reluctant to reverse order granting or refusing new trials, it will do so if it can find no evidence on which to base a contrary finding.

Appeal from Superior Court, Ventura County; Merle J. Rogers, Judge.

Action by Sarah M. Harvey against Eugene Machtig. From an order setting aside a verdict and judgment for plaintiff, and granting a new trial, plaintiff appeals. Reversed.

Drapeau, Orr & Gardner, of Ventura, for appellant.

Michael F. Shannon, of Los Angeles, Charles F. Blackstock, of Oxnard, and Thomas A. Wood, of Los Angeles, for respondent.

CRAIG, J. Appellant sustained personal injuries while seated in an automobile which stood on the highway leading from the county thoroughfare to a public resort owned and conducted by respondent. For her damage thus sustained she instituted this action. A jury awarded her a verdict for $5,000, and on motion of respondent a new trial was granted by the lower court upon the ground that the evidence adduced was insufficient to justify or sustain the verdict. From the order setting aside the verdict and judgment and granting a new trial, the plaintiff appeals.

Said resort is known as the Sulphur Mountain Springs, and immediately adjoins the main thoroughfare to Santa Paula, in the Ojai valley, Ventura county. At some distance back from the county road the respondent operated a large dining hall, dancing pavilion, swimming pool, cottages, and various amusements. Ingress and egress to and from these attractions were available by means of a driveway about 30 feet in width, for the passage of vehicles, along which highway or drive were situated concessions for the sale of refreshments, etc., which were under the independent management of lessees who paid respondent a percentage of their gross receipts as rental. On one side of respondent's said driveway stood a large black walnut tree, which was very old, the main trunk of which was trifurcated about 3½ feet above the roadbed. The total spread of the tree was shown to have been about 50 feet, one of its three trunks growing nearly perpendic-

ularly, another sloping away from the highway, and the third, which caused the accident, about 3½ feet in diameter, extending out over the highway to a distance of about 30 feet. Across the fork, or space formed by the three trunks, and about 12 feet from the ground, a large platform had some years previously to respondent's purchase of the premises been constructed of logs, with a heavy railing or sidewall, and an improvised bench serving as a seat, also of logs, around three sides, all of which rested upon the three massive branches, and was fastened by a cable. Said platform was approximately 15 feet square, and to the open side a stairway about 5 feet wide, with banisters, was constructed from the ground at the side of the highway. Respondent testified that said platform was provided and maintained for the accommodation and amusement of patrons of his resort, and that it was "one of the show places of the resort," from which they could "look over the entire premises"; that his guests would use the tree for entertainment in connection with the resort.

About 15 feet to the north of this tree, which was estimated to have been 50 yards from the dining hall, Rogers and Harvey, copartners, operated one of the concessions. They sold soft drinks, confectionaries, and tobaccos. The highway from the public thoroughfare, through respondent's premises, to the principal amusement center, extended directly past said tree and stand, and was somewhat wider at this point than elsewhere along its course, its border reaching to the base of the tree. Respondent testified that "it swayed in that way to some extent," but that "there was a water faucet to prevent them driving next to the tree"; that before approaching the tree, and beyond it, were parking places for automobiles, one of which consisted of an acre of space, but that machines were accustomed to park along the driveway, and to pass under the tree; that "all laws of etiquette were violated by people, how to park or to act." He admitted, however, that he had not objected to such custom.

On the morning of July 20, 1921, George Harvey, one of the concessionaires last mentioned, made a reservation at respondent's dining room for an extra dinner for his grandmother, appellant herein, who resided at Santa Paula; he then proceeded to that city and purchased supplies for his concession, returning between the hours of 11 and 12 o'clock noon of the same day, with his wife and appellant in his automobile. Harvey drove to the side of the road, and stopped his machine under the tree in question. He and his wife alighted, taking their packages to the stand, and leaving appellant seated alone in the automobile. He testified that he stopped merely for a moment to unload a few supplies, intending to continue his course up the driveway to the dining room; that he did not enter his stand, but had just left the car and deposited his packages, and was starting back toward his machine, when he heard "a couple of little cracks," and saw the platform and tree trunk nearest the highway fall upon the machine. Appellant was severely injured in the crash, which necessitated the amputation of her left arm. She was 75 years old, and previously to the accident was paralyzed on the right side.

This action was commenced by complaint alleging that respondent's place of business was a public resort, and that all the roads and highways upon the premises thereof were open to the public, and were used for the accommodation and to facilitate the ingress and egress of its patrons; that the walnut tree overhanging said driveway was decayed and rotten and was unsafe; that the defendant knew it to be unsafe, and could easily and readily have discovered its dangerous condition by the exercise of reasonable care and diligence. The defendant joined issue upon the material allegations as to liability, but admitted that all of said roads and highways were open to the public, and were maintained by him to facilitate their ingress and egress; he alleged, however, that if said roads and highways within his said resort were used for accommodation of the public as averred by the plaintiff, they were so used without his consent or invitation, and merely under license of the owner, and alleged that if the plaintiff was injured as she contended, her own carelessness contributed to and was the proximate cause of such injury.

The evidence tended to show, and it was not denied, that the decay had progressed to a degree rendering it plainly visible to the casual observer; that the tree was as much a part of the public amusement resort as any other feature thereof; that the highway in question constituted the only means of passage into the grounds; and that appellant when injured was on her way in the automobile in the direct and only possible route from Santa Paula to respondent's public restaurant or dining hall, at the end of the driveway. It was shown that the tree fell on a calm, quiet summer day, when there was no wind, and that there was no one on the platform at the time. Seven witnesses called by the plaintiff testified regarding the condition of the tree, four of whom swore that it was decayed in the roots that protruded above the ground, some of them saying that from the platform above, a badly decayed spot in the crotch could also be seen, and some of them testified that when on the platform they found the tree "shaky," and came down. The witness Rogers testified that before the tree fell there was a spot of decay on one side about 4 inches by 6 inches, plainly visible from the ground, and it was further shown the hole was so large that people playing games were accustomed to place their horseshoes therein. Rogers photo-

graphed the tree after the accident, and inspected it; he testified that it had been supported by a thin shell but a few inches thick, and that four-fifths of the trunk was dead, the heart being gone. All of said seven witnesses testified that until about July 1, 1921, there had been a sign about 18 inches long nailed to the trees or stairway, bearing the words "Danger, Keep Out," or "Danger, Keep Off," and which some witnesses claimed to have seen there as late as July 4th. Respondent admitted that he had heard about the sign, but he strenuously denied having seen it or ordered it removed; he testified that he had carefuly inspected the platform, but that he had never investigated to ascertain the condition of the tree; that nearly every evening he saw people on the platform, and that on one occasion there were as many as 50 people upon it at the same time.

It is not contended that the evidence was not sufficient to establish the facts presented, but it is insisted that, conceding all of said facts to be true, they did not constitute grounds upon which the respondent would be liable for damages, since he did not know that the tree was decayed, did not order Harvey to stop on his way up the driveway, and was not chargeable with the duty to ascertain that the tree was dangerous; wherefore, it is maintained, these facts established proof of carelessness of Harvey, and contributory negligence of the plaintiff who had intrusted herself to his care. It is argued that the automobile in which appellant was seated when injured had been "parked" on the side of the highway leading to respondent's resort, without right. The court below entertained and repeatedly expressed the same view, ruling that "the defendant cannot be held for something that he did not know."

[1] It is at once inconsistent and futile to attempt the application of two incompatible principles of law to the same state of facts, by asserting on the one hand that the public, invited to traverse the sole means of approach to a public resort, were invited patrons, and on the other hand that they should be deemed and treated legally as trespassers or mere licensees if injured by the collapse of a defective device which constituted one of the attractions of such resort. Appellant was not in charge of the automobile, and whether or not it should stop, and if so where, were questions not left to her judgment. The highway was wider at this point, but it was used by the public generally, without objection, and it cannot be said that because Harvey was a concessionaire and was induced to frequent the place by causes concurred in by respondent, he should be denied privileges which were constantly extended to all other persons. The effect of respondent's argument is that the breaking of a defective attraction at his resort, with which neither Harvey nor the appellant had any concern, would be no fault of respondent if his concessionaire, in bringing him business, should incidentally interrupt the performance of that errand to facilitate the operation of the concession. Harvey testified that he invariably left his machine at that point when returning with supplies; and in this he followed the custom of those who patronized "one of the show places of the resort."

Respondent insists that the case falls within the rule announced in Means v. Southern California R. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206, wherein it was said that "the plaintiff was not on the freight house premises to obtain any package from Wells Fargo & Co.; he had changed his mind about going to that office; * * *" and in Polk v. Laurel Hill Cemetery Ass'n, 37 Cal. App. 624, 174 P. 414, in which it was said, "We have found no support for any rule which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with business or their relations with the occupant;" and he quotes with assurance from Kennedy v. Chase, 119 Cal. 637, 52 P. 33, 63 Am. St. Rep. 153, as follows:

"The duty of the owner in such a case has relation to the object for which the right of entry is extended, and is limited to responsibility for the condition of that portion of the premises required for the *purpose* of the visit; it does not impose liability for the want of safety at a point *without those limits*, and where the injured party was *neither invited nor expected to go*." (Italics supplied.)

But the injured party here was on her way to respondent's dining room for the noonday meal, was on a part of the respondent's highway running through his resort, at a point continuously used by others when there for the same purpose; she was not there without invitation, nor for curiosity or motives of private convenience, unconnected with respondent's business. The authorities cited do not apply to the facts presented.

[2] It was respondent's duty to protect those whom he invited against injury from latent defects in contrivances maintained upon the premises which they were expected to frequent. To use and keep in operation a device or apparatus upon which the safety of human life depends, without it being frequently or properly tested as to its continued strength and efficiency to meet the purposes for which used, is not such reasonable care as a prudent man should take to guard the safety of those intrusted to his protection. Burke v. State, 64 Misc. Rep. 558, 119 N. Y. S. 1089.

[3] Respondent had been operating the resort but about one month when the accident occurred; but he had visited it for years, and had done so frequently from 1919 until he took possession. When he assumed control he became responsible for the safety of structures erected by his predecessors. Palmore

v. Morris, 182 Pa. 82, 37 A. 995, 61 Am. St. Rep. 693. If the contingency were such that a secret cause of danger might grow and increase and yet be hidden, it could not be assumed that, as matter of law, the defendant was not bound to do anything except use ordinary means to ascertain when danger was imminent and imperilled the safety of passers-by. Vosper v. New York, 49 N. Y. Super. Ct. 296. The dangerous condition of the tree was observed by others, and the fact that it was decayed, and that it fell on a calm, clear day, is indisputable evidence that it had been in the process of disintegration for so long a time that its impending fall should have been anticipated by the respondent. Lundy v. Sedalia, 162 Mo. App. 218, 144 S. W. 889; Rapho & West Hempfield Township v. Moore, 68 Pa. 404, 8 Am. Rep. 202.

Accepting, as we should, the strongest view of the case which the facts permit, in favor of the lower court's action in ordering a new trial—that appellant was in the care of a concessionaire, whose duty it was to proceed directly to her destination, that he stopped at one of the attractions, on one side of the principal driveway, and that this was unnecessary, and conceding that respondent was ignorant of the constant danger at that point—eliminating evidence which may have been conflicting—the result would be the same. If it were shown that Harvey had control of the defective amusement as a part of his concession, though this is not even intimated by respondent, still the latter would not be relieved from the duties and obligations incident to control of the entire resort. In Johnstone v. Panama-Pacific Int. Expos. Co., 187 Cal. 323, 202 P. 34, the complaint alleged that the plaintiff, a visitor within the exposition grounds was injured by an electric carriage belonging to a concessionaire while passing to another portion of the premises. A demurrer to the complaint was sustained, and upon appeal from such order the Supreme Court, quoting with approval from Thornton v. Maine State Agr. Soc., 97 Me. 108, 53 A. 979, 94 Am. St. Rep. 488, said:

"It is too well settled to need the citation of authorities that, if the owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation to see that such premises are in a reasonably safe condition, so that the persons there by his invitation may not be injured by them or in their use for the purpose for which the invitation was extended.

"Therefore, having invited the public to its fair, it was the duty of the defendant to use reasonable care to keep its grounds, and the usual approaches to them, so far as the approaches were under its control, in a safe condition, safe for all who were invited. * * * The defendant would not be relieved from this duty by leasing portions of its grounds to the proprietors of shows and attractions, and becoming their landlord. As between it and the invited public, the duty still remained of using reasonable care to see that all of the exhibition grounds were safe. * * * Even if it be true, as respondent insists, that there was no duty, as matter of law, resting upon it to provide separate thoroughfares for vehicles and pedestrians, there was a duty imposed upon respondent to use ordinary care to keep its grounds, including the thoroughfares, in a safe condition for its invitees, and the complaint alleged that respondent was under this duty. * * * As was held in Whyte v. Idora Park Co., [29 Cal. App. 342, 155 P. 1018] supra, and the other cases we have quoted, *the fact that the injury was inflicted by a concessionaire and not by the proprietor* would not relieve the latter of responsibility for the negligent acts which resulted in the injury, and as was declared in Thornton v. Maine State Agr. Society, supra, it was the company's duty to use reasonable care 'both in the original letting of space, and in the subsequent inspection and supervision' of the concession." (Italics inserted.)

[4] It is contended by respondent that if he did not know that the tree was decaying, he could not be expected to guard against its possible collapse. But we are cited to no authority so holding upon facts even approaching in resemblance those here presented. Under the evidence adduced in the case at bar, it becomes apparent that to apply such a rule would possibly require that civil liability would arise only upon evidence strongly tending to show criminal negligence of the proprietor. But such is not the length to which an injured patron must go in order to recover for damage sustained at a resort which is thrown open to the public, and to which he is both impliedly and expressly invited. The rule announced in the case from which we have quoted is recognized and applied generally. Hollis v. Kansas City, Missouri, Retail Merch. Ass'n, 205 Mo. 508, 103 S. W. 32, 14 L. R. A. (N. S.) 284; Texas State Fair v. Brittain, 118 F. 713, 56 C. C. A. 499; Texas State Fair v. Marti, 30 Tex. Civ. App. 132, 69 S. W. 432; Richmond & M. R. Co. v. Moore, 94 Va. 493, 27 S. E. 70, 37 L. R. A. 258; Thompson v. Lowell, L. & H. St. R. Co., 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; Graffam v. Saco Grange, Patrons of Husbandry, 112 Me. 508, 92 A. 649, L. R. A. 1915C, 632. In most of the cases here cited the offending object or apparatus was shown to have even been in the possession, control, and management of a concessionaire, but in each instance the proprietor of the resort was held to have been charged with the duty to inspect and to guard against injury to patrons drawn thereto by the general enterprise. The tree in controversy here, however, was of no concern to Harvey, but was admittedly under the exclusive custody, control, and management of the proprietor, respondent herein.

[5] Section 657, subd. 6, of the Code of Civil Procedure, provides that a new trial

may be granted upon the grounds of "insufficiency of the evidence to justify the verdict or other decision, or that it is against law." It must be conceded that if the undisputed facts in the instant case show the verdict and judgment rendered to have been the only result warranted by the evidence—and the authorities cited impel us to that conclusion—in such event the verdict was not, as held by the court below, unsupported by the evidence nor against law, and should not have been set aside and a new trial ordered.

[6] We are not unmindful of the reluctance with which appellate courts reverse orders granting or refusing new trials, nor of the rule that a trial court in passing upon such a motion is not bound by the findings of the jury if there is sufficient evidence to sustain a contrary finding. Huckaby v. Northam (Cal. App.) 228 P. 717. Where, as here, however, there is no evidence upon which a contrary finding could be founded, the order granting a new trial cannot be sustained upon appeal. As was said in Huckaby v. Northam, supra, in which an order granting a new trial as to certain defendants was upheld upon the ground that as to them the evidence was conflicting, but was reversed as to others:

"The evidence shows clearly that the other defendants have no interest in the property. The order granting a new trial was therefore erroneous as to such defendants."

The order granting a new trial and vacating and setting aside the verdict and judgment is therefore reversed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

73 Cal. App. 580

PEOPLE v. OROSCO. (Cr. 1172.)

(District Court of Appeal, Second District, Division 2, California. July 13, 1925.)

1. Criminal law ⟸655(1)—Use of word "murder" by trial judge in reference to offense held error.

In prosecution for murder, reference by trial judge in presence of jury to offense as "murder" was error.

2. Criminal law ⟸656(9)—Remark of trial judge in admitting evidence that it was remote held invasion of province of jury.

In prosecution for murder, where claim of self-defense lay in evidence concerning difficulty between accused and deceased about a year prior to killing, remark by trial judge, in admitting in evidence stipulation as to what absent witness would testify concerning such prior difficulty if present, that it was remote, invaded province of jury.

3. Criminal law ⟸656(6, 9)—Remark of trial judge as to importance as evidence of accused's coat, slashed by deceased in former fight, and as to knowledge of witness, held error.

In prosecution for murder, in which accused's claim of self-defense lay in evidence concerning difficulty about one year prior to killing, on offer of testimony that witness took slashed coat which was received in evidence away from accused, remarks of court indicating that such coat was of no importance, and that witness knew nothing as to how cuts were made, were prejudicial as interfering with explanation of how damaged coat had been preserved instead of being discarded.

4. Criminal law ⟸1166½(12)—Remark of trial judge, that there was no appearance of contradiction in coroner's inquest because such inquest had not been proven, held, if error, harmless.

In prosecution for murder, where state's witness on cross-examination was asked for purpose of impeachment, if he had testified at coroner's inquest that he could not point out person who did shooting because it was dark, statement of trial judge that there was no appearance of contradiction, because coroner's inquest had not yet been proven, if error, was harmless, where it was not denied that accused fired fatal shot.

5. Witnesses ⟸388(7)—Not necessary to show transcript of testimony is authentic before reading question to witness for purpose of impeachment.

Under Code Civ. Proc. § 2052, relating to impeachment of witness by evidence of his statements at other times inconsistent with testimony, even if such statements are in writing, circumstances of time, place, and parties present must be stated to witness before writing is shown, and proof that such writing is authentic is not necessary.

6. Witnesses ⟸388(2)—To impeach witness by inconsistent statement, oral contradictory statement must be recited to him, and his answer as to whether he made it obtained, before others may testify concerning it.

Under Code Civ. Proc. § 2052, relating to impeachment of witnesses by contradictory statements, any oral contradictory statement claimed to have been made by witness must be recited to him, and his answer must be obtained as to whether he made it, before others may testify concerning it.

7. Criminal law ⟸655(5)—Statement of trial judge that procedure of accused's attorney in impeaching witness was bad, etc., held prejudicial error.

In prosecution for murder, in which accused's attorney attempted to impeach state's witness by proof of contradictory statement made by him at coroner's inquest, by reading question from transcript of coroner's inquest, and asking if witness had made such statement, prior to proof that written transcript thereof was authentic, remarks of trial judge that it was bad practice, that it was prejudicial, and

that question asked by counsel shows iniquity of such method was prejudicial error.

8. Homicide ⇐188(1)—Question whether deceased had been in habit of drinking intoxicants held improper.

In prosecution for murder, where deceased's widow testified for state at stage of trial prior to proof of attack by deceased on accused one year before killing, when deceased was intoxicated, sustaining objection to question on cross-examination whether deceased had habit of drinking intoxicating liquor was proper.

9. Criminal law ⇐861—Refusal to permit jurors to smell and taste contents of bottle which fell out of deceased's pocket soon after shooting held not error.

In prosecution for murder, where no evidence had been presented that attack by deceased on accused about one year before killing was while deceased was intoxicated, refusal to permit jurors to taste and smell contents of bottle which fell out of deceased's pocket shortly after killing, to determine whether it held intoxicating liquor, was not error.

10. Homicide ⇐174(1)—Evidence that deceased's friends stoned automobile carrying passengers to notify police of killing held inadmissible to prove conspiracy to take accused's life.

In prosecution for murder, where theory of defense was that deceased and his friends had come to place of killing to take life of accused, evidence that automobile carrying messengers to telephone for police shortly after killing was stoned by persons who had come with deceased to scene of killing was not admissible to prove alleged conspiracy to kill accused.

11. Criminal law ⇐829(5)—Refusal of instruction as to self-defense held error.

In prosecution for murder, refusal of instruction, that one when attacked may stand his ground and defend himself and may pursue his adversary until he has secured himself from danger, on ground that it was covered by other instructions given, was error, regardless of instruction that party assailed may repel force by force to any extent which to him is apparently necessary, acting in reasonable manner.

12. Homicide ⇐300(3)—Refusal of instruction that jury could consider prior relations between accused and deceased as determining their state of mind at time of shooting held error.

In prosecution for murder, refusal of instruction that jury could consider evidence of previous difficulties between deceased and accused to determine their state of mind at time of shooting, in view of remarks of trial judge, was error.

13. Criminal law ⇐776(5)—Refusal of instruction that evidence of good character of accused aided general presumption of innocence, and might generate reasonable doubt sufficient for acquittal, held error.

In prosecution for murder, in which accused introduced testimony that his reputation for peace and quiet was good, refusal to instruct that evidence of good character aided general presumption of innocence and might generate reasonable doubt was error.

14. Homicide ⇐117—When killing in self-defense justifiable stated.

To justify killing in self-defense it must not only appear to accused as reasonable man that he had reason to believe and did believe that he was in danger of his life or of receiving great bodily harm, but it must also appear to his comprehension, as reasonable man, that to avoid such danger it was absolutely necessary to take life of deceased.

15. Homicide ⇐300(11)—Instruction that accused seeking quarrel could not set up self-defense was erroneous as not sustained by evidence.

In prosecution for murder, where there was no evidence that accused sought quarrel with deceased, instruction that one seeking quarrel with design to force deadly issue cannot defend on ground of self-defense was error.

16. Criminal law ⇐829(1)—Refusal of requested instruction as to prejudicial statements of trial judge held error.

In prosecution for murder, where trial judge referred to attempted impeachment of witness for state by reading from transcript of testimony at coroner's inquest before proving authenticity of transcript as iniquitous, refusal of instruction that such reference was not intended to reflect discredit on counsel for accused or accused, nor was jury to infer therefrom that judge had any opinion of facts in case, was error, regardless of other instructions.

17. Criminal law ⇐660, 728(2)—If judge makes damaging comment in presence of jury, or if district attorney takes course having like effect, counsel of injured party should ask judge to admonish jury.

Where judge makes damaging comment in presence of jury during trial, or where district attorney takes course which has like effect, counsel of injured party has duty to give judge opportunity to obviate possibility of harm by admonishing jury, if misconduct of either judge or district attorney is such that its effect may be removed by admonition.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Jos. Orosco was convicted of murder in the second degree, and he appeals. Reversed and remanded.

Wm. T. Aggeler, Public Defender, and G. A. Benedict, Deputy Public Defender, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

WORKS, J. Defendant was charged with the murder of one Nicolas Rios by shooting. He admitted the killing, but contended that the act was done in self-defense. He was convicted of murder in the second degree, and appeals from the judgment of conviction.

[1] The first point made by appellant for a reversal of the judgment is that the trial judge, in the presence of the jury and during the trial, referred to the killing of Rios as "the murder." It is contended that the remark tended to prejudice the rights of appellant in the minds of the jurors. The use of the word to which objection is made came about in this manner: Appellant's counsel had offered evidence concerning an event which occurred after the shooting of Rios, whereupon the judge, without objection having been made by opposing counsel, asked the question: "What is the use of taking up time with an episode that happened after the murder?" In discussing the point thus presented by the record appellant cites a long list of cases to the proposition that the presiding judge in a criminal case should not, directly or indirectly, assume or hypothetically suggest the guilt of the defendant. Particular reliance is placed on People v. Williams, 17 Cal. 142. That was a murder case, and during his charge to the jury the trial judge referred to the person who had been slain as "his victim," that is, as the victim of the defendant on trial. The Supreme Court said:

"We are not disposed to criticize language very closely in order to reverse a judgment of this sort, but it is apparent that in a case of conflicting proofs, even an equivocal expression coming from the judge, may be fatal to the prisoner. When the deceased is referred to as 'a victim,' the impression is naturally created that some unlawful power or dominion had been exerted over his person. And it was nearly equivalent, in effect, to an expression characterizing the defendant as a criminal. The court should not, directly or indirectly, assume the guilt of the accused, nor employ equivocal phrases which may leave such an impression. The experience of every lawyer shows the readiness with which a jury frequently catch at intimations of the court, and the great deference which they pay to the opinions and suggestions of the presiding judge, especially in a closely balanced case, when they can thus shift the responsibility of a decision of the issue from themselves to the court. A word, a look, or a tone may sometimes, in such cases, be of great or even controlling influence. A judge cannot be too cautious in a criminal trial in avoiding all interference with the conclusions of the jury upon the facts; for of this matter, under our system, they are the exclusive judges."

We are convinced that the use of the word "murder" by the judge in the present case comes within the condemnation embraced in this language, although, in our opinion, the word was not as objectionable as the one with which fault is found in the opinion from which quotation is made. There is room for the supposition here that the jury understood at the time that the judge intended by the use of the objectionable word merely to refer to the killing; and that appellant killed Rios is admitted. The possibility of such a supposition is minimized, however, by the fact that, as a matter of course, the judge told the jury in his final instructions, in effect, that murder is a crime. The jury was therefore notified of the difference between a murder and a killing, and it is quite likely that in the last analysis the judge's use of the word to which objection is made left an impression unfavorable to appellant in the minds of the members of the trial body. It appears, then, that the word should not have been used, and that its employment was error. This untoward circumstance, standing alone, is not of great moment, and it is given such extended notice principally because the judge, throughout the trial, let fall other expressions which could not but have been injurious, each in some degree, either lesser or greater, to the rights of appellant. This occurrence was but one of a chain of events of a similar character, and as such it is to be considered when we come to view, as we must, the various errors of the court in applying to the cause the provisions of section 4½ of article 6 of the Constitution. Respondent points out that no exception was taken at the time to the trial judge's use of the word "murder," and no admonition was asked to be given to the jury concerning it. This circumstance will be considered when we later pass upon the action of the judge in refusing certain instructions asked by appellant.

[2] A part of appellant's claim at the trial that the killing of Rios was in self-defense lay in evidence concerning a difficulty between him and Rios which occurred about a year prior to the shooting. According to this testimony, Rios, on the occasion mentioned and while he was in an intoxicated condition, made a vicious assault upon appellant in a certain poolroom. The person of appellant was uninjured during the assault, except for a slight cut on the head, but a coat worn by him was slashed in several places by means of a knife or dagger in the hands of Rios, so much so that it was unfit for further use. It was stipulated in writing during the trial that a certain person who was confined to his bed by illness and who was therefore unable to be present in court as a witness might be deemed to have testified to certain matters concerning this poolroom altercation. When the stipulation was offered in evidence objection was made to it by the district attorney. In ruling upon the objection the trial judge said:

"Well, I think it is remote, but I am going to overrule the objection. I will permit it to be read to the jury."

It is contended that the judge's remark that the evidence was remote was error, and the point is well taken. It is settled that evidence of the character now under discussion, offered for the purpose for which this was offered, is admissible even if remote in point of time; in short, that the objection

that it is remote goes to its weight and not to its admissibility. People v. Brown, 76 Cal. 573, 18 P. 678; People v. Wilson, 23 Cal. App. 513, 138 P. 971. The remark of the judge to which exception is taken was therefore an invasion of the province of the jury, as that body is the sole judge of the weight of evidence. Here again, as in the instance of the point of which we have above made disposition, respondent calls attention to the fact that at the immediate time of the court's remark no objection was made, and no admonition to the jury was asked. This circumstance will later be considered.

[3] Still having in mind the poolroom episode, the mutilated coat was produced at the trial and was received in evidence. It came from the custody of one Serra and his wife, with whom appellant lived at the time of the occurrence. There was testimony that appellant at the time came home with the slashed garment on, and Serra testified that he then took the coat from appellant. The record then shows this:

"Q. Now, what did you mean when you said you took the coat away from Orosco?

"The Court: I don't think I would spend any more time on that coat. I don't think he saw the cuts that were made.

"Mr. Fulcher [counsel for defendant]: We will connect it up.

"The Court: So far I think it has been a waste of time, all about the coat, so far as I can tell.

"Mr. Fulcher: We will show, of course—

"The Court: If you can show by somebody who saw it. He didn't see the cuts made.

"Mr. Fulcher: We were identifying it as Orosco's coat.

"The Court: Well, Orosco must have told him it was his coat. How does he know?

"Mr. Fulcher: If he saw it on him; he testified he saw it on him.

"The Court: We are going far afield on this thing. I expected he would know something as to the cuts made."

The remarks of the judge shown by this excerpt from the record were erroneous and prejudicial. It was most material for appellant to explain how the damaged garment had been preserved for a year, instead of having been consigned to the limbo of discarded clothing, and how, after that length of time, he was able to produce it at the trial. The testimony of Serra tended to make clear this circumstance, which otherwise would have perplexed the jury. The remarks of the judge must have materially interfered with this clearing up process. Moreover, certain of his observations tended to discredit in the eyes of the members of the jury the entire poolroom episode as an item in the defense of appellant that the homicide was justifiable. These particular remarks were:

"So far I think it has been a waste of time, all about the coat, so far as I can tell. * * * We are going far afield on this thing."

These observations of the judge made a substantial addition to his remark that the poolroom occurrence was remote. Here again, as in the case of the points already discussed, appellant at the time took no exception to the comments of the judge, and asked no admonition to the jury concerning them.

[4] During the trial appellant's counsel sought to lay a foundation for the impeachment of a certain witness for the prosecution. He asked the witness if he testified at the coroner's inquest held over the body of Rios, and the answer was in the affirmative. He then asked if the witness had given certain answers to questions propounded to him at the inquest and if the questions were answered. Then the following occurred:

"Mr. Fulcher: Now, your honor, I have some more cumulative matter along exactly the same line, at the preliminary hearing.

"The Court: You mean for impeachment?

"Mr. Fulcher: For the same purpose. It is cumulative of the coroner's inquest; in other words, it contradicts his testimony here.

"The Court: There isn't any appearance of a contradiction yet in the coroner's inquest, because you haven't proven the coroner's inquest yet."

It is contended that this statement of the judge was error, and, in order to state the point completely, it becomes necessary to refer further to the record. The witness on the stand had accompanied Rios to the place where the latter met his death at the hands of appellant. When they arrived appellant was seated on a certain bench, and immediately upon the arrival the life of Rios was taken. The witness testified on his direct examination that as he and Rios and others approached he saw appellant seated on the bench, and that he saw him "get up" from it. On cross-examination the witness was asked if a certain question was put to him at the coroner's inquest and if he gave a certain answer to it. The following were the question and answer:

"Q. Point out the man who done the shooting in the room. A. I can't point him out, because I couldn't see him in the dark; I know it was a person who got up."

As to whether he had so testified the witness answered:

"Maybe I did, if it is written there."

This matter in the record closely precedes the statement of the judge to which exception is taken, and the statement referred in part to it. We need not decide, however, whether the remark of the judge was erroneous, as it related to what turned out, upon the presentation of the evidence for the defense, to be an immaterial circumstance. It was in fact appellant who arose from the bench. Moreover, it transpired that there was to be no controversy in the case as to

who fired the fatal shot. As the remark of the judge could have affected a determination of that question alone, the error committed by him, if error there was, harmed appellant not at all. The fact that the evidence for the defense was devoted solely to a showing that appellant shot Rios in self-defense rendered innocuous any harm which might otherwise have lurked in the comment of the court.

[5] Other unfortunate occurrences arose through attempts of appellant's counsel to impeach witnesses by showing statements made by them at the coroner's inquest which were claimed to be contradictory of their testimony at the trial. These occurrences, three or four in number, were of a similar character and will be treated together. The following transpired when one of the witnesses for the prosecution was under cross-examination:

"Q. I want to show you a part of your testimony, page 16 of the coroner's inquest, beginning at line 1. The question to which he gives the answer is on page 15, at line 30, and I ask you if you so testified at the coroner's inquest.

"The Court: Ask him first if he recollects testifying at the coroner's inquest. A. Some of the words I remember testifying, and then others I don't remember. * * *

"Q. Do you remember testifying at the coroner's inquest over the body of Nick Rios at the day and date given on the front of that? A. Yes. * * *

"Mr. Ryan [a deputy district attorney]: Is this for the purpose of impeachment?

"Mr. Fulcher: It certainly is."

The district attorney then made the objection that:

"It is not impeachment, and if it be impeachment it is impeachment upon a collateral matter, and * * * that there is no evidence that this is a true and accurate copy of the coroner's inquest."

Then came this:

"The Court: He says part of it he remembers, and part of it he does not remember. Until you have shown this is an authentic copy—

"Mr. Fulcher: Your honor, I think impeachment by the coroner's inquest is the same as impeachment by any other oral person.

"The Court: No; except word for word. He says these things he does not remember. You undertook to read word for word. You cannot read it until you prove he did say it.

"Mr. Fulcher: My contention is this: I have a right to ask him if he did so testify, giving him the exact words.

"The Court: You have; nobody objected to that.

"Mr. Fulcher: I haven't been permitted to ask him that. There is nothing in the record to show what the question is on which the ruling is made. * * *

"The Court: Will you indicate the line on this page that you want for the record, and then I will read them?

"Mr. Fulcher: If I find an authority on that, will your honor consider it, on the question of reading the transcript?

"The Court: If you can find it. It is bad practice. It has been, as I understand the authority, not to read a transcript to the jury and have it afterwards held to be of no effect, unless it is reversible error; and I won't allow it.

"If it is reversible error, I will. I think it is such an iniquitous practice, until the Supreme Court say so, I will not do it. * * * I will not let it go to the jury and then afterwards rule it is immaterial, and should not go to the jury, and waste the time of the court, and in my opinion it is prejudicial."

After a further colloquy between the judge and Mr. Fulcher, the following transpired:

"The Court: I will permit you to ask the question, beginning line 30, the bottom of page 15. * * * You had better ask him if he remembers that particular part, but I take it that is what you wanted to show. I will permit you to read the whole of it. * * *

"Mr. Ryan: What about my * * * objection on the ground this transcript has not been shown to be authentic?

"The Court: He can ask whether at a certain time he made a certain statement, irrespective of the transcript. That is, I understand, what he proposes to do now.

"Mr. Fulcher: That is the purpose, your honor.

"Q. Now, I will ask you if the following question was put to you at the coroner's inquest."

The assumed question was then stated, and further queries concerning alleged questions put and answers made at the inquest were propounded to the witness. A somewhat similar chain of circumstances presented itself when another witness for the prosecution was under cross-examination. It was sought to impeach the witness by showing that he had made at the coroner's inquest, statements contradictory of testimony given by him on direct examination at the trial, and several questions had been put to him for the purpose of laying a foundation for the impeachment. Then:

"Mr. Ryan: At this time I move all the questions and answers be stricken from the record until it is shown this testimony was taken at the coroner's inquest.

"Mr. Fulcher: That is a matter of proof on the part of the defendant, proving the remainder of our case. If he says he don't know whether he testified or not, we will prove he did so testify.

"The Court: The question shows the iniquity of that method, because it does not appear here you will show it.

"Mr. Fulcher: If we don't prove it—

"The Court: I understand, but it has gone before the jury."

The attitude of the judge upon the legal question involved in these quotations from the record was incorrect. The counsel was following exactly the course required when an attempt is made to impeach a witness by showing that he has made statements out of court which are contradictory of his testi-

mony given in court. Section 2052 of the Code of Civil Procedure reads:

"A witness may * * * be impeached by evidence that he has made, at other times, statements inconsistent with his present testimony; but before this can be done the statements must be related to him, with the circumstances of times, places, and persons present, and he must be asked whether he made such statements, and if so, allowed to explain them. If the statements be in writing, they must be shown to the witness before any question is put to him concerning them."

The decided cases do not add to the requirements of this section the rule that alleged contradictory statements which are in writing must be proven to be "authentic" before they can be shown to the witness who is sought to be impeached, nor do we think that reason requires such a step. In all instances, under the mandate of section 2052, before an attempted impeachment may be made complete, the witness sought to be impeached must be made acquainted "with the circumstances of times, places, and persons present" when it is claimed the contradictory statements were made, and they must be "related" to him. So far the requirements of the section may be said to be general. After this general provision the Legislature has added the special requirement that if the "statements be in writing, they must be shown to the witness before any question is put to him concerning them." This special mandate of the section is not operative until the general requirement is complied with. That is, even when the alleged statements are in writing, the circumstances of time, place, and parties present must be stated to the witness, and, logically, they must be stated before the writing is shown. After that is done, the special provision of the section operates, and the witness, having been made acquainted with the circumstances of time, place and persons present, and having seen the alleged contradictory statements on paper, may be asked whether he made them. This is all that the statute by its letter requires, and the witness has had before him everything that in fairness could be required for the purpose of refreshing his recollection and putting him on his guard. He is fully armed and warned. Whether or not the transcript which is presented to him is "authentic" is not necessary to his enlightenment. Certain definite statements are presented to him, with all the circumstances under which it is claimed that they were made, and he is given fair opportunity to say, at his peril, it is true, whether he made them. If he says he did not, the very statements which have been exhibited to him must be proven in substance, either by a showing that the transcript of his statements is "authentic," that is, that a stenographer was in attendance when he made the statements, and that he was accurately reported, or by the testimony of those who were present at the time. We are convinced that if a court should require that the authenticity of the transcript be proven in advance of the time when the witness is impeached, the requirement would be an addition to the statute and not a construction of it and would be a work of judicial legislation.

[6] In connection with what has been said above, it is to be observed that the trial judge in the present instance did not take the view that the "authenticity" of the transcript of the testimony before the coroner must be shown in order to enlighten the witness in view of his threatened impeachment. The judge took the ground that if the transcript were not so supported something improper might get before the jury. That position was untenable. The danger which the judge feared is one which is incident to every attempt to impeach a witness by showing statements out of court which contradict his testimony. Under what we have termed the general provision of section 2052, any oral contradictory statement claimed to have been made by a witness must be recited to him, and his answer must be obtained as to whether he made it before others may testify concerning it. The only relief from the danger apprehended by the judge, whether the asserted contradictory statements are oral or written, is to remove their injurious effect, if there be any, by admonition and instruction in the event that there is in the last analysis no evidence that they were made.

As we have already remarked, there is no authority for the position taken by the trial judge on the subject now under examination. There are a number of cases in which the question arose as to whether a sufficient foundation was laid for an impeachment by means of contradictory statements made at preliminary examinations. In them the rule directly prescribed by section 2052 is stated and nothing more; that is, it is said that before a witness may be impeached the alleged contradictory statements must be shown or read to him. People v. Ching Hing Chang, 74 Cal. 389, 16 P. 201; People v. Dillwood, 4 Cal. Unrep. 973, 39 P. 438; People v. Hawley, 111 Cal. 78, 43 P. 404; People v. Lambert, 120 Cal. 170, 52 P. 307. Of course, as indicated in one of these opinions, that in People v. Hawley, the authenticity and correctness of the transcript must be shown before it may be used for the final purpose of impeaching the witness. The sufficiency of the foundation for impeachment has arisen in cases in which the alleged impeaching statements were made at previous trials of the causes in which the witnesses later testified, and in those cases also only the rule expressly stated in section 2052 is set forth (People v. Lee Chuck, 78 Cal. 317, 20 P. 719; Doudell v. Shoo, 20 Cal. App. 424, 129 P. 478; People v. Fitzgerald, 138 Cal. 39, 70 P. 1014); and statements made in an unsigned deposition have been put in the same category by another decision (Lanigan

v. Neely, 4 Cal. App. 760, 89 P. 441). As far as we are able to discover, questions touching impeachment where the alleged contradictory statements are made at a coroner's inquest have been considered in this state but once (People v. Devine, 44 Cal. 452), and it seems to appear from the report of the case that the transcript of the proceedings at the inquest was not shown to the witness who was sought to be impeached, as it is said that she was "asked" whether she had made the alleged contradictory statements. The decision turned upon the question whether the transcript contained a report of a proceeding judicial in character and therefore admissible for the purpose of impeaching the witness, due foundation having been laid. The Supreme Court decided that it was such a report, and reversed the judgment for the reason that the trial court had excluded the transcript. If this decision has not been overturned, as to the exact point determined by it, by Mar Shee v. Maryland Assurance Corp., 190 Cal. 1, 210 P. 269, a transcript of the proceedings at a coroner's inquest would seem to be governed by the provisions of section 2052, like a transcript of proceedings at a preliminary examination, but if it has been overruled by the late case noted, it is possible that such a transcript is not to be viewed as containing statements "in writing" of the witness testifying at the inquest, as that term is used in the special provision contained in section 2052. It has been held in one case that a statement made by one to the police and by the latter reduced to writing is not a statement "in writing," under the section, of the party who makes the statement. People v. Glaze, 139 Cal. 154, 72 P. 965. See, also, People v. Talman, 26 Cal. App. 348, 146 P. 1063. If the statements made at the inquest here were not statements in writing, as that term is employed in the section, they need not have been "shown" to the witnesses whose impeachment was desired, and it would have been sufficient, of course, merely to have asked whether the statements were made. While the exact question which we now discuss has never been decided in this state, the procedure which we have above outlined as being proper seems actually to have been followed in People v. Morine, 61 Cal. 367, a case in which the alleged contradictory statements were made at an earlier trial of the cause in which the impeached witness was on the stand. After an "effort had been made by the defense to impeach the witness * * * by showing that he had testified on a former trial of this case to a state of facts different from that stated by him on the second trial," and while the evidence of the defendant was being produced, the reporter who had been in attendance at the first trial was placed on the stand. It was shown by him that his transcript of that trial was "authentic," and he testified to the making of the contradictory statements. We are satisfied that the attitude of the trial judge here in making his remarks concerning the practice followed by appellant's counsel was based upon an incorrect understanding of the law.

[7] We have not discussed the legal question arising under section 2052 for the purpose of imputing error to the trial court in any ruling which he made involving it. No such error is claimed. It appears that appellant at last succeeded in getting before the witnesses the various questions he desired to propound to them through the expedient, apparently devised by the judge, of "asking" them, but not "word for word" from the alleged record, whether they had made the asserted contradictory statements. It is contended, however, that the judge erred in saying in the presence of the jury concerning the course being taken by appellant's counsel, that "it is bad practice," that "it is such an iniquitous practice," that "it is prejudicial," and that a question asked by counsel "shows the iniquity of that method." These expressions, strong as they were, would have been of doubtful propriety if the judge had been correct in his view of the law, and if it had become necessary for him to halt counsel in the course he attempted to take, albeit by remarks of a more temperate character. We have been at pains to examine the question of law which counsel and judge debated, upon the theory that the error of the latter was the greater if he were wrong in his view of the law and if counsel were right. We are satisfied that the judge injured materially the defense of appellant by the character of rebuke he administered when not even a mild rebuke was deserved. He held appellant's counsel up to the jury as one who, in an endeavor to win his cause, would resort to iniquitous practices. In fact, he in effect accused the counsel of pettifogging, and he accused him unjustly. His course must have lessened appellant's chances of acquittal. It is to be observed here again, that no exception was taken to the remarks of the court at the time they were made, and that no admonition was asked concerning them.

[8] The widow of Rios testified for the prosecution. On her cross-examination she was shown a half-pint bottle containing a white or yellowish fluid, and was asked whether she had seen it in her husband's possession when he left home immediately preceding his death. She replied that she had not. She was then asked whether Rios was in the habit of drinking intoxicating liquor. An objection to the question was interposed, and the objection was sustained. It is contended that the ruling was error. This occurrence was at a stage of the trial which preceded what we have above termed the poolroom episode, during which, it will be remembered, Rios, while intoxicated, had made a vicious assault upon appellant. The court had no knowledge, when the question was put to Mrs. Rios, that appellant had ever had trouble with the de-

ceased when the latter was in a state of intoxication, or that he knew anything about the habits of deceased in that regard. Whether the question put to Mrs. Rios would have been proper if it had come after the evidence concerning the trouble in the poolroom, under the rule stated in slightly varying forms in People v. Lamar, 148 Cal. 564, 83 P. 993, People v. Bennett, 161 Cal. 214, 118 P. 710, and People v. Barrett, 22 Cal. App. 780, 136 P. 520, we need not pause to decide. The question having been propounded at the early stage of the trial which brought it forth, and without intimation that there would be any evidence showing appellant's knowledge concerning the alleged habits of Rios, we are satisfied that the trial court did not err in sustaining the objection to it.

[9] At a later period of the trial it was shown that the bottle which had been exhibited to Mrs. Rios was taken from the clothing of Rios when, soon after his death, his body was lifted into a conveyance for transport from the scene of the homicide. The bottle and its contents were offered and received in evidence. Appellant then asked that the members of the jury be permitted to smell the contents of the bottle in order to determine whether it held an intoxicating liquor, and the permission was refused. Laying aside points made by respondent as justifying the refusal, we think the court did not err in making it for the reasons stated in the last preceding paragraph. At the time of the request a part of the evidence concerning the poolroom affair had been introduced, it is true, but there was at that stage of the trial no hint that Rios had made the assault upon that occasion while he was intoxicated, nor was the court notified in any other manner that appellant knew anything whatever as to the alleged habits of Rios in the use of intoxicants.

[10] Immediately after Rios was killed, certain of the bystanders got into an automobile and started toward a telephone for the purpose of notifying the police of the occurrence. The defense offered to prove that the automobile was stoned, as it left the place, by those persons who had come with Rios to the scene of his death. Upon objection the offer was rejected. It was the theory of the defense that Rios and his friends had come to the place for the purpose of taking the life of appellant. It is contended that the rejected evidence was admissible in proof of the alleged conspiracy. In our opinion it was not.

Appellant requested several instructions on the law of self-defense. They were refused on the ground that the matter presented by them was covered by instructions which were given. We have read the instructions which the court gave upon the subject, and we are satisfied that all but two of the requested instructions were properly rejected for the reason stated. We shall therefore proceed to a specific consideration of those two alone.

[11] One of the rejected instructions contained the statement "that a person in the exercise of the right of self-defense * * * not only has a right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger." This requested instruction, like others on the same general subject, was denied on the ground that its matter was covered by instructions which were given. We find in the record no instruction in which the substance of the language above quoted was presented to the jury. Respondent calls our attention to an instruction which recited that, in the exercise of the right of self-defense, the party assailed has "the right to repel force by force," and that he may employ the right to defend himself from the apprehended danger "to any extent which to him is apparently necessary, acting in a reasonable manner." The language thus given did not, to our minds, cover the point. The refusal to give the requested language was therefore error. "The right to stand one's ground should form an element of the instructions upon the necessity of killing and the law of self-defense." People v. Hecker, 109 Cal. 451, 42 P. 307, 30 L. R. A. 403. "When [a man] without fault himself is suddenly attacked in a way that puts his life or bodily safety in imminent hazard, he is not compelled to fly, or to consider the proposition of flying, but he may stand his ground, and defend himself to the extent of taking the life of the assailant, if that be reasonably necessary." People v. Newcomer, 118 Cal. 263, 50 P. 405. The requested instruction was peculiarly applicable in the present instance, as it fitted exactly certain phases of the testimony in the case.

[12] One of the instructions which was requested and refused read as follows:

"The jury may take into consideration the evidence of the previous difficulties between Nick Rios and Jose Orosco in this case and likewise any other matters pertaining to their prior relations which have been introduced in evidence for the purpose of determining their state of mind at the time the fatal shot was fired."

The court gave no instruction upon the subject covered by this language, and we think, therefore, that the refusal to give the requested instruction was error. Such an instruction was called for by the testimony, and it was made particularly necessary because of the trial judge's reference to the poolroom episode as "remote," and by the manner in which he commented upon the evidence concerning appellant's damaged coat when the witness Serra was on the stand.

[13] Appellant introduced testimony at the trial to the effect that his reputation for peace and quiet was good. In view of this evidence he asked the court to give two certain instructions, but both were refused. One of them read:

"The court charges the jury that evidence of the good character of the defendant comes in aid of the general presumption of innocence, and is no more to be laid aside by the jury in their deliberations than is the general presumption itself. It is a fact in the case and itself may, in connection with all the other evidence in the case generate a reasonable doubt, sufficient to entitle the defendant to an acquittal."

The other proposed instruction, although differently couched, was in legal effect the same as the one here set forth. The court erred in not giving one or the other of the two. People v. Wilson, 23 Cal. App. 513, 138 P. 971.

[14] One of the instructions read to the jury contained the following:

"The law of self-defense is founded on necessity, and in order to justify the taking of life upon this ground it must not only appear to the slayer, as a reasonable man, that he had reason to believe, and did believe, that he was in danger of his life, or of receiving great bodily harm, but it must also appear to his comprehension, as a reasonable man, that to avoid such danger it was absolutely necessary for him to take the life of the deceased."

The question whether this instruction, in its use of the term "absolutely necessary," is a proper statement of the law has had a stormy career in the courts of this state, but its correctness was established in People v. Bruggy, 93 Cal. 476, 29 P. 26, and since that decision it has been upheld, either in the form in which it was given to the jury here or in similar forms, in People v. Lemperle, 94 Cal. 45, 29 P. 709, in People v. Emerson, 130 Cal. 562, 62 P. 1069, where the expression "necessary" was used without the qualifying word "absolutely," and perhaps in other cases. It was practically conceded to be correct in People v. Cyty, 11 Cal. App. 702, 106 P. 257. These cases deal with what may be termed the rule of apparent necessity; that is, they decide that where it appears to an assailed person as a reasonable man that, because of the conduct of his assailant, it is necessary, or absolutely necessary, to take the life of the assailant in order to save his own life, or to protect himself from great bodily injury, he may slay with impunity. The instruction here given was therefore correct. In addition to the cases last cited there are also decisions which deal with what may be called the rule of real necessity under the law of self-defense. These latter decide that where the jury finds that the assailed person was, through the conduct of the assailant, put in jeopardy of life or in danger of great bodily harm, the absolute necessity for slaying the assailant arises as matter of law. The cases on this subject are People v. Hecker, supra, People v. Newcomer, supra, and People v. Estrada, 60 Cal. App. 477, 213 P. 67. It is not contended that appellant asked any instruction under the law as declared in these decisions.

[15] It is urged upon us that the trial court erred in instructing the jury "that self-defense is not available as a plea to a defendant who has sought a quarrel with the design to force a deadly issue and thus, through his fraud, contrivance or fault to create a real or apparent necessity for killing." The point is well taken. While the instruction was a correct statement of an abstract proposition of law, it was improperly given in the present instance, for the reason that there was not in the record the slightest evidence that appellant sought a quarrel with Rios during the series of events leading up to the latter's death. See People v. Maughs, 149 Cal. 253, 86 P. 187; People v. Roe, 189 Cal. 548, 209 P. 560.

[16] In considering the damaging remarks and comments made by the judge during the trial of the action, we have several times observed that no objection was interposed to them at the time they were uttered, and that no request was made that the jury be admonished to disregard them. Appellant did, however, ask the court to read to the jury the following as a part of his final instructions:

"During the course of this trial, counsel for the defendant asked a question by way of impeachment of one of the witnesses in this case to which I answered as follows: 'The question shows the iniquity of that method. Because it does not appear here you will show it.' You are not to infer from this statement of mine nor from my attitude during the period of time which I made this statement that I intend to reflect any discredit upon the counsel for the defendant or upon the defendant himself; nor are you to infer from this statement that I have any opinion regarding any of the facts in this case, for with them I have nothing to do. You are the sole and exclusive judges of the facts."

The following instruction was also proposed by appellant:

"You are further instructed that during the course of this trial I have engaged at different times in discussions with the attorneys in the case and have made certain remarks during that time. In referring to certain evidence which the defendants were attempting to introduce, I have spoken of a certain practice as being 'iniquitous.' You are not to infer from my statements or from my attitude or actions in this case that I have any opinion in regard to the facts in this case. You are the sole and exclusive judges of the facts in this case, and with them I have nothing to do, nor are you to infer from anything which I have said that I have any opinion regarding them; and if my remarks have seemed to reflect even in the slightest degree upon the integrity of the counsel for the defendant, you are not to so regard them, nor are you to indulge in any inference against the defendant because of my remarks made during the course of this trial."

Each of these requested instructions was refused.

[17] Where a judge makes damaging com-

ment in the presence of the jury during a trial, or where a district attorney takes a course which has a like effect, it is the duty of the counsel for the injured party to give the judge an opportunity to obviate the possibility of harm by means of admonition addressed to the jury, if the misconduct of either judge or district attorney is such that its effect may be removed by admonition. People v. Hayes (Cal. App.) 237 P. 390. In many of the cases which announce this rule it is said that the request for an admonition must be "timely." We do not understand this expression to mean that a request for the insertion of such an admonition in the final instructions to be given to the jury is so untimely as to justify a judge in refusing to grant it. Such a request is surely timely to the extent that it will be effective, and a judge should be eager to give the instruction if a beneficial result may be expected or even hoped to flow from it. We think the refusal to give either the one or the other of the requested instructions set forth above, under all the circumstances of the present case, was error. Some good could certainly have been accomplished by reading one of them to the jury, and the judge, having wrought the harm which followed from his injudicious remarks, should have made haste to embrace the opportunity to eradicate it. The judge did give a certain instruction which is read to juries in practically all cases, but we think it did not cover prominent features of the instructions which were refused. The given instruction read:

"I have not expressed, nor intend to express, nor have I intimated or intend to intimate, any opinion as to what witnesses are or are not worthy of credence; what facts are, or are not, established; or what inferences are to be drawn from the evidence adduced. If any expression of mine has seemed to indicate an opinion relating to any of these matters such expressions must be disregarded by you."

The refused instructions did not specifically cover all the harmful comment of the judge made during the trial, it is true, but some of the general language of them was calculated better to cover all of his injurious remarks than was the more general instruction which was given.

We have made a careful examination of the entire cause, including the evidence, for the purpose of determining whether, under section 4½ of article 6 of the Constitution, a reversal of the judgment must follow from the error shown in the record. The evidence offered by appellant went solely to the point as to whether he had shot Rios in self-defense. In support of the issue thus presented by him, there was much evidence of a positive character, while the testimony to the contrary was wholly negative and was much attenuated. This state of the record is so plain that we find it unnecessary to recite the evidence upon the subject. We do not hesitate to say that if we could be called upon to decide the cause from the showing made by the record, not having an opportunity to observe the witnesses and thus to determine their credibility from their demeanor, we should hold that a slaying in self-defense was shown by a vast preponderance of the evidence, and that appellant should have been acquitted. It may be, of course, that the witnesses offered by appellant were entirely unworthy of belief, and that the jury may have been able to so determine from their appearance and manner of testifying. By our attitude upon the subject we do not intend to say that the question was not solely for the jury at the trial. It was. We express ourselves so forcibly only for the purpose of indicating that the showing of the cold record, upon which alone we may make application of the rule of the Constitution, imperatively demands a reversal of the cause. This result must follow even if we view appellant's request for a final admonitory instruction as not being broad enough to cover all the erroneous remarks made by the judge during the trial. His characterization of the efforts of appellant's counsel when the latter was seeking to impeach some of the witnesses of the prosecution, his refusal of proper instructions requested by appellant, and his giving of an instruction asked by the prosecution, which was improper, demand a reversal. As the evidence shown by the record inclines so strongly toward a support of the defense made by appellant, we are bound to assume that even a slight added circumstance favorable to him, or the removal of a slight circumstance unfavorable to him, would have impelled the jury to return a verdict of acquittal. Surely, if the trial court had not committed the errors mentioned, such a result would have been not only possible, but probable. This fact is indicated by a circumstance which we have reserved for final mention. Appellant was charged with murder. Under the evidence he either shot Rios in cold blood, or he was totally innocent of crime for the reason that the killing resulted through the exercise of the right of self-defense. There was in strictness no middle ground. The jury, however, found appellant guilty of murder in the second degree. Not only so, but after expressing that finding the verdict ends, "and ask the extreme lenience of the court." Here was a remarkable verdict. It showed nothing if it did not indicate that the minds of the members of the jury were in a state of doubt as to the correctness of their solution of the problem submitted to them.

Judgment reversed, and cause remanded for a new trial.

We concur: FINLAYSON, P. J.; CRAIG, J.

73 Cal. App. 678

ARCHER v. MILLER (two cases). (Civ. 4649, 4651.)

(District Court of Appeal, Second District, Division 1, California. July 20, 1925.)

1. Quieting title ⟸37(1)—Answer asking affirmative relief must, as to sufficiency of allegations, conform to rules applicable to complaint.

In action to quiet title, answer setting up rights under a contract should allege fairness of contract and adequacy of consideration, since rule requiring such matter be shown in complaint applies to an answer through which pleader seeks judicial recognition and declaration of an equitable interest.

2. Specific performance ⟸73—Contract for personal service not subject to specific performance.

Contract for sale of real estate, providing that purchaser plant and cultivate orange trees on property, is a contract calling for personal service by one of the parties; hence specific performance cannot be enforced.

3. Quieting title ⟸37(1)—Answer setting up contract of sale not alleging performance by defendant no defense.

Answer in suit to quiet title, setting up contract of sale, which contains no statement of facts showing performance by defendant or excuse for nonperformance of conditions prescribed therein, fails to state a defense or show right to affirmative relief.

4. Quieting title ⟸37(1)—Defense setting up contract in which time is of the essence must show actual compliance.

Where in action to quiet title answer set up contract in which time was of essence, and which provided defendant was to purchase orange trees on contract and assign contract to plaintiff on or before November 1, an allegation that defendant purchased trees for planting on or about November 10 was no defense under Civ. Code, § 1657.

5. Quieting title ⟸15—Contract of sale, not specifically enforceable, no defense.

A contract for sale of real estate, containing provision that purchaser was to plant and cultivate orange trees, not being specifically enforceable because there was no mutuality of remedy, could not be the basis of defense against an action to quiet title.

Appeals from Superior Court, Los Angeles County; John M. York, Judge.

Action by C. E. Archer against H. B. Miller. From the judgment, both parties appeal. Reversed.

See, also, 192 Cal. 67, 218 P. 410.

Tobias R. Archer and O'Melveny, Millikin, Tuller & Macniel, all of Los Angeles, for plaintiff.

B. J. Bradner and Seward A. Simons, both of Los Angeles, for defendant.

CONREY, P. J. These are two appeals in the same action. Plaintiff brought the action to quiet title to 40 acres of land owned by him. By his answer the defendant admitted that the plaintiff is the owner and in possession of the land, but alleged that the same is subject to contract rights of the defendant. These rights are claimed under a contract dated September 10, 1921, whereby Archer, as party of the first part, leased said real property to Miller for the term of ten years, commencing November 1, 1921, at a total rent of $40,000, payable as follows: $4,000 on or before four years from November 1, 1921; $6,000 each year thereafter until the entire principal is paid, with interest on said $40,000 at the rate of 7 per cent. per annum, payable annually from the 1st day of November, 1921. The contract, after setting out many of the ordinary stipulations of a lease, provided as follows:

"Should the said party of the second part during the faithful performance by him of all the covenants of this lease desire to purchase the said premises, then said party of the first part agrees to sell the said premises to the said party of the second part at any time during the faithful fulfillment of this lease, if no default exists on the part of said party of the second part, for the sum of $40,000, together with interest thereon at 7 per cent. per annum, computed and payable annually from the commencement of this lease to the completion of purchase. Any amounts paid on the $40,000 rent and on the interest thereon may be applied to the purchase price of principal and interest at the time of purchase, but unless the whole purchase price is paid at once, this lease and the terms thereof shall continue until the whole purchase price is paid and completed.

"Should the said party of the second part fail to make any of the payments agreed to be made in this lease, or to fulfill any of the obligations of this lease or this agreement, then the said party of the second part agrees to and hereby does relinquish all rights and interest created or conferred by or under this indenture and in all sums paid thereunder, and in the property herein described.

"For the consideration of fifty ($50.00) dollars paid to said party of the first part by said party of the second part, receipt of which is hereby acknowledged, the said party of the second part is hereby given the right to terminate this indenture on or before November 1, 1921, by notice in writing, signed by him, to that effect; otherwise this indenture is to continue in full force.

"It is agreed that said party of the second part is to purchase for and plant all of said premises to first-grade orange trees during the year 1922, said planting thereof to begin on or before March 2, 1922, or otherwise if agreed to by both parties, and to be completed on or before May 1, 1922; and to that end, said party of the second part, as a part of the covenants of this lease, agrees to level and put in good condition said land and premises prior to any such planting, and agrees to purchase said first-grade orange trees therefor by contract

with one-third cash payment or more down, before or on November 1, 1921, and to assign such contract and all his interest therein to said party of the first part on the condition and agreement that if the provisions of this indenture are not fulfilled by said party of the second part he forfeits to said party of the first part all his interest in said contract and orange trees, and all the payments made thereon to and the same shall thereby vest in the party of the first part, as an absolute assignment thereof to him, and he shall have the right thereupon to complete the payments under such contract for said orange trees, and take and receive all of said trees under said contract. Said party of the second part agrees to plant, cultivate, irrigate, and carefully and diligently care for all of said orange trees, and keep the same in good and thrifty condition on said premises during the existence of this indenture.

"All royalties or bonuses from oil are to apply on purchase price of land.

"In case said second party does not terminate this indenture, then immediately after November 1, 1921, said party of the first part will furnish to said party of the second part a certificate of title of said premises, showing the same vested in said party of the first part and may at his option furnish such certificate at any time during this indenture, showing title to said premises free and clear of all incumbrances, except taxes accruing subsequent to the date of this indenture, and will furnish such certificate on the completion of the purchase of said premises by said party of the second part hereunder." * * * "It is mutually agreed that time is of the essence of this indenture and agreement."

The judgment, after first determining that the plaintiff is owner in fee of said land subject to the rights of the defendant under and by virtue of said agreement, further decreed as follows:

"II. It is further ordered, adjudged, and decreed that said agreement is a valid and subsisting contract for the purchase of said property, and that defendant is relieved from any forfeiture or attempted forfeiture by the plaintiff of his rights under said contract, and that said defendant is entitled to have said contract concluded and carried out, but only on the terms and conditions hereinafter set forth.

"III. It is further ordered, adjudged, and decreed that upon the payment to said plaintiff within 60 days from the date hereof of the sum of $40,000, and taxes accruing subsequent to the 10th day of September, 1921, that plaintiff execute and deliver to the defendant, H. B. Miller, a good and sufficient deed of conveyance of said property, free and clear of all incumbrances.

"IV. It is further ordered, adjudged, and decreed if the said plaintiff shall fail and refuse and neglect to make such conveyance, that the clerk of this court be, and he is hereby, appointed commissioner to execute such deed, and that such transfer, when made by such clerk as such commissioner, shall operate as a transfer to defendant of the said premises.

"V. It is further ordered, adjudged, and decreed, that upon the payment by the defendant of the said sum of $40,000 and the taxes as aforesaid, and upon the execution of said deed of conveyance by plaintiff, or in lieu thereof by the clerk of this court as hereinbefore provided, the plaintiff and all persons claiming, or to claim, said premises, or any part thereof, through or under said plaintiff, be and they are hereby restrained from thereafter asserting any right, title, or interest in or to any of the property described in the defendant's answer and in the findings herein.

"VI. It is further ordered, adjudged, and decreed, that in the event of failure of the defendant to pay to the plaintiff the sum of $40,000, which amount is hereby decreed to be due and payable to said plaintiff at the date of the trial of this action, and taxes accruing subsequent to the 10th day of September, 1921, within 60 days from the entry of the judgment herein, that the said agreement hereinbefore referred to be canceled and of no effect, and that in such case said premises be restored to said plaintiff and that in such event said defendant has not any right, title or interest in or to said property, or any part thereof, and that in such event said defendant is thereafter perpetually restrained and enjoined from setting up any claim or claims thereto or any part thereof."

Plaintiff's appeal is from every part of the judgment adverse to him and in favor of the defendant. Defendant's appeal is in form an appeal from the entire judgment, but his sole objection is to that part of the judgment which requires him to make full payment within 60 days from the date of the judgment and upon his failure to comply with that requirement terminates all of his rights under the contract.

The first point presented by plaintiff is that the court erred in overruling his objection to the receipt of any evidence in support of the answer. The ground of the objection was that the answer failed to state a defense. Plaintiff contends that, for several reasons, the answer is fatally defective. The terms of the judgment indicate that the court treated the answer as a cross-complaint. Possibly the answer was so intended by the pleader. The prayer thereof is:

"That plaintiff take nothing by his cause of action, and that defendant be given possession of said land so that he may fulfill and carry out the agreement, and for costs of suit, and such other and further relief as to the court may seem meet in the premises."

[1] One of the plaintiff's points against the sufficiency of the answer is that it is silent upon the subjects of fairness of contract and adequacy of consideration. He contends that the rule requiring that the facts respecting such matters be shown is as applicable to an answer through which the pleader seeks judicial recognition and declaration of an equitable interest as it is to a complaint or cross-complaint having a similar object. Although no authority has been cited in support of this proposition, we are inclined to the opinion that the rule should be so applied. The answer contains no allegation as to the actual value of the land, and the facts stated are

not sufficient to show that the contract was just and reasonable or that the consideration was adequate. This is clearly insufficient for any purpose involving an equitable remedy. The facts showing that the contract was just and reasonable should have been alleged. Salisbury v. Yawger, 184 Cal. 783, 795, 195 P. 682.

[2] It further appears that the contract is not one which furnishes a basis for mutuality of remedy. Therefore it is not a contract which can be specifically enforced. This is so because agreements to perform acts in the nature of personal service cannot be specifically enforced, and the contract herein provides for such service by defendant. By its terms it requires the defendant to prepare the land for planting, and to plant, maintain, and care for orange trees on the entire tract. "It is elementary that mutuality of remedy is an indispensable prerequisite to the specific performance of a contract. The remedy must be mutual as well as the obligation, and when the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. Cooper v. Pena, 21 Cal. 404; Stanton v. Singleton, 126 Cal. 657, 59 P. 146, 47 L. R. A. 334; Los Angeles, etc., Development Co. v. Occidental Oil Co., 144 Cal. 528, 78 P. 25; Pacific, etc., Ry. Co. v. Campbell-Johnston, 153 Cal. 106, 94 P. 623. 'Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance.' Civ. Code, § 3386." Poultry Producers of So. Cal., Inc., v. Barlow, 189 Cal. 278, 287, 208 P. 93, 96.

[3, 4] It further appears that the answer contains no statement of facts showing performance by the defendant or excuse for nonperformance by him of the conditions prescribed to be performed by him "before or on November 1, 1921." For that reason we think that the answer fails to state a defense and fails to show any right to affirmative relief. Since the answer does not allege any repudiation by plaintiff of the contract until on or about the 10th day of November, 1921, it is plain that such repudiation cannot be a valid excuse for defendant's failure to do the things which he was to do before or on November 1st. The provision of the contract whereby the defendant agreed to purchase first-grade orange trees to be planted on said land and to make said purchase "by contract with one-third cash payment or more down before or on November 1, 1921, and to assign such contract and all his interest therein" to the plaintiff, and that if this was not done the defendant would forfeit all his interest in said contract and orange trees and all payments made by him, required not only that the contract be made not later than November 1st, but that the assignment thereof to the plaintiff must be made not later than November 1st. The answer alleges that in fulfillment of said agreement the defendant purchased trees for the planting of said premises and on or about November 10, 1921, took possession of the premises and commenced work thereon, but was ejected by the plaintiff. This was not an allegation of assignment to plaintiff of the contract or of any tender or offer of or attempt to make such assignment. The contract by its terms provided that time was of the essence thereof. "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed. If the act is in its nature capable of being done instantly—as, for example, if it consists in the payment of money only—it must be performed immediately upon the thing to be done being exactly ascertained." Civ. Code, § 1657. The assignment of a contract is a thing capable of direct and immediate performance as soon as the contract exists. Here there was nothing alleged, nor is there anything in the terms of the contract, which would exempt defendant from his obligation strictly to perform his obligation to assign said contract before or on November 1st. On the contrary, the nature of the contract, particularly as it existed prior to November 1st, was such that plaintiff was clearly entitled to the full benefit of the provision making time of the essence of the contract, for the contract reserved to the defendant until that date the right to withdraw therefrom. In other words, until then it was only an option under which defendant had the right to become lessee of the land with further right of purchase.

[5] We think that the court erred in overruling the objection of the plaintiff to the evidence offered in support of the affirmative defense. This error caused a miscarriage of justice, because it has resulted in a judgment to which the defendant was not entitled, even though it be conceded that all of the allegations of the answer are true. It is sufficient on this proposition to refer to the rule, established by decision, that a contract of purchase and sale which is not specifically enforceable cannot be the basis of defense against an action to quiet title. Jolliffe v. Steele, 9 Cal. App. 212, 98 P. 544; Valentine v. Streeton, 9 Cal. App. 640, 99 P. 1107; Crane v. Roach, 29 Cal. App. 584, 587, 156 P. 875.

Both parties are dissatisfied with that part of the judgment found in paragraphs III, V and VI thereof. For the reasons which have been stated in discussing the answer of defendant, the result necessarily follows that the defendant was not entitled to any judgment enforcing the contract by compelling the plaintiff to execute a deed, either upon payment of the sum of $40,000 to plaintiff within the time stated in the judgment, or at

all. This being so, it is unnecessary to consider and determine the merits of defendant's contention that he should not have been required to pay the full contract price within 60 days from the date of the judgment, or upon failure so to do be deprived of his right to purchase the property.

The judgment is reversed.

I concur: CURTIS, J.

---

73 Cal. App. 692

SWALLOW v. FRANCISCO et al.
(Civ. 4006.)

(District Court of Appeal, Second District, Division 2, California. July 22, 1925.)

1. Appeal and error ⟹931(7)—Where findings do not conform to issues made by pleadings, it is assumed court heard evidence to sustain them.

Where the findings fail to respond to issues framed by pleadings, it must be assumed in support of judgment that the court heard evidence sufficient to sustain them.

2. Appeal and error ⟹197(1)—Variance between pleading and proof must be raised below.

Where there is variance between pleading and proof, point that there is such a variance must be made at the trial.

3. Appeal and error ⟹916(1)—On appeal on judgment roll without bill of exceptions presumed that no objection on ground of variance was made below.

Where an appeal comes up on the judgment roll without bill of exceptions, it will be presumed in aid of a judgment that no objections on ground of variance were made in the trial court.

Appeal from Superior Court, Inyo County; Wm. D. Dehy, Judge.

Action by A. H. Swallow against Herbert Francisco and another. From a judgment for plaintiff, defendant named appeals. Affirmed.

Crouch & Crouch, of Los Angeles, for appellant.

Forbes & Guthrie, of Bishop, for respondent.

WORKS, J. This is an action to recover an attorney's fee. Judgment was rendered in favor of defendant Soteras and against defendant Francisco. The latter appeals.

The sole point presented by appellant is that the findings of the trial court are not responsive to the issues framed by the pleadings. The complaint alleged that at all times mentioned in it respondent was a duly licensed, qualified, and practicing attorney at law in the state; that within two years last past, he, at the special instance and request of defendants performed certain legal services for which they promised and agreed to pay him the reasonable value thereof on demand; that the reasonable value of the services was the sum of $500, and that he has demanded of defendants the payment of the amount, but that they have wholly failed and refused, and still fail and refuse, to pay the same or any part thereof except the sum of $45.90. Judgment was prayed for $454.10. The defendants answered separately. In the answer of appellant it is denied that respondent at the instance and request of appellant, or otherwise or at all, performed any legal services for appellant, or for his use or benefit; that appellant ever agreed to pay respondent the reasonable value of any legal services whatever, or any sum of money for any legal services; or that the sum of $500 is the reasonable value of the services claimed to have been rendered by respondent for appellant. In addition to these denials the answer of appellant contained an averment that he is not indebted to respondent in any sum for services, or at all.

The trial court found, so far as its findings were material to the issues in the cause, that between September 15 and December 25, 1920, respondent performed legal services which were of the reasonable value of $500 for defendant Soteras and at his special instance and request; that on or about December 17, 1920, appellant, for a certain consideration moving to him from defendant Soteras, promised and agreed to and with Soteras, and to and with respondent, to pay to respondent the reasonable value of the services rendered to Soteras, as found by the court; and that appellant has paid no part thereof except the sum of $45.90.

[1-3] It is not necessary to determine whether the findings fail to respond to the issues framed by the pleadings. Even if they do, it must be assumed in support of the judgment that the court heard evidence sufficient to sustain them. If the findings do not follow the pleadings, the evidence upon which they were based was also not within the issues, and there was a variance between pleading and proof; but the point that there is such a variance must be made at the trial. People v. Gonzales (Cal. App.) 231 P. 1014. As the present appeal comes to us on the judgment roll alone, without bill of exceptions, it will be presumed in aid of the judgment that no objection on the ground of variance was made in the trial court. Practically all of these questions have lately been passed upon by us. Gaffny v. Michaels (Cal. App.) 238 P. 746. See, especially, concurring opinion.

Judgment affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

73 Cal. App. 782

CITY INV. CO. v. PRINGLE et al.
(Civ. 5112.)

(District Court of Appeal, First District, Division 1, California. July 28, 1925.)

1. Landlord and tenant ⊂=209—Landlord cannot sue undertenants for rent or for use and occupation of premises without privity of contract.

Where, as between landlord and subtenants and their subtenants, there was neither privity of estate nor contract, landlord cannot sue undertenants on original lessee's covenant to pay the rent, unless undertenants had assumed the lease, nor for use and occupation of the premises, unless there had been an agreement for use of the premises, express or implied, between landlord and sublessee.

2. Landlord and tenant ⊂=209 — Equity will compel subtenant to pay rent to landlord, where original lessee becomes insolvent.

Though, as between landlord and subtenants, there is neither privity of estate nor privity of contract, equity will compel subtenant to make all future payments of rent to landlord according to terms of sublease, when original lessee becomes insolvent.

⊂=For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

8. Landlord and tenant ⊂⊃184(2) — Title to money, deposited by subtenants with original lessee remained in them subject to terms and conditions of lease.

Title to money, deposited by subtenants with original lessee, as security for performance of the lease, remained in them subject to terms and conditions of the lease, notwithstanding failure of original lessee to perform his obligations to landlord.

4. Set-off and counterclaim ⊂⊃8(1)—Equity will take cognizance of cross-claim between litigants, though wanting in mutuality.

Equity will take cognizance of a cross-claim between litigants, though wanting in mutuality, and set off one against the other, whenever it becomes necessary in order to effect a clear equity or prevent irremediable injustice.

5. Landlord and tenant ⊂⊃223(2)—Subtenants held entitled to set off money deposited by them with original lessee in action for rent.

In suit in equity by owner against subtenants for rents, original lessee having failed to pay rent, and his estate being insolvent, subtenants *held* entitled to set off money deposited by them with original lessee as security for performance of the covenants of the lease, under Code Civ. Proc. § 438, notwithstanding lack of mutuality between them and owner.

Appeal from Superior Court, City and County of San Francisco; Frank J. Murasky, Judge.

Action by the City Investment Company, a corporation, against Edward J. Pringle, etc., and others, with set-off by Helmut Lewin and another. From a judgment allowing the set-off, plaintiff appeals. Affirmed.

See, also, 231 P. 355.

Nathan Moran, of San Francisco, for appellant.

Jos. B. Kennedy, of San Francisco, for respondent Exnicios.

Jacob Samuels and Oscar Samuels, both of San Francisco, for other respondents.

CASHIN, J. An action commenced by City Investment Company, a corporation, appellant herein, against Edward J. Pringle and Sidney J. Pringle, as executors of the last will and testament of William B. Pringle, deceased, the deceased being the original lessee of certain real property, Helmut Lewin and Herman Oppenheim, copartners, and others, sublessees of portions thereof, to recover rents unpaid by certain of the sublessees, the estate of deceased being insolvent.

Appellant is the owner of a certain building divided into storerooms fronting on Market and Eddy streets in the city of San Francisco, a lease of which was on June 22, 1909, executed by its predecessors in interest to William B. Pringle for the term commencing on said date and ending on June 22, 1924, at a monthly rental of $2,988.42 for the first five years, and $3,238.42 for the second five years of the term, payable each month in advance, and which lease permitted the lessee to sublet.

On June 23, 1909, Pringle sublet a portion thereof to respondents Lewin and Oppenheim for the term commencing on said date and ending on June 22, 1919, at a monthly rental of $800, payable each month in advance. Pursuant to a provision of the lease, said respondents deposited with Pringle the sum of $3,200 as security for the performance by them of all the terms and conditions thereof, it being agreed therein that upon such performance prior to the last four months of the term the amount so deposited should be applied in payment of the rent for those months and that Pringle should pay interest semi-annually on such deposit at the rate of 4 per cent. per annum. Said respondents thereupon sublet a portion of the premises demised to them to Cohn & Cohn (also made defendants in the action) for the monthly rental of $400 per month.

Thereafter Pringle leased the whole of the premises described in the original lease to D. D. Oliphant for the term which expired June 22, 1919, who in turn leased to James Hansen for a term expiring June 21, 1919, and who on his part executed a lease thereof to Fred Sturmer and Kate C. Mason for a term which expired on February 21, 1919. Subsequently to the execution of the lease last mentioned, Sturmer transferred to J. Holmes Wade (one of the defendants) his interest therein.

The rent, as provided by the original lease was paid to appellant and its predecessors in interest for the portion of the term ending on December 21, 1917, from which date to February 26, 1919, the rent accrued and unpaid amounted to the sum of $48,576.30.

William J. Pringle died on December 10, 1916, and his executors from the month of January, 1917, to February 26, 1919, held and occupied the leased premises, not in person, but by the subtenants mentioned. The estate of Pringle was at all times insolvent and without assets of any character.

On October 31, 1918, the date of the commencement of the instant action, appellant commenced an action in ejectment in the same court against the same defendants for the recovery of the premises described in the original lease, following which a judgment therein was entered on February 26, 1919, adjudging the original lease forfeited on account of the failure to pay the rent as provided therein, that all of the rights of the lessee thereunder be terminated and that plaintiff recover possession of the premises.

The executors appealed from the judgment, which appeal was hereafter on November 3, 1919, by order and judgment of the Supreme Court, dismissed, and on December 4, 1919,

the remittitur from said court was filed in the court from which the appeal was taken.

Respondents Lewin and Oppenheim performed all the covenants and conditions of their lease from Pringle with the exception of the payments provided to be made in the month of December, 1918, and the months of January and February, 1919. After the commencement of the actions by appellant as above mentioned, said respondents withheld payment, and upon the appointment of John Exnicios, one of the respondents herein, as receiver by the court in the instant case to collect the rents unpaid by the various subtenants, upon order theretofore made by the court, said respondents and their sublessees Cohn & Cohn paid to the receiver the sum of $2,154.24, which sum was equivalent to the rental due and unpaid by said respondents to February 23, 1919. Upon the entry on February 26, 1919, of the judgment in the ejectment action, said respondents, treating such judgment as an eviction, entered into a lease with appellant for the portion of the premises occupied by them under the Pringle lease at the same monthly rental for a term commencing on said date and extending beyond the term provided in their original lease. Thereupon by their supplemental answer to appellant's complaint in the instant case, said respondents alleged the fact of the entry of said judgment in ejectment, the insolvency of the estate of Pringle, the eviction of respondents, that by reason of the eviction the amount of the deposit less the proportion thereof which might properly be applied to the rent earned between the 23d day of February, 1919, and the date of the entry of said judgment became payable to respondents, and prayed that the balance thereof be offset against the claim of appellant for the rents accrued under the Pringle lease.

It appears that respondents occupied the premises under the Pringle lease for a period of three days after the rental payment date of February 23, 1919, provided therein, and before the eviction, for which Pringle or those claiming under him would be entitled to the sum of $80, and in payment of which the deposit to that extent might properly be applied.

In the instant case the court, pending the final determination of the action, upon motion duly made by said respondents therefor, ordered the receiver to pay to respondents the moneys by them and their sublessees paid to the receiver, to wit, the sum of $1,716.98, with the further sum of $437.26, the amount paid to said receiver by Cohn & Cohn, being the total sum of $2,154.24; and thereafter on June 5, 1923, entered judgment for appellant against certain defendants other than respondents herein and Cohn & Cohn, and for the payment by the receiver to appellant of sums collected by him from certain of the sublessees other than respondents and Cohn & Cohn, and further adjudged that appellant take nothing as to respondents, and that the latter recover from appellant their costs. From the judgment entered for respondents Lewin and Oppenheim, the appeal was taken.

The facts on which the court based its order for the payment by the receiver of the sums mentioned to respondents, and on a finding of which was based the judgment for respondents, were that respondents, except for the three days from the 23d to the 25th of February, 1919, both exclusive, did not enjoy the last four months of their subtenancy under the lease to them from William B. Pringle, although respondents had theretofore faithfully performed all the terms, conditions, and covenants of their lease; that save for the termination of the leasehold estate of William B. Pringle in the ejectment proceedings respondents would have been entitled to the application of their deposit to the four months' rental as provided therein from February 23, 1919; that the pro rata of rent earned for the three days above mentioned under their lease was the sum of $80, and that the balance of said deposit, to wit, the sum of $3,120, was not applied or consumed by way of rent and had not been repaid to respondents.

It is the contention of appellant that judgment should have been entered for the recovery by it of the rents accrued under the lease from Pringle to respondents, being the total of the sums paid by them and their sublessees to the receiver, to wit, $2,154.24; that no part of the deposit could properly be applied as an offset to their right to recover from respondents the amount of such accrued rents.

[1, 2] As between appellant and respondents and their sublessees there was neither privity of estate nor privity of contract. Buttner v. Kasser, 19 Cal. App. 755, 127 P. 811; Ericksen v. Rhee, 181 Cal. 562, 185 P. 847. Appellant, therefore, could not sue the undertenants upon the original lessee's covenant to pay the rent, unless the undertenants had assumed the lease, nor could an action be maintained for the use and occupation of the premises, unless there had been an agreement for the use of the premises express or implied between the lessor and the sublessee. 36 Corp. Jur. "Landlord and Tenant," 379; 16 R. C. L. p. 879, § 384, "Landlord and Tenant." When, however, the original lessee becomes insolvent, equity will compel the subtenant to make all future payments of rent to the lessor according to the terms of the sublease. City Investment Co. v. Pringle et al. (Cal. App.) 231 P. 355; Story Eq. Jur. (14th Ed.) § 926g; Young v. Wyatt, 130 Ark. 371, 197 S. W. 575. The estate of the original lessee being insolvent, the amount unpaid by the sublessee is deemed in equity a

trust or charge upon the estate, and the sublessee is bound in conscience not to take the profits without the due discharge of the rent out of them. Story Eq. Jur., supra. In Young v. Wyatt, supra, the court said:

"The authorities seem to be uniform in holding that an equitable lien exists in favor of the landlord, or original lessor, on the rent money in the hands of an undertenant in case the lessee becomes insolvent."

It is not contended that the obligations of respondents were increased by the failure of Pringle to perform his obligation to appellant, or that their rights under the sublease would be affected thereby, either as to Pringle or appellant, so long as the original lease had not been terminated.

[3] The claim of appellant is based upon the unperformed obligation of Pringle, and, there being no privity of estate or contract between it and respondents, the object of the proceeding and the relief afforded in equity is the satisfaction of this claim to the extent of the obligation of respondents. The latter obligation arose from their contract with Pringle, and the right to its performance was subject to the other express or implied terms thereof. The title to the money deposited by respondents as security for the performance of the covenants of the lease remained in them subject to the terms and conditions of the lease. 36 C. J. "Landlord and Tenant," 298; Alvord v. Banfield, 85 Or. 49, 166 P. 549; Moumal v. Parkhurst, 89 Or. 248, 173 P. 669; Degnario v. Sire, 34 Misc. Rep. 163, 68 N. Y. S. 789. Upon the eviction the right to the return of the deposit accrued, and an action to recover the excess above the amount of the rents unpaid could have been maintained, it appearing from the findings of the court that respondents had fully performed all of the covenants of the sublease with the exception of payment of the rents withheld and collected by the receiver (Rez v. Summers, 34 Cal. App. 527, 168 P. 156; Tiffany, Landlord and Tenant, § 323); and, had an action been brought by Pringle or his executors after the eviction for the rents theretofore accrued, a counterclaim for the portion of the deposit unapplied under the terms of the sublease might have been set up by respondents. Parish v. Studebaker, 50 Cal. App. 719, 195 P. 721; Hyman v. Jockey Club, etc., 9 Colo. App. 299, 48 P. 671.

But it is urged by appellant that, the eviction having occurred after the period ending February 22, 1919, to which date the sums collected by the receiver were received as rent under the Pringle lease, and the right to the return of the deposit not having accrued until the eviction on February 26, 1919, a cause of action therefor did not arise until the latter date, and that therefore such cause of action could not have been pleaded as a set-off or counterclaim under the provisions of section 438 of the Code of Civil Procedure as against an action for the accrued rents brought before the eviction; that, the action in the instant case having been brought before the amounts here involved had accrued as rent under the sublease, its position is the same as that of a plaintiff in the case last assumed.

Assuming that the position of appellant would be correct had the action been brought by a solvent lessor before eviction for the rents accrued, the fact which distinguishes the instant case is the insolvency of Pringle and his estate. This fact was the ground for the proceeding, and upon it was based the jurisdiction of a court of equity to afford the relief sought. Story, Eq. Jur. supra; Pomeroy, Eq. Jur. (4th Ed.) § 189. The same fact would have been the occasion of equitable relief to respondents, the eviction having occurred and the right to the return of the deposit having accrued after the rents under the sublease became due and action therefor commenced, in that the insolvency of their lessor appearing equity would have sustained the right, other things being equal, to set off the deposit to the extent that it remained unapplied under the terms of the lease as against the claim for rent.

[4] In the case of Pendleton v. Hellman Commercial, T. &. S. Bank, 58 Cal. App. 448, 208 P. 702, an action by the administrator of the estate of a depositor against the bank to recover the deposit, the deceased having died insolvent and his estate being in the same condition, and wherein the bank sought to set off against the action for the deposit a note of deceased owned by the bank, but which by its terms was not due at the date of the death of decedent, and wherein it was held that the bank might apply the amount of the deposit to the unmatured note, the court said:

"We are of the opinion that the fact of insolvency of the debtor as applied to the situation existing in this case is sufficient to sustain the right of set-off in favor of the creditor bank, notwithstanding that the debt of the depositor was not due at the time when he died leaving an insolvent estate. The principles involved are discussed at length in Nashville Trust Co. v. Fourth Nat. Bank, 91 Tenn. 336, 18 S. W. 822, 15 L. R. A. 710. In that decision it was noted that the doctrine of set-off, whether legal or equitable, is essentially a doctrine of equity. It was that natural justice and equity, which dictates that demands of parties, mutually indebted, should be set off against each other, and only the balance recovered, that gave birth to the idea of accomplishing the result in a judicial proceeding. * * * There is no magic in the statutory enactment of a rule derived from equity, whereby in receiving this legislative sanction the principle is deprived of its equitable qualities.

"It is not just that the representative of an insolvent debtor who on another account is the creditor of his debtor should be permitted

to enforce the insolvent's claim without paying the other, merely because the obligation in his favor is due while the correlative obligation is not due,"

—citing further in support of the principle the cases of Carr v. Hamilton, 129 U. S. 252–255, 9 S. Ct. 295, 32 L. Ed. 670; People v. California, etc., Trust Co., 168 Cal. 241, 250, 141 P. 1181, L. R. A. 1915A, 299, the latter case holding the rule to be well settled that the insolvency of a party against whom a set-off is claimed is a sufficient ground for the allowance of a set-off not otherwise available. To the same effect in principle are the decisions in the cases of Coonan v. Loewenthal, 147 Cal. 218, 81 P. 527, 109 Am. St. Rep. 128; Scott v. Armstrong, 146 U. S. 499, 13 S. Ct. 148, 36 L. Ed. 1059; Georgia Seed Co. v. Talmadge & Co., 96 Ga. 254, 22 S. E. 1001; Steelman v. Atchley, 98 Ark. 294, 135 S. W. 902, 32 L. R. A. (N. S.) 1060; Hayden v. Citizens' Nat. Bank, 120 Md. 163, 87 A. 672, 46 L. R. A. (N. S.) 1059, Ann. Cas. 1915A, 686, 689.

The majority of the cases, wherein the rule has been applied, have been those in which a bank has sought to set off the unmatured indebtedness of an insolvent depositor to it as against a claim for the deposit by the depositor or his representative or as against the assignee of such depositor. The principle, however, applies in all cases where a right of the insolvent is asserted, and in accordance with equitable principles set-off should be permitted. As held in Nashville Trust Co. v. Fourth Nat. Bank, supra, cited with approval in the cases of Pendleton v. Hellman Com., etc., Bank, supra, and Coonan v. Loewenthal, supra, insolvency itself is a sufficient ground for the application of equitable set-off, and the fact, that the indebtedness on one side is not due when set-off is claimed, constitutes no obstacle to the assertion of the right as against an insolvent debtor. While it is our view that the claim of appellant, as against respondents upon the fund on which it is sought to impose a lien, is measured by the rights of the original lessee in the premises, should it be urged that there was no mutuality as between the demands of appellant and respondents, and that therefore, respondents may not set off a claim for the deposit as against appellant's demand for the rent, it is well settled that a court of equity will take cognizance of a cross-claim between litigants, though wanting in mutuality, and set off one against the other whenever it becomes necessary in order to effect a clear equity or prevent irremediable injustice. 24 R. C. L. Set-off and Counterclaim, § 70, p. 865; Georgia Seed Co. v. Talmadge, supra; Kentucky Flour Co's Assignee v. Merchants' Nat. Bank, 90 Ky. 225, 13 S. W. 910, 9 L. R. A. 108; and, as held in the case of People v. California, etc., Trust Co., supra, where an administratrix deposited funds in her hands as administratrix in a bank which held an allowed claim against the estate, the bank having subsequently become insolvent, a want of mutuality was no defense as against the right of the administratrix to set off her deposit claim against the allowed claim of the receiver of the bank.

[5] It is our conclusion that upon the facts shown grounds existed for the application of the equitable rules above stated, and that the set-off claimed by respondents Helmut Lewin and Herman Oppenheim was properly allowed. It is therefore ordered that the judgment, as between appellant and respondents herein be affirmed.

We concur: TYLER, P. J.; KNIGHT, J.

196 Cal. 778

In re HALM'S ESTATE.

HALM v. HALM et al.

(L. A. 8343.)

(Supreme Court of California. Aug. 31, 1925.)

1. Wills ⇐16—Bequest to charitable institution held void.

A bequest, made in a will executed within 30 days of death to University of Heidelberg in Germany, was void under Civ. Code, § 1313, as being bequest to a charitable institution.

2. Wills ⇐16—University of Heidelberg not a tax exempt state institution that may take bequest made less than 30 days before death; "state institution"; "educational institution."

University of Heidelberg is not a "state institution" or "educational institution which is exempt from taxation" under Const. art. 13, § 1a, within the meaning of that section and accordingly cannot take, under Civ. Code, § 1313, a bequest made less than 30 days before death of testator.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Educational Institution; State Institution.]

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

Final accounting of Emil Halm, executor of the estate of Karl Halm, deceased. From an order allowing a bequest to the University of Heidelberg, Emma Halm, a residuary legatee, appeals. Reversed, with directions.

Stephens & Stephens, of Los Angeles, for appellant.

Karl L. Ratzer and Max Adler, both of Los Angeles, and Gustav Gutsch, of San Francisco, for respondents.

RICHARDS, J. This is an appeal from a portion of the order settling the final account and for the distribution made, given, and entered by the superior court of the county of Los Angeles, wherein said court undertook to find that a certain bequest of the decedent, bequeathing a cash legacy of $1,000 to the University of Heidelberg was a valid legacy and ordering the distribution of the amount of said legacy to said legatee. The appeal is by Emma Halm, the widow of the decedent, who was the residuary legatee and devisee under the last will and testament of said decedent. The decedent died on the 28th day of February, 1923, being a resident of the county of Los Angeles, state of California, at the time of his death. On the 21st day of February, 1923, he made and executed his last will and testament. In said will he made the following bequest:

"11. As a memorial I bequest to the following institutions, relatives and friends the following sums:

"University Heidelberg, Germany, $1,000.00. * * *"

The will of said deceased was in due course offered and admitted to probate, and thereafter the executor thereof presented his first and final account and report and petition for distribution, wherein he alleged that the University of Heidelberg, of Germany, was a public educational institution not carried on for private gain, and that the bequest to it was therefore void under the prohibition of section 1313 of the Civil Code. The University of Heidelberg appeared by its attorney in fact, filed written objections to the account and petition for distribution, in which it denied that it is a public educational institution, alleging that it is a state institution of the state of Baden, and prayed for distribution of this legacy to it. After a hearing upon said account and petition and said objection thereto, the court made its findings of fact and conclusions of law, wherein it found:

"That the University of Heidelberg is in the fullest sense of the word a state institution of the free state of Baden of the German Republic formed for scientific, literary, and purely educational purposes; and that its expenses and costs of upkeep are defrayed by the said free state of Baden, without any donations or endowments from any source whatever, and that the said university is and was not incorporated nor is the same conducted for profit, nor is any profit derived from the conduct thereof. * * *

"As conclusions of law the court holds:

"That the University of Heidelberg is not a charitable or benevolent corporation, and that the said University of Heidelberg is entitled to receive by decree of distribution herein the sum of one thousand dollars ($1,000), to it bequeathed under the said last will and testament of the said Karl Halm, deceased."

Upon the foregoing findings of fact and conclusions of law the court made its order distributing said estate and said bequest in conformity therewith, and it is from said portion of said order that this appeal has been taken.

It appearing upon the face of said proceeding that the will of said decedent was executed within 30 days prior to the decease of the decedent, the sole question presented upon this appeal is as to whether the foregoing bequest to the University of Heidelberg was a valid bequest under the provisions and limitations of section 1313 of the Civil Code. Said section reads, in part, as follows:

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; * * * and provided,

further, that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution or to any educational institution which is exempt from taxation under section 1A of article thirteen of the Constitution of the state of California, or for the use or benefit of any such educational institution, are excepted from the restrictions of this section. * * *"

[1] It is the contention of the appellant herein that, under the findings of said court, the University of Heidelberg must be held to be such a charitable or benevolent institution as would come within the inhibitions of the foregoing provisions of section 1313, Civil Code, and hence that said bequest was void and as a consequence that the order and decree of distribution awarding the sum provided for in said bequest to the University of Heidelberg was erroneous. We are of the opinion that this contention must be sustained.

The University of Heidelberg, according to the foregoing findings of the probate court, is a state institution of the free state of Baden of the German Republic, formed for scientific, literary, and purely educational purposes, with its expenses and costs of upkeep defrayed by the free state of Baden, and with its activities devoted apparently to the teaching of education freely to an indeterminate number of the youth of Germany who may from time to time be the recipients of its benefaction. It is thus to be placed in the same category with any other educational institution, whether founded by or under the provision of the state or by private gift, bequest, or trust. In the case of People v. Cogswell, 113 Cal. 129, 136, 45 P. 270, 35 L. R. A. 269, it was held that a private trust created for the purpose of the erection and maintenance of a polytechnic college devoted to the spread of technical knowledge and to the gratuitous instruction in mechanical arts of the youth of this state was a purely charitable foundation. In Estate of Sutro, 155 Cal. 727, 102 P. 920, the court quotes approvingly from Perry on Trusts (2 Perry on Trusts, § 711) the general definition of a charitable trust as given by Judge Gray in Jackson v. Phillips, 14 Allen (Mass.) 556:

"A charity, in the legal sense, may be more fully defined as a gift, to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works or otherwise lessening the burdens of government."

In the case of Skinner v. Harrison Township, 116 Ind. 139, 18 N. E. 529, 2 L. R. A. 137, it was held that a bequest to said township for the use and benefit of the common schools therein was a charitable bequest, and in Webster v. Wiggin, 19 R. I. 73, 31 A. 824, 28 L. R. A. 510, it was decided that a bequest to certain school districts of the state of New Hampshire for the purpose of establishing and maintaining public schools therein was a charitable trust. In Estate of Dol, 182 Cal. 159, 187 P. 428, this court had under consideration the question as to whether the particular recipient of the bequest in that case was a charitable or benevolent society within the meaning of section 1313, Civil Code, and while the court in that case held that it was not such, it suggested that there was no essential difference between the words "charitable" and "benevolent" as employed in that section, at least in so far as it had application to the case then in hand. We are unable to observe any such distinction between said terms as employed in said section, and our view in that respect is, we think, strengthened by the language of the proviso therein above set forth which clearly indicates that bequests or devises to a state or a state institution for educational purposes would come within the foregoing provisions of said section, unless such institution could be brought within the inhibition made in said proviso.

[2] It is the contention of the respondent herein, however, that under the terms of said proviso it is exempt from the foregoing limitations of said section for the reason that it is, as found by the court, a state institution of the free state of Baden, Germany. Reading said proviso as a whole, however, the conclusion appears inevitable that the state institutions and educational institutions referred to therein are only those which are exempt from taxation under section 1a of article 13 of the Constitution of the state of California; and it is plain that the educational institution in question here does not come within the terms of such exemption. We are therefore of the opinion that the University of Heidelberg is such a charitable or benevolent institution as would come within the terms and provisions of said section of the Civil Code and to which, therefore, a bequest would be void, unless the same were made by the testator by a will duly executed at least 30 days before his decease.

The will of the decedent herein not having been thus executed and said bequest thus being void, it follows that the order and decree of said court, in so far as it undertook to distribute the sum named in said bequest to that particular legatee, was erroneous, and that said sum should have been distributed to the residuary legatee of said decedent, the appellant herein. The order as to the portion appealed from herein is reversed, and the trial court is directed to enter a decree of distribution in said estate in accordance with the views expressed in this opinion.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; WASTE, J.; KNIGHT, Justice pro tem.

196 Cal. 768

GORDON v. BECK. (L. A. 7413.)

(Supreme Court of California. Aug. 31, 1925.)

1. Principal and agent ⊜157 — Remedies of principal without knowledge of dual agency as against opposing principal having knowledge stated.

Principal having no notice or knowledge of duplicity of agent may, at his option, be relieved from contract as against opposing principal who had notice or knowledge, either by an affirmative action rescinding contract or by interposing dual agency as defense to action to enforce.

2. Brokers ⊜100—Engagement of purchaser's agent with vendor for compensation without former's knowledge rendered contract voidable.

Where purchaser had right to expect loyalty to his interest by his agent, latter's engagement with vendor for compensation without purchaser's knowledge rendered contract voidable at purchaser's option, even though vendor paid commissions in good faith.

3. Brokers ⊜105—Purchaser not chargeable with uncommunicated knowledge where agent was acting for vendor.

Where purchaser's agent acted also for vendor on commission basis, his interest was adverse to purchaser, and latter could not be charged with uncommunicated knowledge of actual conditions.

4. Brokers ⊜103—Vendor not permitted to disclaim representations and concealment of agent.

Where agent acted for vendor on commission basis, vendor, having accepted advantage obtained under contract and retaining it, cannot disclaim responsibility for representations and concealments of his agent.

5. Principal and agent ⊜157 — Dual agency not tolerated except by consent of both principals.

Dual agency can be tolerated only with knowledge and consent of both principals.

6. Judgment ⊜198—Omnibus finding that allegations of defense were not true held insufficient to support judgment.

Omnibus finding that material allegations in named paragraphs of defendant's affirmative defense were not proved *held* insufficient to support judgment.

7. Appeal and error ⊜1071(6), 1122(2)—Supreme Court unauthorized to make findings where trial court failed to do so, but will reverse for failure to make necessary findings.

When trial court has failed to make findings, the Supreme Court is unauthorized to do so, but will order new trial where findings not made are necessary to proper determination of rights of parties.

8. Evidence ⊜21 — Common knowledge that seller of real estate usually pays commission.

In case of purchase and sale of real estate, it is common knowledge that seller usually pays commission.

In Bank.

Appeal from Superior Court, Los Angeles County; Albert Lee Stephens, Judge.

Action by G. L. Gordon against S. Beck, in which defendant counterclaimed for affirmative relief. Judgment for plaintiff, and defendant appeals. Reversed and remanded for new trial, with directions to overrule demurrer to cross-complaint.

Hocker & Austin, of Los Angeles, for appellant.

Davis & Thorne, of Los Angeles, for respondent.

SHENK, J. After judgment of reversal herein counsel appearing amici curiæ were granted leave to file a petition for a rehearing on the representation that the decision in this case would probably have an important bearing on other and important pending litigation in which they and counsel associated with appellant's counsel were interested. As respondent had filed no brief, and as the importance of the questions involved seemed to warrant it, the rehearing was granted in order that respective counsel might have full opportunity to present more fully both sides of the controversy.

After due consideration of the questions involved we are satisfied with and adopt the reasoning and conclusions expressed in the former opinion, and will append such further comment as the additional points and authorities have elicited. As the contentions of amici curiæ are all in behalf of the respondent's position, they will be referred to and deemed the respondent's contentions. The former opinion is as follows:

"This is an appeal by defendant, S. Beck, from a judgment foreclosing his interest in an executory contract for the purchase and sale of real property. The record is presented pursuant to section 953a of the Code of Civil Procedure.

"The action was commenced on January 21, 1921, by the filing of a complaint wherein it was alleged that on the 14th day of October, 1920, the plaintiff and defendant entered into a contract for the purchase and sale of an improved lot in the city of Los Angeles for the sum of $1,800, of which $400 was to be paid on the execution of the contract and the balance in monthly installments of $20, and that no part of the contract price had been paid except the initial payment of $400. The plaintiff prayed that an interlocutory judgment be entered adjudging the defendant to be indebted to the plaintiff for the unpaid balance of the contract price, and that if the same be not paid within such time as the court might fix, the plaintiff's title to the property be quieted and the interest of the defendant therein be terminated. To this complaint the defendant filed an answer admitting that he had signed the contract, but setting forth as an affirmative defense that the contract was invalid and not binding on him, for the reason that without his knowledge or consent his agent in the transaction, one Claude

Minor, had also acted for and as the agent of the plaintiff in the same transaction, and had received compensation therefor. The defendant also filed a cross-complaint alleging the dual agency of said Minor; that he had first discovered the duplicity of his agent about the first week in November, 1920, and immediately informed the plaintiff that he would not take possession of the property and would not carry out the terms of the contract; that he at no time had possession or control of said property, and that by reason of the dual agency of the said Minor, without the knowledge or consent of the defendant, the contract was void and of no effect; that he had demanded the return of said $400 from the plaintiff, but that the same had not been paid. In the cross-complaint the defendant tendered the contract into court for cancellation. The plaintiff interposed a general and special demurrer to the answer and also to the cross-complaint. The demurrer to the answer was sustained with leave to amend, and the demurrer to the cross-complaint was sustained without leave to amend. Before the defendant filed an amended answer the plaintiff filed an amended complaint wherein the facts from the plaintiff's standpoint were more elaborately alleged, and certain defects appearing on the face of the original complaint were cured. To this amended complaint the defendant filed an answer wherein he again set forth in an affirmative defense, among other things, the alleged dual capacity of the agent, Minor, without the knowledge or consent of the defendant; that the plaintiff knew at the time he employed said Minor as his agent that Minor was acting as the agent of the defendant; that he had first discovered the duplicity of his agent about the first week in November, and immediately notified the plaintiff that he would not take possession of the property and would not carry out the terms of the contract. On the issues thus joined the court found in favor of the plaintiff, and entered an interlocutory judgment declaring the defendant to be indebted to the plaintiff in the sum of $1,400, and that if the same be not paid within 90 days from such entry the plaintiff be awarded judgment terminating the interest of the defendant in and to said contract and property. The defendant failed to make such payment, and the final judgment was entered.

[1] "The appellant contends that the trial court erred in sustaining the demurrer to the cross-complaint, and that the findings are defective and insufficient to support the judgment and are not supported by the evidence.

"The demurrer to the cross-complaint was sustained, apparently for the reason that it did not affirmatively appear therefrom that at the time the contract was signed the plaintiff had knowledge or notice that Minor was also the agent of the defendant in the transaction, and on the theory that such knowledge or notice must be shown in order to subject the plaintiff to rescission. We do not so understand the rule. It is well settled in this state that a principal who has no notice or knowledge of the duplicity of his agent may at his option be relieved from the obligations of the contract as against his opposing principal who had notice or knowledge of such dual agency, either by affirmative action in rescinding the contract or by interposing such dual agency as a defense in an action to enforce the contract. Wilson v. Southern Pac. Land Co., 61 Cal. App. 545, 215 P. 396; Newell-Murdoch Realty Co. v. Wickham, 183 Cal. 39, 190 P. 359. In each of those cases the effect of want of knowledge of the dual agency on the part of the defendant principal was referred to but was not determined, for the very obvious reason that in each case the defendant principal had knowledge of the dual capacity of the agent. There is nothing in those cases, nor in any case in this state to which our attention has been directed, which would prevent the approval of the rule in its broader application as announced and declared by text-writers and the courts of other jurisdictions. Professor Mechem, in his work on Agency (2d Ed.) vol. 2, p. 1978, says that if neither principal has knowledge of the dual capacity of the agent, the action of the agent is a fraud on both, and a contract made under such circumstances is voidable at the option of either principal. Again, it is said, on page 1717 of the same volume: '* * * that not even an innocent third party, who is also the principal of the same agent, may be allowed voluntarily to retain benefits or advantages which come to him only through the act of his agent and as the result of that agent's perfidy to his other principal.' Also, on page 1713, we find the following: 'An agent who is relied upon to exercise, in behalf of his principal, his skill, judgment, knowledge or influence, will not be permitted without such principal's full knowledge and consent, to undertake to represent the other party also in the same transaction. Such conduct is a fraud upon his principal, and not only will the agent not be entitled to compensation for services so rendered, but the contract or dealings made or had by the agent, while so acting also for the other party without the knowledge or consent of the principal, are not binding upon the latter, and if they still remain executory, he may repudiate them on that ground, or, if they have been executed in whole or in part, he may by acting promptly and before the rights of innocent parties have intervened, restore the consideration received, rescind the contract and recover back the property or rights with which he has parted under it. It makes no difference that the principal was not in fact injured, or that the agent intended no wrong, or that *the other party acted in good faith;* the double agency is a fraud upon the principal and he is not bound.' (Italics added.) The rule is supported by cases cited by the author, and cases cited by appellant also approve the rule that such a contract is voidable at the option of either principal. Becker v. Spalinger, 174 Wis. 443, 183 N. W. 173; Ferguson v. Gooch, 94 Va. 1, 26 S. E. 397, 40 L. R. A. 234; Guthrie v. Huntington Chair Co., 71 W. Va. 383, 76 S. E. 795; Evans v. Brown, 33 Okl. 323, 125 P. 469; City of Findlay v. Pertz, 66 F. 427, 13 C. C. A. 559, 29 L. R. A. 188; Black v. Miller, 71 Ill. App. 342; People's Insurance Co. v. Paddon, 8 Ill. App. 447; Fish v. Leser, 69 Ill. 394; McElroy v. Maxwell, 101 Mo. 294, 14 S. W. 1; Greenwood v. Spring, 54 Barb. (N. Y.) 375; March v. Buchan, 46 N. J. Eq. 595, 22 A. 128; Henninger v. Heald, 52 N. J. Eq. 431, 29 A. 190; Arthur v. Georgia Cotton Co., 22 Ga. App. 431, 96 S. E. 232; Vinson et al. v. Pugh, 173 N. C. 189, 91 S. E. 838; Truslow v. Bridge & Terminal Co., 61 W. Va. 628, 57 S. E. 51.

[2-5] "The defendant was entitled to receive, and had the right to expect, absolute fidelity and loyalty to his interest on the part of his agent,

Minor, and under the authorities his engagement with the plaintiff for compensation in the transaction without defendant's knowledge rendered the contract voidable at the option of defendant, even though the plaintiff paid the commission in good faith. As Minor was acting for plaintiff upon a commission basis his interest was adverse to defendant, and the latter could not be charged with this uncommunicated knowledge of the actual conditions. On the other hand, having accepted the advantage obtained under the contract, and seeking to retain such advantage, the plaintiff will not be permitted to disclaim responsibility for the representations and concealments of Minor, his agent. Herdan v. Hanson, 182 Cal. 545, 189 P. 440. The law will not tolerate such a dual agency without the knowledge and consent of both principals. Glenn v. Rice, 174 Cal. 269, 162 P. 1020. No question has been raised upon this appeal as to the sufficiency of the cross-complaint in respect to the allegations thereof showing compliance with the requirements of section 1691 of the Civil Code to entitle a party to rescind, and we are not, therefore, called upon to consider that question. It must be concluded that the cross-complaint states a cause of action, and that the court erred in sustaining the demurrer thereto.

[6] "The appellant attacks the following finding as defective and insufficient: 'That the material allegations contained in paragraphs II, III, and IV of defendant's affirmative defense to plaintiff's amended complaint are not true for the reason that plaintiff advertised and dealt with Minor as the undisclosed agent of defendant, Beck, said Minor representing himself as a real estate broker, and charged plaintiff $50 as commission for his services in the sale of said property.'

"Paragraph I of the affirmative defense alleges that at the time the contract was signed the defendant was engaged in dealing in real estate on his own account, and in the conduct of his said business employed Minor as his agent to examine real estate offered for sale and to represent him in the examination, purchase, and sale of the same; that the plaintiff reposed confidence in the ability and integrity of his agent in connection with his business, and relied upon the judgment and representations of said agent. Paragraph II alleges certain representations made by Minor to the defendant concerning the transactions. Some of the allegations of this paragraph are immaterial. Paragraph III alleges that the plaintiff well knew that Minor was acting as the agent of the defendant upon an agreed compensation; that the plaintiff paid Minor $50 commission in the transaction; that the defendant had no knowledge of the duplicity of the agent in relation to the purchase and sale of said property, and did not discover the facts surrounding the transaction until about the first week in November, 1920, whereupon the defendant informed plaintiff that he would not receive or take possession of said house and lot and would not carry out the terms of such contract as set forth in the complaint. Paragraph IV alleges that the defendant at no time received or took possession of the house and lot, and that the plaintiff has at all times been in possession and control thereof, and that by reason of the fraud practiced upon the defendant the contract is void and of no effect. It will thus be seen that the allegations of the paragraphs referred to go to the very heart of the defense. 'The option to avoid the contract remained complete until the action was begun and was then available as a defense to the action.' Newell-Murdoch Realty Co. v. Wickham, supra.

"The finding that the material allegations contained in the paragraphs mentioned are not true is uncertain. No one may know what allegations were deemed material. Such an omnibus finding is insufficient for any purpose. Holt Mfg. Co. v. Collins, 154 Cal. 276, 97 P. 516; Turner v. Turner, 187 Cal. 632, 203 P. 109. The reason assigned by the court for the finding as incorporated therein does not cure the uncertainty. Even if the facts recited in the reason for the finding were true, it would not follow that the allegations of said paragraphs of the affirmative defense might not also be true. If those allegations were found to be true, the facts thus established would be a defense to said action.

[7] "When the trial court has failed to make findings this court is not authorized to do so. Where, under the pleadings and evidence, findings not made are necessary to the proper determination of the rights of the parties a new trial will be ordered (Blood v. La Serena L. & W. Co., 113 Cal. 221, 41 P. 1017, 45 P. 252). From what has been said concerning the finding complained of we do not wish to be understood as deciding that the evidence is sufficient to support a finding that the allegations of said paragraphs are not true. On the contrary, it may be said that said allegations were established without conflict in the evidence except the allegation of paragraph III to the effect that at the time of the signing of the contract the plaintiff knew that Minor was the agent of the defendant in the transaction. This allegation the court found to be not true. But under the law and the facts as here shown that finding was not sufficient to support a judgment against Beck."

It is conceded on behalf of the respondent that the principal question involved in this case is one of first impression in this state, and it is insisted that it is the first case in the United States involving the point of setting aside a transaction of purchase and sale on the ground of the dual employment of an agent where both principals were unaware of such dual employment. It is suggested that the consequences flowing from a holding that a transaction involving such duplicity of an agent may be rescinded at the instance of either principal would be disastrous in all dealings wherein agents and brokers are employed, as, for instance, in two illustrations suggested by the respondent: First, in the case of stockbrokers, where the purchaser, desiring to acquire the ownership of a certain kind of stock, agrees to compensate the broker for procuring such stock, the seller also paying a commission; and, secondly, in the case of one desiring to purchase a home or property for industrial or other particular purposes, who employs a real estate agent to procure the same for him, the seller also paying a commission in the same transaction. But the results contemplated by respondent

would seem to be more imaginary than real. In the case of a stockbrokerage business, it is stated by appellant to be a matter of common knowledge, and such statement is not denied, that persons handling transactions in that line of endeavor, by long established custom, may collect compensation or a commission from both buyer and seller, in which event they are in the class of known joint agents, for each principal is charged with knowledge of the custom.

[8] Likewise, it may be said that in the case of the purchase and sale of real estate it is a matter of common knowledge that the seller usually pays a commission, and that the parties to the transaction in the case at bar were charged with notice of that custom. But we find no sound basis for the conclusion that the appellant under such circumstances was negligent in not notifying the respondent not to pay Minor a commission, for the appellant had the right to rely upon the presumed good faith of Minor, and to rest assured that he would not violate his trust and breach the duty which the law imposed upon him. The facts in the case at bar do not present a situation where either principal may be charged with negligence in his relations with the other. It is not intimated that either innocent principal would have a cause of action for damages against the other on account of the duplicity of the common agent. Rather, the facts herein present a situation in which sound public policy demands that a transaction attended by such duplicity and concealment on the part of an agent as against both innocent principals may not be permitted to stand when, at the instance of either principal, the status quo may be restored. In such cases the personal and selfish interest of the agent is opposed to the interest of both principals. His concern is to see that the transaction is consummated in order to obtain his double commission. By reason of the fiduciary relation to both principals, he is, as to both, in such a peculiar position of trust and confidence that his advice and activities would be influenced by his own self-interest. It is immaterial that these results may not necessarily follow. It is enough that they are likely to follow. It is the policy of the law not to permit an agent to assume a position that will result in such a strain on his honesty. The protection of the public against such duplicity is the foundation for the rule. To deny the right of rescission to either innocent principal would necessarily result in a denial to both, and thus place the parties at the mercy of an unscrupulous agent. It is of no consequence that no fraud was actually intended by the agent, or that the rescinding party suffered no injury. Black v. Miller, supra.

In some of the cases above cited as approving the rule that a contract resulting from dual agency unknown to both principals is voidable at the option of either principal, it did not appear that the duplicity of the agent was unknown to the defending principal. In our consideration of those cases that fact was recognized. Others, however, as for example, the case of Marsh v. Buchan, supra, are directly in point. Although in some of the cases cited the defending principal had or was chargeable with notice of the dual agency, the discussion of the principles of law surrounding such inconsistent relationship recognized the right of either innocent principal to rescind, provided the defending principal could be placed in his former position.

The case of Blair v. Baird, 43 Tex. Civ. App. 134, 94 S. W. 116, relied on by respondent, is not in point, for the reason that, under the express terms of the contract between the parties, the agent was a joint agent appointed as and known to be such by both parties. Other cases cited on behalf of respondent have been noted, but an examination thereof discloses that they are not out of harmony with the rule as herein approved.

Finally, the respondent contends that a principal can only be held liable for the acts of his agent when the same are within the scope of his authority. It is conceded in this case that neither principal knew of the employment of the agent, Minor, by the other, and it may be assumed that it was beyond the scope of the authority of such agent, as to each principal, to enter the employment of the other without the consent of both; but, when the agent had done so, and thus exceeded his authority, it was optional with either principal to refuse to be bound by his acts and to rescind the transaction. When, as here, the respondent is standing on the contract, is insisting on his right to retain the benefits and advantages gained thereby, and is contending herein for his right to retain the same after full notice of his agent's duplicity, he will not be permitted to disclaim responsibility for the representations and concealments of said agent. Herdan v. Hanson, supra.

The judgment is reversed and the cause remanded for a new trial, with instructions to the trial court to overrule the demurrer to the cross-complaint.

We concur: RICHARDS, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; WASTE, J.

196 Cal. 672

CUNNINGHAM v. ROBINSON et al.
(Sac. 3643.)

(Supreme Court of California. Aug. 17, 1925.)

1. Principal and agent ⇐146(2)—Person, buying interest of partnership and assuming debts, not relieved from personal liability for debts so assumed, because he acted as undisclosed agent of another.

Under Civ. Code, § 2854, making creditor entitled to benefit of securities held by surety, where person bought interest in partnership and assumed debt evidenced by note and secured by chattel mortgage, he was not relieved from personal liability, because he acted as undisclosed agent of another.

2. Principal and agent ⇐145(4) — Creditor may hold person assuming debt liable or look to undisclosed principal for whom he acted.

Where person bought interest in partnership and assumed obligation of paying partnership debts, evidenced by note and secured by chattel mortgage, creditor may hold such person liable for payment of debt or look to undisclosed principal for whom he acted.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action on a promissory note by Richard Cunningham against F. E. Robinson and others. From a judgment for plaintiff, which denied entry or docketing of any deficiency judgment against defendant J. M. Jones, plaintiff appeals. Reversed, with instructions.

John R. Connelly, of Sacramento, for appellant.

Elliott & Atkinson, of Sacramento, for respondent.

RICHARDS, J. This appeal is by the plaintiff upon the judgment roll and is from that portion of the judgment which fails to adjudge and decree that the defendant and respondent herein, J. M. Jones, is personally liable to the plaintiff upon the obligation sued upon by him herein, and that in that respect the said judgment is not supported by but is, as a matter of law, inconsistent with the findings of fact. The facts of the case, as they appear from the findings, are briefly these: On January 31, 1921, the defendants F. E. Robinson and B. D. Huff, who were copartners, executed and delivered their individual promissory note to the plaintiff herein for the sum of $400, payable on or before December 1, 1921, with interest and counsel fees, and at the time of the execution and delivery of said promissory note, and for the purpose of securing the payment thereof, also executed and delivered to the plaintiff their chattel mortgage upon certain personal property. Thereafter and on June 27, 1921, the defendant Huff, for a valuable consideration, assigned and transferred all of his right, title, and interest in the copartnership and also all of his right, title, and interest in and to the property covered by said mortgage to the defendant and respondent herein, J. M. Jones, who at the time of said assignment and transfer and as a part of the consideration therefore assumed in writing and promised and agreed to pay the obligation of said B. D. Huff created by the latter's aforesaid execution and delivery of said promissory note to the plaintiff herein. Thereafter, the said promissory note not having been paid, the plaintiff commenced this action for a recovery thereon, for the foreclosure of the mortgage given as security therefor, and for a deficiency judgment against the defendants Robinson, Huff, and Jones, in the event that the sale of the security should be insufficient to satisfy the judgment. The defendant Huff defaulted.

The defendant Jones appeared and set up as a defense to said action that at the time of the assignment and transfer to him by said Huff of all of his interest in said copartnership and in the property covered by plaintiff's mortgage, and at the time of the assumption by said Jones of the obligations of said Huff, and of his promise to pay the same, he, the said Jones, was secretly acting as the undisclosed agent for one W. C. Robinson, and that engaging in said transaction as a principal he did so for the use and benefit of said Robinson and solely as his agent, and that the secret relationship between himself and the said Robinson was unknown to any one other than themselves. The trial court, in addition to its other findings, found this to be the fact, and thereupon in its conclusions of law, which were generally in favor of the plaintiff as between himself and the other defendants, found that as to the defendant Jones he was not personally liable to the plaintiff. In its judgment, which otherwise followed the findings in plaintiff's favor, the court directed that whatever deficiency judgment should exist after the sale of the mortgaged property and the application of the proceeds thereof pro tanto to the payment of the plaintiff's judgment, should be docketed against the defendants Robinson and Huff, but that as to the defendant Jones the court failed to direct the entry or docketing of any deficiency judgment against him. It is from the latter portion of said judgment that the plaintiff has prosecuted this appeal.

[1] We are of the opinion that the trial court was in error in its conclusion of law based upon the foregoing findings of fact that the defendant Jones was not personally liable to the plaintiff for the amount of the obligation of Huff which he assumed and agreed to pay at the time of the transfer to him by said Huff of the latter's interest in the copartnership and in the property which secured said obligation; and was also in error in its judgment predicated upon such conclusion of law.

In so far as the defendant Huff was concerned, the averment of the respondent Jones to the effect that in assuming the obligation of Huff to the plaintiff herein he was acting as the agent of an undisclosed principal would admittedly have constituted no defense in an action brought by Huff to enforce said obligation. Nor do we think it would be sufficient to constitute a defense to the action brought by this plaintiff to enforce the obligation against Jones, which, in the capacity of a principal on the face thereof, he entered into as between himself and Huff, but which inured to the benefit of the plaintiff by virtue of the fact that he was the creditor of Huff at the time. In the case of Williams v. Naftzger, 103 Cal. 439, 37 P. 411, it was held by this court that an agreement on the part of a grantee to pay and discharge a mortgage debt upon the granted premises for which his grantor is liable, renders the grantee liable therefor to the mortgagee, and in an action for the foreclosure of the mortgage, if the mortgaged premises are insufficient to satisfy the mortgage debt, judgment may be entered against the said grantee as well as against the mortgagor for the amount of such deficiency. "This liability" says the court "results from the familiar doctrine in equity that a creditor is entitled to the benefit of all securities or collateral obligations that his principal debtor may have given to the surety for the payment of the debt. By the conveyance of the mortgaged premises and the assumption of the mortgage debt by the grantee, the latter, as between himself and the grantor, becomes primarily liable to the mortgagee and his vendor becomes his surety." This conclusion is predicated upon section 2854 of the Civil Code, wherein the like language is found.

The decision of this court in the above-cited case was approved by this court in the case of Hopkins v. Warner, 109 Cal. 133,[1] and has not since in anywise been departed from or modified. We are cited by the respondent to no case which supports the doctrine that the said defense herein, which he could not have availed himself of in an action brought against him by Huff, can be made available to him in an action brought by the creditor of Huff to enforce the latter's direct obligation which the respondent, in the capacity of a principal, and for a full and valuable consideration, has assumed and agreed to pay. The argument, which the respondent puts forth as the basis for such doctrine, is that the liability which he assumes with respect to Huff in the capacity of a principal, but in the actual though undisclosed relation of an agent for a concealed principal, arises through the application of the doctrine of estoppel which would forbid him to plead his agency as against Huff.

[2] We are of the opinion, however, that the liability of Jones to Huff upon such a transaction, whether or not it may be based in part upon estoppel, rests upon the fact that he has contracted as a principal and thus made the contract his own, and that his immediate creditor is entitled to hold him to that relation, or, if he would be advantaged thereby, to treat him not as a principal but as the agent of his undisclosed principal, and to hold the latter liable as such. 1 Cal. Juris, 819–822, 860. If such be the basis of the obligation of Jones to Huff, it is equally the basis of the obligation which, under the authorities above cited, Jones has assumed with relation to and for the benefit of the creditor of Huff, and which the plaintiff in this action seeks as such creditor to enforce as a contract made for the latter's benefit. It follows that the trial court was in error in finding in its conclusion of law that the defendant Jones was not personally liable to the plaintiff in this action, and was also in error in its judgment based thereon, wherein it failed to provide for a deficiency judgment against Jones for the enforcement of such personal liability.

The judgment is reversed, with instructions to the lower court to so modify its conclusions of law and its judgment based thereon as to declare and decree the personal liability of the respondent Jones to the plaintiff upon his assumed obligation, and to provide for a deficiency judgment against said respondent in the event that the mortgaged property shall upon sale thereof be found insufficient to satisfy said obligation.

We concur: MYERS, C. J.; SHENK, J.; LENNON, J.; LAWLOR, J.; SEAWELL, J.; HOUSER, Justice pro tem.

---

196 Cal. 666

SCOTT et al. v. HENRY. (Sac. 3493.)

(Supreme Court of California. Aug. 14, 1925.)

1. Waters and water courses ⟹158½(2) — Deeds misdescribing land admissible in aid of oral proof of parol grant of easement.

Deeds improperly describing lands of servient tenement were properly admitted for limited purpose of showing mutual mistake of parties in description and in aid of plaintiffs' offered proof of executed parol grant of easement to maintain irrigation ditch, which had become effectual by exercise while grantor was still owner of land.

2. Waters and water courses ⟹158½(2) — Deeds admissible, although recordation imparted no notice to defendant.

Deeds improperly describing land of servient estate, admitted solely to show mistake in description and in aid of plaintiffs' offered proof of executed parol grant of easement to maintain irrigation ditch, *held* properly admitted, though recordation thereof imparted no notice to defendant of plaintiffs' alleged right to easement so as to aid latters' claim by prescription, where plaintiffs' claim did not depend for inception on

⟹For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

[1] 41 P. 868.

deeds or notice imparted by making or recordation thereof.

3. Waters and water courses ⊂158½(2)—Evidence held to show oral grant of easement.

In suit to enjoin defendant from interfering with plaintiffs' alleged right to maintain and use ditch on or across defendant's land, evidence *held* to show oral grant of easement before defendant purchased land.

4. Frauds, statute of ⊂60(2)—Easement may be acquired by parol.

An equitable title to an easement to maintain and use a water ditch on and across land of another may be acquired by parol.

5. Waters and water courses ⊂152(8)—Evidence held to establish continuance of use of ditch.

Evidence *held* sufficient to show plaintiffs' open, notorious, continuous, peaceable, and uninterrupted use of ditch to convey water for irrigation whenever and as often as irrigation was necessary, notwithstanding occasional interruptions.

6. Waters and water courses ⊂151—Obstructions if ditch held not to manifest purpose of defendant to interrupt plaintiffs' use.

Interruptions by defendant with integrity of ditch, easement of which was possessed by plaintiffs to convey water for irrigation, and obstructions placed therein by persons unknown to plaintiffs, *held* not such as to frequency or persistence as to manifest purpose by defendant to so interrupt plaintiffs' otherwise open, peaceable, and continuous use of ditch as to prevent running of prescriptive period.

7. Waters and water courses ⊂158½(2)—Use of ditch held sufficient to put purchaser of land on inquiry.

In view of Civ. Code, § 19, evidence *held* to show that at date of defendant's acquisition of title to land and for several months prior thereto ditch claimed by plaintiffs was plainly visible and in use on and across land, and sufficient to put purchaser on such inquiry as to possible adverse user as would lead him to actual knowledge of rights of those apparently exercising easement.

In Bank.

Appeal from Superior Court, Kings County; M. L. Short, Judge.

Action by Effa May Scott, executrix of the last will of C. L. Scott, deceased, substituted as plaintiff instead of deceased, and another against John Henry. Judgment for plaintiffs, and defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, for appellant.

John G. Covert, of Hanford, for respondents.

RICHARDS, J. This appeal is from a judgment in the plaintiffs' favor in an action brought to enjoin the defendant from interfering with the plaintiffs' alleged right to maintain and use a water ditch upon and across the defendant's land. The plaintiffs, in their second amended complaint, based their claim of right to maintain and use said ditch in common with each other and with the defendant upon their ownership of an easement alleged to have been acquired by plaintiffs from the predecessor of the defendant in the ownership of the servient tenement, and also by prescription. The defendant in his answer denied each of these sources of title in the plaintiffs, and upon the issues thus joined the cause went to trial. The trial court made its findings of fact in plaintiffs' favor, wherein it found that the plaintiffs had acquired their ownership in said easement before the defendant became the owner of the land, and also found that the plaintiffs had acquired a prescriptive right to said easement by open, peaceable, continuous, uninterrupted, and adverse maintenance and use of said ditch for a period of more than five years prior to a date antedating the commencement of the action. From the judgment based upon these findings the defendant prosecutes this appeal.

[1] The first contention of the appellant is that the deeds by which the plaintiffs purported to have acquired their rights to construct, maintain, and use said ditch from one Papalian, the grantor of the servient tenement to the defendant, were nullities, for the reason that in neither of said deeds were the lands subsequently conveyed by Papalian to the defendant correctly or at all described. The error in description in one of these deeds consisted in describing the lands of the servient tenement as situated in the northeast instead of the northwest quarter of the government section in which the lands of the defendant are in fact located, and in the other deed consisted in locating said lands in the wrong township altogether and in a section six miles east of the defendant's said location. When the plaintiffs offered these deeds in evidence respectively the defendant objected to their introduction as muniments of title to the easement in question, whereupon the plaintiffs conceded, and the court ruled, that as such they were not admissible. They were then offered by the plaintiffs in connection with the testimony of Papalian, the grantor therein, to the effect that he intended by these conveyances to give to the plaintiffs the right to said easement upon and over the particular land in question which he then did own, and not upon and over other and distant lands which he did not own, and that the erroneous descriptions in said deeds were due to the mutual mistake of the parties. These deeds were admitted solely for that limited purpose and in aid of the plaintiffs' offered proof of an executed parol grant of said easement which had become effectual by its exercise while Papalian was still the owner of the land. The appellant has produced no authority to the effect that the admission of said

conveyances for such limited purpose was error, nor do we think it was so.

[2, 3] The main contention of the appellant with regard to the admission of these conveyances is that, since they embraced descriptions of other land than that of which he subsequently became the owner by purchase from Papalian, their recordation imparted no notice to him of the plaintiffs' alleged right to this easement so as to aid the latters' claim of title by prescription. As to that contention the defendant is doubtless correct. That he is so is, however, of little aid to him upon this appeal since the plaintiffs' claim of title by prescription does not depend for its inception upon these deeds nor upon notice imparted by the making or recordation thereof, but, as we shall presently see, upon evidence of actual and visible occupation and use of the water ditch upon and over the land at the time of the defendant's purchase thereof and thereafter for the time required to perfect such prescriptive right. Before dealing with this phase of the appeal, however, we should consider the asserted right of the plaintiffs to this easement based upon an executed oral grant from the then owner of the land, Papalian. As to the facts attending this oral grant the evidence in the case is uncontradicted, and is all one way. The plaintiffs, Papalian, and other witnesses concur in testifying that in the early part of the year 1913 Papalian, the then owner of the servient tenement, not only made, executed, and delivered to the plaintiffs the deeds respectively by which he intended to invest them, and each of them, with the title to this easement, but also went with them upon the land, and there undertook to orally invest them with the right of said ditch, and that pursuant thereto the plaintiffs did each immediately enter into the use and enjoyment of said easement by turning the waters to which they were entitled from other sources into the same, and by extending the actual ditch then in being over a portion of its route up to and over their own lands. It was upon this uncontradicted evidence that the trial court based its findings that the plaintiffs had become the owners of such easement prior to the date of the defendant's purchase of said land.

[4-6] That the equitable title to such an easement may be thus acquired by parol, see Rubio Cañon, etc., v. Everett, 154 Cal. 29, 96 P. 811. The only form of attack which the defendant makes upon this finding lies in his contention that, standing alone, it would be insufficiently supported to sustain the judgment, and hence would not suffice to do so except upon a sufficient showing of facts proving a prescriptive right, predicated upon such original investiture, and that as to such prescriptive right the evidence is not sufficient to sustain the plaintiffs' claim of title gained thereby. Upon this phase of the case it must be said, however, that the evidence is sharply conflicting. The testimony of the plaintiffs and their witnesses was, if believed, sufficient to show that they, and each of them began the use and extension of said ditch immediately after the making and delivery of the Papalian deeds to them embracing the erroneous descriptions and the oral investiture by the grantor in said deeds of the right to the use, extension, and enjoyment thereafter of said easement, and that such use and enjoyment thereof had been from that time forth for more than five years open, notorious, continuous, peaceable, and uninterrupted under a claim of right up to the date in the year 1918, when, for the first time, the defendant manifested an unmistakable intention to interfere with and prevent such use. It is true that this evidence shows that the actual use of said ditch for the purpose of conveying the plaintiffs' water to their lands was not continuous in the sense that it was constant; the evidence being that the plaintiffs ran water in said ditch for irrigation purposes whenever and as often as irrigation was necessary during the period from February, 1913, until April, 1918, and that they ran such water through said ditch at will and without interruption during said period. This would be sufficient to establish continuance of use. Hesperia Land Co. v. Rogers, 83 Cal. 10, 23 P. 196, 17 Am. St. Rep. 209; Strong v. Baldwin, 154 Cal. 150, 97 P. 178, 129 Am. St. Rep. 149; Pollard v. Rebman, 162 Cal. 633, 124 P. 235; Humphreys v. Blasingame, 104 Cal. 40, 37 P. 804; Silva v. Hawn, 10 Cal. App. 545, 102 P. 952. It is true, also, that there were occasional interruptions on the part of the defendant with the integrity of said ditch, such as at times plowing across portions of it, but as to these the testimony of the plaintiffs was to the effect that this was done with their concurrence, and for the purpose of clearing the lands along the line of the ditch from weeds, and that the defendant in each instance, except the final one, restored the lines and bank of the ditch. It is also true that there were occasions at irregular intervals, and mainly in the nighttime, when persons unknown to the plaintiffs had placed obstructions in the ditch, causing a diversion of the water, and these were removed by their employees. These obstructions were not such as to frequency or persistence as to manifest a definite purpose on the part of the defendant to so interrupt the plaintiffs' otherwise open, peaceable, and continuous use of said ditch as to prevent the running of the prescriptive period. With respect to these episodes the evidence is in sharp conflict, and the finding of the trial court thereon was in the plaintiffs' favor. Such findings will not be disturbed upon appeal.

[7] The final contention of the appellant is that the plaintiffs' use and occupation of said ditch was not such, nor under such claim of right, as to put him upon notice of its adverse character at the time he purchased

said land from Papalian; and hence that he then, and within the five-year period of prescription, became a purchaser in good faith and for value without notice, and that the plaintiffs' occupancy and use of said ditch was not sufficient in point of time thereafter as to perfect their prescriptive right to the easement claimed by them. As to this phase of the case the evidence, however, shows that at the date of the defendant's acquisition of the title to the said land from Papalian and for several months prior thereto the ditch was plainly visible and in use by the plaintiffs upon and across said land. This fact would suffice to put the purchaser of the lands in question upon such an inquiry as to a possible adverse user as would lead him to an actual knowledge of the rights of those apparently exercising an easement over his land. Civ. Code, § 19; Dreyfus v. Hirt, 82 Cal. 621, 23 P. 193; Pollard v. Rebman, supra; Rubio Cañon, etc., v. Everett, supra; Myers v. Kenyon, 7 Cal. App. 112, 93 P. 888.

We find no merit, therefore, in the appellant's final contention.

The judgment is affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; LENNON, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

---

196 Cal. 677

AMOS et al. v. SUPERIOR COURT OF CALIFORNIA, IN AND FOR SAN DIEGO COUNTY, et al. (L. A. 8636.)

(Supreme Court of California. Aug. 17, 1925.)

1. Jury ⟹25(2), 28(3)—May be waived in civil action; jury waived by failure to demand.

Parties to a civil action may always waive a jury, and are deemed to have done so if they fail to demand it and pay the jury fee at the proper time, in view of Code Civ. Proc. §§ 631, 883.

2. Jury ⟹31(1)—Not essential to jurisdiction of subject-matter in civil action.

The presence of a lawful jury is not essential to the jurisdiction of the subject-matter of a civil action at law, even though the parties may have a constitutional right to a trial thereof by jury.

3. Courts ⟹23, 37(1)—Cannot confer jurisdiction of subject-matter by waiver or consent.

Jurisdiction of the subject-matter cannot be conferred by waiver or consent.

4. Courts ⟹30—That clerk failed to note order of court for special venire on minutes did not deprive court of jurisdiction of subject-matter.

In action for injuries in a street car accident, where the clerk neglected to make a note on the minutes of the court's order calling a special venire, as required by Code Civ. Proc. § 226, *held* that the irregularity in the drawing of the jurors did not deprive the court of jurisdiction of the subject-matter of the action.

5. Prohibition ⟹3(2)—Writ not a writ of error.

Writ of prohibition is not a writ of error, and is not available as an original writ in matters properly taken by writ of error or appeal.

6. Jury ⟹70(1)—Special venire drawn only on good reason therefor.

Provisions of Code Civ. Proc. § 226, for the drawing of special venire, are intended to provide for an emergency situation, and not to be resorted to as a matter of course and without good reason therefor.

In Bank.

Application by Mintie Amos and another for writ of prohibition, to be directed to the Superior Court of the State of California, in and for the County of San Diego, and the Honorable S. M. Marsh and others, Judges thereof, and the San Diego Electric Railway Company. Peremptory writ denied, and alternative writ discharged.

Crouch & Sanders, of San Diego, for petitioners.

Read G. Dilworth, of Coronado, and V. F. Bennett, of San Diego, for respondents.

MYERS, C. J. This is an application for a peremptory writ of prohibition to restrain the respondent court and the judges thereof from proceeding with the trial of an action pending in said court, before a jury to be selected from a special venire, which was drawn for the purpose of the trial of that action. The pending action is one to recover damages for personal injuries growing out of a street car accident. The case having been regularly set down for trial before a jury, the presiding judge made an order directing the clerk of the court to issue and deliver to the sheriff a writ for a jury venire from which jurors were to be impaneled to try the case. This was evidently intended to be in compliance with section 226, Code of Civil Procedure, which provides:

"Whenever jurors are not drawn or summoned to attend any court of record or session thereof, or a sufficient number of jurors fail to appear, such court may order a sufficient number to be forthwith drawn and summoned to attend the court, or it may, *by an order entered in its minutes*, direct the sheriff, or an elisor chosen by the court forthwith to summon so many good and lawful persons of the county, or city and county, to serve as jurors, as may be required, and in either case such jurors must be summoned in the manner provided in the preceding section." (Italics added.)

The italicized words in the foregoing quotation are the ones upon which petitioners rest their contention that the respondent

court is without jurisdiction to proceed. The clerk, through inadvertence and oversight, failed to make entry of the order in the minutes. However, he did issue the writ and delivered the same to the sheriff as the order contemplated. The sheriff served the same, and on the day the case was called for trial the jurors were in attendance. The names of 12 prospective jurors were drawn, who took their places in the box and were sworn to answer questions as to their qualifications. Counsel for plaintiffs (petitioners herein) then examined the prospective jurors in the box as to their general qualifications, and, after such examination, passed them as to general qualifications, after which counsel for defendant examined and passed them as to general qualifications. Then counsel for plaintiffs examined them individually and at length respecting possible grounds for individual challenge, challenged one of them for cause, the challenge was allowed, and that juror was excused and another one drawn in his place. After concluding the examination of the individual jurors for cause, counsel for plaintiffs then interposed a challenge to the entire panel upon the ground that they were not selected or summoned in the manner required by law, because of the circumstance that the order for the drawing of the special venire had not been entered in the minutes, and because of the further circumstance that the venire as drawn and summoned consisted of but 20 jurors, only 15 of whom were present in court at the commencement of the trial. The trial court denied said challenge and objection, whereupon the plaintiffs in said action filed the present petition for a writ of prohibition to restrain the respondent court and the judges thereof from proceeding with the trial of petitioners' said action before such purported jury.

Respondents point out that in civil actions there is no such thing as a challenge to the entire jury panel, and the right to interpose such a challenge exists only in criminal cases. Estate of Wall, 187 Cal. 50, 55, 200 P. 929. Petitioners answer this by saying that the objection goes deeper than a mere challenge to the panel—that it is in effect a challenge to the very jurisdiction of the respondent court to try the cause; and they assert that, by reason of the irregularity in the impanelment of the jury, the respondent court is wholly without jurisdiction to try this cause before a jury drawn from that panel; and they contend further that the irregularity cannot be corrected by a nunc pro tunc entry of the order in the minutes of the court, even though the court actually rendered the order in due form and at a proper time, and its omission from the minutes was due solely to the inadvertence of the clerk. These contentions are not sound. They are predicated chiefly upon the decision of this court in Bruner v. Superior Court, 92 Cal. 239, 28 P. 341. In that case the defendant procured a writ of prohibition from this court to restrain the superior court from trying him upon an indictment returned by a grand jury which had not been impaneled in accordance with law. The grand jurors who returned the indictment had been summoned by an elisor appointed by the court in a case wherein the sheriff admittedly was not disqualified. The law did not authorize the appointment of an elisor or the summoning of grand jurors by an elisor in cases where the sheriff was not disqualified. This court held, therefore, that the so-called grand jury was not a lawful or constitutional grand jury, and that the purported indictment returned by it was void, and concluding that the trial court was without jurisdiction to proceed with the trial of the defendant upon a void indictment, issued a peremptory writ of prohibition. The soundness of that decision may be conceded for the purposes hereof, but it is not controlling of the present proceeding.

[1-3] Petitioners have lost sight of the distinction between criminal actions and civil actions with relation to questions of trial by jury. In criminal actions of a felony grade the trial jury is an essential constituent element of the court to try the defendant, the presence of which cannot be waived by the defendant even though he be willing to do so. It may also be said that, in the absence of an indictment found and returned by a lawfully constituted grand jury, or of an information duly signed and filed by a district attorney following the issuance of a complaint and a preliminary hearing thereon, the court is without jurisdiction to hold for trial a defendant charged with a felony. But in a civil action it cannot be said in any case that the court is without jurisdiction to try the case because of the absence of a jury. In a civil action at law wherein a jury is demandable as of right, and is duly demanded, it doubtless would be reversible error to deny such demand. Farrel v. City of Ontario, 39 Cal. App. 351, 178 P. 740; Estate of Baird, 173 Cal. 617, 160 P. 1078. But the parties to a civil action may always waive a jury, and, indeed, are deemed to have done so if they fail to demand it and pay the jury fees at the time prescribed by law therefor. Code Civ. Proc. §§ 631, 883. It follows that the presence of a lawful jury is not essential to jurisdiction of the subject-matter of a civil action at law, even though the parties thereto may have a constitutional right to a trial thereof before a jury. If it were, it could not be waived. It is fundamental that jurisdiction of the subject-matter cannot be conferred by waiver or consent (7 Cal. Juris. pp. 597, 598), or by estoppel. Lindsay-Strathmore Irr. Dist. v. Superior Court, 182 Cal. 315, 331, 334, 187 P. 1056.

[4, 5] The parties to this action might have stipulated, if they had been willing to do so,

that the action should be tried before a jury to consist of 12 persons, who had neither been drawn nor summoned as jurors, and who were not even citizens of the state. If this had been done, and if the trial were otherwise regular, the verdict of such a jury would be binding upon both parties. This being true, the irregularity in the drawing of the jurors herein could not have operated to deprive the court of jurisdiction to proceed with the trial. The cases of People v. Compton, 132 Cal. 484, 64 P. 849, and People v. Wong Bin, 139 Cal. 60, 72 P. 505, are inapplicable to the present situation for the reasons above indicated. It may be that, if the respondent court compels the plaintiffs to proceed to trial before such jury, it will constitute reversible error. Upon this question we express no opinion. The writ of prohibition is not a writ of error and we are not disposed to use it as such. The respondent court, having jurisdiction of both the parties and the subject-matter, may commit error in the exercise of such jurisdiction, and the appropriate remedy for the correction thereof is an appeal. This court is not disposed to encourage the practice of resorting to appellate courts for original writs for the purpose of procuring what amounts to a pro tanto review upon appeal before the cause has proceeded to final judgment in the trial court. Assuming, without deciding, that it may be reversible error for the trial court to deny plaintiffs' challenge and overrule their objections, nevertheless it may happen that the verdict and judgment when rendered will be entirely satisfactory to petitioners, in which event there will be no occasion to review this ruling.

[6] It is alleged in the petition, and not denied herein, "that there is a trial jury box in the county of San Diego containing the names of approximately 400 qualified jurors that have not been drawn or summoned to attend as trial jurors in said county, and that, when the said action of petitioners was called for trial, jurors had not been drawn from said trial jury box or summoned to attend said court at all." In this connection the statement is made in the briefs of counsel that it has been the practice of the superior court of San Diego county to favor the drawing of special venires for the trial of civil actions because of the great expense occasioned the county by using drawn juries, in that jurors are usually located at different distant points in the county, and because such jurors, if drawn and summoned, would be inconvenienced by being compelled to leave their farms. It is plainly the legislative intent that, in the ordinary course of judicial procedure, jury lists are to be made up and jurors drawn therefrom by lot in the manner prescribed in sections 204 et seq., Code of Civil Procedure. The provisions of section 226, Code of Civil Procedure, for the drawing of a special venire, wherein the jurors to be summoned are selected by the sheriff or elisor who executes the writ, are obviously intended to provide for an emergency situation and not to be resorted to regularly as a matter of course, or without good reason. This court has repeatedly pointed out the dangers inherent in the practice of resorting to special venires, and has repeatedly indicated that the better practice is to use jurors whose names are drawn from the term trial jury box. Bruner v. Superior Court, supra; Levy v. Wilson, 69 Cal. 105, 10 P. 272; People v. Yeaton, 75 Cal. 415, 17 P. 544; People v. Suesser, 142 Cal. 354, 360, 75 P. 1093; Estate of Wall, 187 Cal. 50, 200 P. 929. The record in this case, however, does not indicate that any such practice has been followed by the respondent judges or by any of them. Neither does it establish the fact that there may not have existed some sufficient reason for resort in the present instance to the procedure prescribed in Code of Civil Procedure, § 226. In any event, the action of the trial court in resorting to a special venire, even though no good reason therefor existed, would be no more than error in the exercise of jurisdiction.

The application for a peremptory writ is denied, and the alternative writ discharged.

We concur: RICHARDS, J.; SEAWELL, J.; LAWLOR, J.; LENNON, J.; KNIGHT, Justice pro tem.; HOUSER, Justice pro tem.

---

196 Cal. 701

SAN FRANCISCO CREDIT CLEARING HOUSE v. WELLS. (S. F. 11437.)

(Supreme Court of California. Aug. 19, 1925.)

1. Adverse possession ⟸114(1) — Evidence held not to establish elements of adverse possession.

In an action of replevin to recover a piano which had been sold by purchaser in violation of her conditional sales contract and purchased by defendant at auction, evidence *held* not to show elements necessary for adverse possession by defendant or predecessors for statutory period, so as to give defendant title.

2. Adverse possession ⟸112—Burden of proving elements of adverse possession or prescriptive title on party relying on same.

The burden of proving elements of adverse possession or prescriptive title is upon the party relying upon it.

3. Action ⟸63—At law, statute of limitations, not doctrine of laches, furnishes rule of decision.

In an action at law, the statute of limitations, rather than doctrine of laches, furnishes rule of decision.

4. Limitation of actions ⊂⊃45—Action against purchaser of converted property may be commenced within three years after he receives property, under Code.

An action of replevin, commenced within three years after defendant purchased converted property, is not barred by Code Civ. Proc. § 338, subd. 3, requiring such actions to be brought within three years, though combined possession, which was not adverse, of defendant and others was over three years; for as against a wrongdoer statute begins to run from date he receives property, and is not modified by Civ. Code, § 1007, conferring title on occupants for period limiting bringing of actions.

5. Adverse possession ⊂⊃43(1) — Wrongdoer cannot add possession of other wrongdoers to his own so as to come within bar of statute of limitations; "taking and detaining."

Under Code Civ. Proc. § 338, subd. 3, requiring actions for taking and detaining of property to be commenced within three years, a wrongdoer not possessing property for statutory period cannot avail himself of bar of statute by adding possession of other wrongdoers in privity to his own, since words "taking," etc., relate to person who wrongfully received property when action was brought.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Taking.]

In Bank.

Appeal from Superior Court, Alameda County; James G. Quinn, Judge.

Replevin by the San Francisco Credit Clearing House against C. B. Wells. From a judgment for defendant, plaintiff appeals. Reversed.

R. H. Cross and A. H. Brandt, both of San Francisco, for appellant.

Hugh K. McKevitt, of San Francisco (Joseph De Martini, of San Francisco, of counsel), for respondent.

SEAWELL, J. The facts of this case, the questions of law involved, and the proceedings had in the lower court are stated generally in the opinion of the District Court of Appeal, and we adopt the same, supplemented by such additional facts as may seem to us to give some additional basic support for the conclusion reached. The statement of the case by the District Court of Appeal follows:

"Action in replevin to recover a certain piano and bench.

"There is no dispute as to the facts. It appears therefrom that on the 2d day of August, 1911, the Aeolian Company of New York, a corporation engaged in the manufacture and sale of musical instruments, entered into a conditional contract of sale with one Sarah S. Rodgers for a Weber pianola and bench. The terms of this sales agreement provided for payments in installments, with the usual provision that title should not pass until completion of payments, and in case of default in any of the installments, the company could take possession of the property without demand. The price agreed to be paid for the piano and bench was the sum of $1,800, $100 of which was to be paid on the 2d day of August, 1911, $100 on the 15th day of October following, and $100 on the 15th of each and every third month thereafter, beginning with the 15th day of January, 1912, until the entire sum with interest was paid. Pursuant to this contract delivery of the piano was had, and thereafter and from time to time payments were made on account. The last payment occurred on January 3, 1913, and apart from the sum of $600, which was credited as an allowance for a piano turned in by the purchaser, only the sum of $551 was paid on her account. At this time the purchaser, the piano, and the bench disappeared, and after a lapse of some five years, and shortly before the 12th day of June, 1918, the property was discovered in the possession of the respondent, Wells, the defendant in this action. It appears that Mr. Wells bought the piano and bench, on the 29th day of November, 1915, for the sum of $925 from one E. Curtis, an auctioneer in San Francisco. The property had been sold by Curtis at the instance of and as the property of one Mrs. S. J. Moran. The Aeolian Company, upon the discovery of the piano, made an assignment of all its rights in the instrument to the plaintiff in this action. Formal demand was thereupon made upon Wells for its possession, and, this demand being refused, the present action in replevin was instituted.

"Additional facts show that shortly after the service of the demand by the plaintiff, the defendant, Wells, commenced an action against Mrs. Moran, in which he sought to recover the sum of $925, which sum he had paid Curtis for the piano and bench. This action was premised upon her fraudulent representations as to ownership. Wells recovered a judgment for the full amount prayed for and costs. It appears from the return of the sheriff that he executed upon this judgment and collected the sum of $203.95, $201.92 of which was turned over to Wells and receipted for in part satisfaction of the judgment.

"At the conclusion of the trial in the instant case the court found that on the 2d day of August, 1911, the Aeolian Company was the owner of the piano and bench, and that it entered into the agreement above referred to with Sarah Rodgers, and that on the 29th day of May, 1918, it had assigned and transferred its rights therein to plaintiff, who had made written demand upon defendant for the possession of the piano and bench. It further found, however, that plaintiff's action was barred by section 338, subd. 3, section 337, subds. 1 and 2, and section 339, subd. 1, of the Code of Civil Procedure, and that the action was also barred by laches, and that plaintiff did not acquire any interest in the property by virtue of the assignment, but, on the contrary, the defendant, Wells, was the owner thereof and entitled to the possession of the same. * * *"

The conditional sale contract provided that said personal property was to be delivered to Mrs. Sarah S. Rodgers, whose address for delivery was given as East Fifty-Eighth street, New York City. There being no other evidence as to the place of delivery, it must be inferred that said personal prop-

erty was delivered to her at the place named in the contract. As to what period of time the property remained in New York City after the execution of the contract, or when, or under what circumstances it was brought into this state, the record is silent. From the day on which the last installment was paid to the Aeolian Company under said contract, to wit, January 3, 1913, to the day that said property was delivered by one Mrs. S. J. Moran to the auctioneer for sale and was purchased at auction sale by Mr. Wells, to wit, November 29, 1915, it was clandestinely possessed. As a matter of fact, said company had no knowledge of the sale of said personal property or by whom the actual possession was held, or where it had been detained, after the day of said last payment, until it was discovered in the possession of Mr. Wells in May, 1918, a period of approximately five years and four months. No charge of intentional wrong is imputable to Mr. Wells. No privity is shown to have existed between him and Mrs. Moran or between him and Mrs. Rodgers.

[1, 2] The question which seems to us to be decisive of the case is whether plaintiff's cause of action was barred by the provisions of section 338, subd. 3, Code of Civil Procedure, as found by the trial court. The second question, as to whether the possession of defendant, or any one of the parties under whom he claims title, or the possession of all of them considered together, none of whom was in possession for a period of three years after a cause of action for its detention had accrued in favor of plaintiff's assignor, was legally sufficient to support respondent's claim of title by adverse possession, is discussed by respondent, but we think the latter question is rendered unimportant by the fact that the possession of the defendant, or by any or all of the persons under whom he claims, is wholly lacking in those essentials which are necessary to the creation of a title by adverse possession. Said property was not held by the defendant or by those under whom he claims openly or notoriously, continuously and uninterruptedly, for the statutory period, exclusively and under a claim of right, nor were the taxes shown to have been paid by the adverse claimants. Neither the defendant nor his predecessors possessed said property continuously for the full statutory period. Its possession was not open and notorious, but clandestine, and the owner was without the means of knowing in whose possession it actually was or that the possessor asserted an adverse claim to it. In fact, the place of its location was concealed from the owner. The burden of proving all the essential elements of an adverse possession or prescriptive title is upon the party relying upon it. 1 Cal. Jur. 636; Allen v. Allen, 159 Cal. 197, 113 P. 160. There is no evidence of any kind to be found in the record which tends to support a claim of title by adverse possession.

[3] The trial court specifically found, in addition to the bar of the statute, that plaintiff and its assignor were also guilty of laches. This being an action at law, the statute of limitations, rather than the doctrine of laches, furnishes the rule of decision. Brownrigg v. de Frees et al. (Cal. Sup.) 238 P. 714; Anzar v. Miller, 90 Cal. 342, 27 P. 299; 10 Cal. Jur. 522.

[4] Section 338, subd. 3, prescribes that "an action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property," must be commenced within three years. Mrs. Rodgers, upon disposing of the personalty to which she had no title, thereby became a converter of the same. The title remained in the seller by the terms of said contract. The last installment was paid by her on January 3, 1913. She then defaulted in all subsequent payments. Within a period of three years thereafter, to wit, November 29, 1915, the defendant became the purchaser at an auction sale. Within three years after this purchase, plaintiff, after demand, brought this action to recover the possession of said property. We think the rule of law declared in Harpending v. Meyer, 55 Cal. 555, is determinative of the rights of the parties to this action. In that case Baux, a bailee, wrongfully pledged the plaintiff's jewelry to the defendant Meyer, a pawnbroker. Plaintiff subsequently commenced an action in conversion against the pledgee. The defense was made there, as here, that the action was barred by subdivision 3, § 338, Code of Civil Procedure. The court, in discussing the question as to when the right of action accrues in this class of cases, in part said:

"In Wells v. Ragland, 1 Swan (Tenn.) 501, it is distinctly held that where the possession of property is obtained from one who had no right to transfer it, a right of action by the owner against the transferee accrues as soon as the latter acquires possession of it; that the bare taking of possession under such circumstances constitutes a new conversion on the part of the person taking it, and that from the time of the commission of that act, the statute will commence running. * * *

"We are unable to perceive, however, that a person can ever be considered a bona fide purchaser of goods from one who has no right to sell, in a case where the rule of caveat emptor applies. The law imputes notice to him. Under that rule he is not only put upon inquiry, but he is conclusively presumed to have ascertained the true ownership of the property before purchasing it. If he has notice in fact, no demand upon him for the property is necessary before commencing the action to recover it. * * *

"We shall hold, in accordance with the rule adopted in Maine, Michigan, Vermont, and Massachusetts, that the defendants having acquired the possession of plaintiff's property by and through the tortious acts of Baux, and not otherwise, such possession was tortious from its commencement, and constituted a conversion of

the plaintiff's property, for which she might at any time within three years thereafter have maintained an action without previously making any demand, and that the omission to commence an action within that time, constitutes a bar to this action."

See, also, 5 Cal. Jur. 172.

The evidence in the instant case, being obviously insufficient to support a title of adverse possession or prescription, renders it unnecessary to consider the question whether or not it was the intention of the Legislature, by the enactment of section 1007, Civil Code, that it should be applied to personal property. Said section reads:

"Occupancy for the period prescribed by the Code of Civil Procedure as sufficient to bar an action for the recovery of the property confers a title thereto, denominated a title by prescription, which is sufficient against all."

[5] Whether by the adoption of said section it was intended to include personal property or not, it is very clear that the section in nowise modifies or limits the effect of subdivision 3, section 338, Code of Civil Procedure. That subdivision authorizes the commencement of an action by the owner of personal property against a wrongful converter at any time within three years from the day that the wrongdoer receives the property into his possession. The acts of "taking," "detaining," etc., the property relate to the person who wrongfully has the property in his possession at the time the action is commenced against him, and the fact that others may have wrongfully possessed it for fragmentary portions of the statutory period, which, taken together, would exceed the period that bars the remedy, is not a defense of which the wrongdoer, who has not possessed the property for the full period of three years may avail himself. This construction seems to be in harmony with Harpending v. Meyer, 55 Cal. 555, and would afford some protection to persons as to their ownership of personal property which is of an ambulatory and movable character, and easy of concealment. Less baneful consequences would probably flow from a rule that would require a fixedness or stability of possession before an owner of property, without fault on his part, could be deprived of its use and enjoyment than that which would follow the confusion of "tacking" the possession of many holders of various durations, residing in various neighborhoods and with the situation further embarrassed by the difficulties of identification.

A careful examination of the decisions of this state has failed to disclose to our investigation a single case in which section 1007, Civil Code, has been applied to the acquisition of title to personal property. Said section has been cited and interpreted many times in cases involving the title to property real. In Thomas v. England, 71 Cal. 456, 12 P. 491, this court, in interpreting said section, said:

"This section merely fixes the time in which a right by prescription shall be acquired, but does not alter the requisites which before the code were essential to the growth of a prescriptive right. Woodruff v. N. B. G. M. Co., ([C. C.] 18 F. 753) 9 Sawy. 441.

"The use must be adverse to the true owner. Anaheim W. Co. v. Semi-Tropic W. Co., 64 Cal. 185 (30 P. 623).

"If the use must be adverse then it must be accompanied by the elements required to make out an adverse possession."

See, also, Sullivan v. Zeiner, 98 Cal. 346, 33 P. 209, 20 L. R. A. 730; Water Co. v. Richardson, 72 Cal. 598, 14 P. 379; People's Water Co. v. Anderson, 170 Cal. 683, 151 P. 127.

Said property was not taken from the possession of the original conditional purchaser for a tax, assessment or fine, or pursuant to any statute, and the title thereto could not have been transferred by her without the consent of the seller. Mrs. Rodgers never having acquired title by her possession and her successors in interest not having possessed or occupied said property for the period required by subdivision 3, section 338, supra, the privilege of the statute of limitations is not, therefore, available to the defendant as a defense to the action.

The judgment is reversed.

We concur: RICHARDS, J.; LAWLOR, J.; LENNON, J.; WASTE, J.

MYERS, C. J. I concur. If, however, we should assume that section 1007 of the Civil Code applies to personal property, and that title to such property may therefore be acquired by prescription, I am not prepared to say that the occupancies of successive possessors who are in privity with one another could not be tacked for that purpose. That question is not necessary to be determined in this case, for the reason pointed out by Mr. Justice SEAWELL, that the essential elements of open and notorious adverse possession under claim of right coupled with payment of taxes, are wholly lacking herein.

196 Cal. 683

PICKERILL v. STRAIN. (Sac. 3575.)

(Supreme Court of California. Aug. 18, 1925.)

1. Appeal and error ⟸113(3)—Proper appeal is from judgment, after order denying motion to vacate default judgment.

Where a default judgment is taken, and after motion to open up default, an order of judgment in accordance with proof is entered, the proper appeal is from the judgment, as no direct appeal lies from an order denying a motion to vacate default, as provided by Code Civ. Proc. § 963.

2. Appeal and error ⟸957(1)—Judgment ⟸139—Ruling of trial court not disturbed on appeal, when no abuse of discretion is shown.

Action of trial court, in setting aside or granting relief from default judgment, rests largely in its discretion, and it will not be disturbed on appeal, unless it clearly appears an abuse of the discretion.

3. Judgment ⟸143(12)—Refusal to set aside default judgment held not abuse of discretion by trial court.

Where summons and complaint were served December 6, 1922, and demurrer and motion for change of place of trial was served on plaintiff's attorney by mailing on January 5, 1923, a refusal by trial court to set aside default judgment taken on January 6, *held* not to be an abuse of discretion, notwithstanding defendant's contention of mistake and excusable neglect under impression that service could be made by deposit under Code Civ. Proc. § 1013.

4. Appeal and error ⟸659(4)—Diminution of record denied, where omitted papers immaterial.

Where affidavits used below were not included in the record on appeal, but would have added nothing to the showing made, diminution of the record will be denied.

In Bank.

Appeal from Superior Court, Kings County; M L. Short, Judge.

Action by E. F. Pickerill against Thomas Strain, Jr., doing business under the firm name and style of the National Fruit Exchange. Judgment for plaintiff, after denial of motion to open up default, and defendant appeals. Affirmed.

H. Scott Jacobs, of Hanford, and Moore & Patterson, for appellant.

J. L. C. Irwin and Chas. E. Watkinson, both of Hanford, for respondent.

WASTE, J. A judgment, after default, was entered against the defendant, and he has appealed on the judgment roll and a bill of exceptions which presents only the matters relating to the refusal of the lower court to set aside the default.

The plaintiff commenced an action in the superior court of Kings county and the defendant was served with complaint and summons in Los Angeles county on December 6, 1922, as he was about to depart from the state. The defendant returned to California on January 2, 1923. On January 5, demurrer to the complaint and papers on motion for a change of place of trial were served on the plaintiff's attorneys by mailing, and the originals, unaccompanied by any filing fees, were forwarded to the clerk of the court in which the action was pending. On the next day, January 6, the plaintiff, who is the county clerk of Kings county, noted the default of the defendant, and thereupon entered judgment in his own favor for the full amount prayed for in the complaint. On January 22, the defendant served affidavits and notice of motion to set aside the default and judgment on the ground of excusable neglect, and upon the further ground that plaintiff, as clerk of the court, was disqualified from entering either a default or a judgment. A countershowing was made by the plaintiff, and, upon due consideration, the court denied the motion to open the default, but made an order setting aside the judgment. Thereafter, according to the record, the action was "set down for trial * * * before the court sitting without a jury; whereupon witnesses on the part of the plaintiff were sworn and examined, and the evidence being closed, the cause was submitted to the court for consideration and decision," and judgment was ordered for the plaintiff in accord with the proof made. The defendant filed notice of appeal "from the judgment made and entered in said superior court in the above-entitled action on the 7th day of August, 1923, in favor of the plaintiff in said action and against the defendant, for the sum of $1,750.89 and costs, and from the whole thereof."

[1] The respondent urges, in opposition to a consideration of the appeal, the contention that appellant cannot be heard in support of his plea that the court erred in refusing to set aside his default, for the reason that no appeal has been taken from that order. There is no merit in the objection. No direct appeal lies fom an order denying a motion to vacate a default. Code Civ. Proc. § 963; Timmons v. Coonley, 39 Cal. App. 35, 179 P. 429. But, whether or not his default was properly entered is a question which appellant had a right to have adjudicated upon an appeal from the judgment. Ricketson v. Torres, 23 Cal. 636, 650; Maud v. Wear, 55 Cal. 25.

[2, 3] The motion to set aside the default was made upon the ground of surprise, mistake, and excusable neglect. According to the bill of exceptions, the only affidavit in support of the motion was one made by an attorney for the defendant in which he sets forth the pertinent facts already narrated, and the further allegation that "affiant had

in mind the provisions of section 1013, Code of Civil Procedure of the state of California, which provides that a deposit in the mail is equivalent, and that service is had when deposit was made and affiant was under the impression that by the provisions of this section an appearance would also be had by deposit." It has been so often held as not to need citation of authorities that the action of the superior court upon an application to set aside a default, or grant relief therefrom, rests so largely in its discretion that it will not be disturbed on appeal, unless it shall be made clearly to appear that there was an abuse of the discretion. Ingrim v. Epperson, 137 Cal. 370, 70 P. 165. In this case the court did not err in refusing to open the default on the showing made. Hancock v. Pico, 40 Cal. 153.

[4] Appellant makes a suggestion of diminution of the record for the purpose of bringing to our attention the affidavits of the respondent and the deputy county clerk, both of which affidavits, he represents, were before the trial court, but neither of which is included in the record on appeal. There is nothing in the record to show that the affidavits were actually before the court on the application to open the default, but, assuming that they were, they add nothing to the very weak showing, otherwise made, in support of the motion.

Appellant complains that the judgment is excessive. The judgment recites that witnesses on the part of the plaintiff were sworn and examined, and the evidence being closed the cause was submitted. Appellant has not brought the evidence to this court. From an examination of the judgment roll, we find the case is one in the jurisdiction of the superior court, the complaint states a cause of action, the default of the defendant was duly entered, and the judgment is regular on its face.

For the reasons given, diminution of the record is denied.

Judgment affirmed.

We concur: MYERS, C. J.; LAWLOR, J.; SEAWELL, J.; RICHARDS, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

---

196 Cal. 686

JOHNSON v. KAESER et al. (Sac. 3620.)

(Supreme Court of California. Aug. 19, 1925.)

1. Sales ⟹477(4)—Contract construed as conditional sale with option to retake property or sue for balance on default.

Contract for sale of personalty, reserving title in seller until performed, and giving him right on default in payment of installments to declare balance of purchase price due, and thereupon retake possession of property, is a conditional sales contract and gives seller option on buyer's breach to treat contract as a conditional sale and retake property or ratify contract as an absolute sale and sue for balance due.

2. Sales ⟹477(4)—Contract, giving seller option to retake property or sue for balance on default, does not require notice of election.

Contract for sale of personalty, reserving title in seller until performed, and giving seller right, on default by buyer, to sue for balance of purchase price or retake property requires no further notice to the defaulting party of election by seller to sue for balance of purchase price than the bringing of the action.

3. Evidence ⟹413—Contract provision for attorney fees binding so as to exclude proof of reasonable value.

Provision in contract, that if seller, on default of buyer, must employ an attorney, buyer is to pay "an additional sum equal to 10 per cent. of the purchase price" as attorney fees, is binding, unless unconscionable, and objection to proof of reasonable value of attorney's services was properly sustained.

4. Sales ⟹477(5)—Oral agreement to extend time for payment of installments waives provisions for payment in contract.

Under conditional sales contract payable in installments, an oral agreement to extend time for payment of installments of three months waived provisions of contract for payment and forfeiture clause as to installments.

5. Sales ⟹477(1)—Seller cannot declare forfeiture for nonperformance where he consents thereto.

A seller, under a conditional sales contract, cannot declare forfeiture for nonperformance by purchaser of terms of contract, where such nonperformance has been with express or implied consent of seller.

6. Frauds, statute of ⟹139(6)—Oral agreement to extend time of payment of installments, fully performed, not void under statute.

In a contract for payment by installments, oral agreements to extend time of payment of installments, fully performed by acceptance by seller of interest for extended time, are not void, under Code Civ. Proc. § 1856, and Civ. Code, § 1661, as being oral, executory, and without consideration.

7. Estoppel ⟹55—Waiver of legal right implied, where party's acts mislead another to believe waiver intended and amounts to estoppel against him.

A waiver of legal right may be implied, where acts of party are such as to mislead another to believe that a waiver was intended and amounts to an estoppel against the former.

8. Evidence ⟹84—Check presumed tendered, as required by contract, where no evidence to contrary.

Under a contract, requiring payment by installments on the 1st day of each month, or within 10 days thereafter, where a check dat-

ed 8th of the month was tendered, it is presumed that it was tendered in time, there being no evidence to the contrary.

9. Forfeitures ⊂⊃2 — Statutes liberally construed to avoid forfeitures.

Forfeitures not being favored by the court, statutes authorizing them are to be liberally construed to avoid such penalties.

10. Sales ⊂⊃479(7)—Burden of proof, as to tender of check in time, on party declaring forfeiture.

In action on contract for failure to pay installments, burden of proving that check was not tendered in time, which fact was put in issue under Code Civ. Proc. § 462, is on party declaring contract forfeited, under rule requiring such party to bring himself clearly within conditions authorizing forfeiture.

11. Time ⊂⊃9(10) — Action brought on 11th day, under contract giving 10 days after 1st of month to pay, was premature.

Under a contract, providing that installments were to be paid on 1st day of each month, or "within 10 days thereafter," 10 days begins to run from 2d day of month, first day being excluded under Civ. Code, § 10, and Code Civ. Proc. § 12, and an action brought on 11th day was premature.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by F. E. Johnson against R. G. Kaeser and others. Fron a judgment in favor of plaintiff, defendants appeal. Reversed.

Thos. B. Leeper and O. G. Hopkins, both of Sacramento, for appellants.

Charles B. Harris and White, Miller, Needham & Harber, all of Sacramento, for respondent.

HART, Justice pro tem. The plaintiff brought this action to recover from defendants the total sum of $13,671 and interest, together with attorney's fee in the sum of $2,000, alleged to be due from the latter by virtue of the terms of a conditional contract of sale of certain personal property.

The cause was tried before a jury, and a directed verdict returned for the full amount prayed for in the complaint. Judgment was entered accordingly, and the defendants appeal.

The terms of the contract, in substance, and the payments thereunder made by the defendants, are correctly stated as follows in the brief of respondent:

"On June 28, 1922, respondent as seller, and appellants as purchasers, entered into a written contract for the sale and purchase of certain personal property used in the conduct of a dairy business and situated at No. 2935 Franklin boulevard in the city of Sacramento, Cal., a copy of which contract is annexed to the complaint and set out on pages 4 to 12 of the clerk's transcript. The agreed price was $20,000, payable $5,000 upon the signing of the contract, and the balance in monthly installments of not less than $300 on the 1st day of each and every month thereafter, beginning August 1, 1922, until the full amount had been paid, together with interest upon the deferred installments at the rate of 6 per cent. per annum, payable monthly on the 1st day of each month. Said contract provides that the title to said personal property shall remain in the vendor until all of the payments therein provided for are made; that past-due payments shall bear interest at the rate of 1 per cent. per month; that should the vendees fail to make any of the said payments in the amounts, manner, and within the time therein provided for, or within 10 days thereafter, the vendor may declare the entire purchase price due and payable without notice; that in the event the vendor shall employ an attorney to collect any unpaid balances, the vendees promise to pay an additional sum equal to 10 per cent. of the purchase price of said personal property as and for attorney's fees, and that time is of the essence of the contract. * * *

"Thereafter, to wit: On July 1, 1922, appellants entered into the possession and took charge and control of the personal property described in said contract and the business theretofore conducted by respondent on the above-mentioned premises, and they ever since have been in the possession, management, and control thereof. The uncontradicted evidence shows that the following payments, and no other, were made on the following dates, to wit: August 14, 1922, $375; September 15, 1922, $373.50; October 14, 1922, $372; November 16, 1922, $70.50; December 16, 1922, $70.50; January 15, 1923, $70.50; February 16, 1923, $219.75; March 16, 1923, $219.75; April 19, 1923, $219.10."

The facts above stated are substantially alleged in the complaint. It is further therein averred that:

"On the 10th day of May, 1923, defendants were in arrears on the payments due on the principal in the sum of one thousand three hundred seventy-one and 15/100 ($1,371.15) dollars, no part of which has been paid; * * * that said plaintiff has been compelled to employ an attorney, and has so done, to represent him in this action, and he alleges that, under the terms of said contract, there is now due and payable from said defendants the sum of two thousand dollars as attorney's fees; that plaintiff now elects to treat said contract of sale as an absolute sale."

The contract is attached to, and made a part of, the complaint, and therein is set forth in detail the personal property sold or agreed to be sold and transferred to defendants.

A demurrer on the general ground was interposed to the complaint and overruled, whereupon the defendants filed an answer denying specifically the allegations of the complaint and setting up a special defense based upon an alleged waiver by plaintiff of

the payment of installments referred to according to the requirements of the contract.

Defendants, also, by way of a cross-complaint, pleaded a counterclaim growing out of damage alleged to have been suffered by them by reason of alleged false and fraudulent representations by plaintiff as to the extent, value, volume, and profits of the dairy business which, it is further alleged, was sold to defendants by plaintiff with the personal property constituting the equipment of said business. In this connection, the cross-complaint charges that the plaintiff knowingly and fraudulently misrepresented to defendants, at the time the sale was under negotiation, the extent and profits of said business, which alleged fraud was not discovered by defendants until after the sale was consummated and they had taken possession, control, and management of said property and business; that they relied and acted upon and were induced to purchase said property and business by the representations so made to them by plaintiff, and paid to the latter for said property in excess of the actual and reasonable value thereof, the sum of $12,500, with the result that they were and are damnified in that amount; that, "upon discovering said fraud, these defendants affirmed said contract and offered to perform the same, and do now affirm and offer to, and are now able, ready, and willing, to carry out all its terms and conditions," etc. The plaintiff answered the cross-complaint, specifically denying all its material averments.

It appears that, between the 1st and 10th day of November, 1922, and when the payment of the installment for the month of November, 1922, was due but still unpaid, the defendants called on and had an interview with the plaintiff with regard to said payment and also like payments to be made for the months of December, 1922, and January, 1923. As to the nature of the conversation then had by defendants with plaintiff, the testimony of each of the defendants was substantially the same and not contradicted. In fact, the plaintiff virtually admitted it to be true. The defendant Potter testified that they first said to plaintiff that, during the negotiations culminating in the sale, he had misrepresented the value and the extent of the business and the property which were the subject of the sale; that the business, for reasons not material to the present consideration, had not been as profitable during the period of time that it had been in their possession and under their control as he (plaintiff) had represented that it was while he controlled and managed it; that, therefore, they would not be able to meet the payments on the principal as required by the contract for the months of November and December, 1922, and January, 1923, and that "unless some adjustment was made he (plaintiff) could take the dairy business back"; that thereupon the plaintiff stated that the defendants need not "pay the principal for three months—that we could pay the interest alone— * * * the months of November, December, and January." Defendant Beskeen testified that plaintiff "agreed to extend the payment (of the installments for the months of November, December, and January) for three months. We were to pay the interest, but did not have to pay the principal."

Defendant Kaeser testified:

"I told Mr. Johnson (plaintiff) he had misrepresented the business—it was not paying what he said it would pay. He could take his d——n business back and his contract back. I said he misrepresented it; said he was getting $1.08 a case for the milk, which we found out was not true. Then Mr. Johnson says: 'It is a quiet time now, being it is winter time; in the spring it will probably be a whole lot better;' and I said we could not make the payment at the present time; that the business would not pay it. He said, 'Well,' he would extend the time for three months, and we would not have to make a payment on the principal, only pay the interest, and I said to run three months, November, December, and January."

Shortly prior to the maturing of the February, 1923, installment, the defendant Potter had a second conversation with plaintiff, in which the former stated to the latter that:

"We were unable, still unable, to make full monthly payment, and suggested we might make half payment. He (plaintiff) said that it would be all right and the matter mentioned was three months. * * * To make half payments for three months. There was nothing said concerning the other half payments for those months."

On April 18, 1923, acting for and on behalf of plaintiff by the latter's request, H. H. Robinson, cashier of the Merchants' National Bank, at which plaintiff transacted his business, addressed and mailed to the defendants, Beskeen and Potter, a letter in which he notified them of their arrears in the payments required by the contract in the sum of $1,371.15 and demanded payment of said sum "on or before ten days, or we will call upon Mr. R. G. Kaeser, cosigner on the agreement."

Under date of May 2, 1923, the attorney, then representing the plaintiff, addressed and mailed a letter to each of the three defendants demanding payment of the sum of $1,371.15, arrearages for the months of November and December, 1922, and the months of January, February, March, and April, 1923, and further notifying the defendants that, unless they paid said sum, together with interest which had accrued thereon, on or before the 10th day of May, 1923, he would "commence proceedings to collect the total due under the contract."

A few days after the date and mailing of the letter last referred to, and prior to the

10th day of May, 1923, the defendants met with the plaintiff and his attorney at the latter's office. On that occasion, so the plaintiff testified, after a general discussion relative to the installments unpaid for the months mentioned, the defendants proposed to give the plaintiff their promissory note covering the total sum ($1,371.15) of their arrearages; that to that proposition the plaintiff answered that he would accept such a note "if the bank would cash it for the full amount. I told them," proceeded plaintiff, "I wanted 24 hours to find that out. I went to the Citizens' Bank at Oak Park, where they (defendants) were already doing business and where I was doing business myself, and he could not tell me until he consulted the Capital National Bank." The plaintiff, on the succeeding day, again called at the Citizens' Bank, and was informed by the cashier that the bank would take the proposed note at a discount of $171.15, or, in other words, pay plaintiff $1,200 for the $1,371.15 note. The plaintiff thereupon refused to accept the note for said amount from the defendants.

A check, dated May 8, 1923, for the sum of $368.55, drawn by the defendants Beskeen and Potter on the Citizens' Bank, above mentioned, and in favor of the plaintiff, and covering the installment on the principal and interest for the month of May, 1923, was offered the plaintiff. The plaintiff refused to accept the payment thus tendered, and on the 11th day of May, 1923, brought this action to recover on the contract by reason of the alleged defaults of the defendants in the matter of the payment of the installments as provided thereby.

Before considering and disposing of what is conceived to be the pivotal question on this appeal, under the facts as they are above stated, and which stand in the record undisputed, we may, with propriety, in view of possible future litigation growing out of the contract upon which this action was brought, make some observations relative to certain points discussed in the briefs of counsel representing both sides of the controversy and upon which they disagree.

[1] The contract herein involved is undoubtedly a conditional sale agreement. It provides, as will be noted, that the title to the property which is the subject thereof shall remain in the seller until the full amount of the purchase price shall have been paid. It also provides, as is further to be noted, that on default in the payment of the installments of principal and interest the seller may declare the entire purchase price, or so much thereof as then remains unpaid, due and payable, and may thereupon retake possession of the property. It is settled by an unbroken line of decisions that, as to such a contract, it is optional with the seller, upon default by the purchaser in complying with any of the vital terms of the agreement, either to treat the contract as involving a conditional sale and retake possession of the property or ratify the contract as one involving an absolute sale of the property and so sue for the recovery of all moneys then payable thereunder. In other words, the seller in such case is vested with the right to exercise an election as between the two remedies suggested. See Parke & Lacy Co. v. White River L. Co., 101 Cal. 37, 40, 35 P. 442; Elsom v. Moore et al., 11 Cal. App. 377, 379, 105 P. 271; George J. Birkel Co. v. Nast, 20 Cal. App. 651, 654, 129 P. 945; Pac., etc., Co. v. Haydes & Son, 26 Cal. App. 607, 609, 147 P. 988; Holt Mfg. Co. v. Ewing, 109 Cal. 353, 356, 42 P. 435; Van Allen v. Francis, 123 Cal. 474, 480, 56 P. 339; Harter v. Delno, 49 Cal. App. 729, 735, 194 P. 300, 303; Boas v. Knewing, 175 Cal. 226, 165 P. 690, L. R. A. 1917F, 462. The text-writers lay down the same rule. (See 1 Mechem on Sales, § 615; Williston on Sales, § 579.)

[2] Furthermore, no notice to the defaulting parties of his election to treat the sale as absolute and sue for the recovery of the purchase price is required to be given by the seller. The provisions of the contract that the title to the property shall remain in the seller until the full amount of the purchase price has been paid, and that, upon default by defendants to pay the purchase price as prescribed in the agreement, the seller may retake possession of the same, were inserted in the instrument for the purpose of securing such payment and were intended solely for the benefit of the vendor. It was, therefore, within the rights of the latter to waive those provisions and treat the sale as absolute or unconditional and so proceed with the enforcement of the terms of the agreement without any further notice to the defendants of his intention to do so than such as necessarily is imparted by the institution of an action to recover upon the contract. See Trinity County Bank et al. v. Haas, 151 Cal. 553, 556, 91 P. 385; Hewitt v. Dean, 91 Cal. 5, 27 P. 423; Sichler v. Look, 93 Cal. 600, 29 P. 220; Clemens v. Luce, 101 Cal. 432, 35 P. 1032; Bank of Commerce v. Scofield, 126 Cal. 156, 58 P. 451.

[3] The defendants, objecting to the claim of plaintiff that he was entitled to recover as and for attorney's fees the sum of $2,000 for professional services in collecting the amount due him on the contract, offered to prove the reasonable value of such services, but the court sustained plaintiff's objection to the proposed proof. The contract, as seen, provides that if the seller shall be required to employ the services of an attorney for the collection of any unpaid balance which becomes due and payable under the agreement, the purchaser "promises to pay (to the seller) * * * an additional sum equal to 10 per cent. of the purchase price." The theory upon which testimony as to the reasonable value of the services of the attor-

ney was excluded was that the parties themselves had, by the contract, definitely fixed the amount to be paid for such services. We think the ruling was correct. Reynolds v. Sorosis Fruit Co., 133 Cal. 625, 66 P. 21. As is said in that case, in effect, even if the amount agreed upon as compensation was in excess of the value of the services rendered and thus the defendants made an improvident agreement as to the amount so to be paid, they are nevertheless, still bound by their bargain in that respect. There may be cases or circumstances arising in cases in which such fees as fixed by the contract of the parties could, and with justness, be held to be so unreasonable as to be unconscionable, and, therefore, unsustainable, but it cannot justly be so declared in this instance, in view of the amount remaining unpaid on the contract and the circumstances generally surrounding the transactions leading to this action.

We now proceed to the consideration of the points, the solution of which will be decisive of the case. The plaintiff presented his case in the court below and undertakes to sustain this appeal upon the theory that the oral arrangements entered into between the parties as to the payment of the installments for the months of November and December, 1922, and January, February, March, and April, 1923, merely involved agreements that the payment of said installments was to be postponed until the expiration of the period covered by said six months. In other words, the contention is that the intended effect of said agreements was that payment of said installments was extended for six months only, just as the payment of a promissory note might be extended by the payee or holder to some date beyond that of its maturity. Under this view of the oral agreements as shown by the testimony of the defendants, it is further argued that said agreements were void for two reasons, viz: (1) That the alleged agreements involved an attempt to modify, vary, or change a written contract, and not themselves being in writing and also being of an executory character, they are void, or legally incapable of being proved and enforced. Section 1856, Code Civ. Proc.; section 1661, Civ. Code. (2) That, even if the agreements were not void for the reason just stated, still neither agreement was supported by a consideration, and each for that reason was a nudum pactum and, therefore, void.

[4] Conceding that the testimony warrants the conclusion, as the plaintiff contends, that the agreements were that the payment of the installments for the months mentioned should be postponed to a time contemporaneous with the expiration of the period covering six months, it is, nevertheless, true, as the defendants maintain, that the legal effect of the agreements, on plaintiff's part, was to waive the payment, as the contract requires, of the installment for each of the months mentioned; that there having been no agreement, express or otherwise, to the contrary, such waiver necessarily, or in the very nature of the case, carried with it, as to the said installments, a like waiver of the provisions of the contract that time is of the essence thereof and, consequently, of the forfeiture clause of the contract enforceable only upon default by defendants to make the monthly installment payments according to the stipulations of the contract, or on their failure to comply with any of the other vital or material terms or conditions of the contract. See Van Vranken v. C. R. & M. R. Co., 55 Iowa, 135, 5 N. W. 197, 7 N. W. 504; see, also, on the question of waiver, Belloc v. Davis, 38 Cal. 242; Trinity County Bank et al. v. Haas, 151 Cal. 553, 91 P. 385; Weinke v. Smith, 179 Cal. 225, 176 P. 42.

[5] This conclusion, as to the legal effect or scope of the waiver, is the essential corollary of the proposition that the seller, under a conditional contract for the sale of property, will not be permitted to declare a forfeiture of the rights of the purchaser under such contract for nonperformance by the latter of any of the vital terms or conditions of the writing, where such nonperformance has been with the express or clearly evinced tacit or implied consent of the seller. As is well said in Neppach v. Oregon R. Co., 46 Or. 396, 80 P. 487, 7 Ann. Cas. 1039, treating with a contract somewhat similar to the one here:

"It would certainly be unreasonable to hold, under such circumstances, that the defendant can now insist upon a forfeiture of the contract on account of the failure to make such payments. 'We know of no principle of law,' says Mr. Chief Justice Andrews, in Thomson v. Poor, 147 N. Y. 402, 42 N. E. 13, 'which will permit a party to a contract, who is entitled to demand the performance by the other party of some act within a specified time, and who has consented to the postponement of the performance to a time subsequent to that fixed by the contract, and where the other party has acted upon such consent, and in reliance thereon has permitted the contract time to pass without performance, to subsequently recall such consent and treat the nonperformance within the original time as a breach of the contract.' The same principle is announced by the Supreme Court of Wisconsin in Marsh v. Bellew, 45 Wis. 36, 52."

[6] In the present instance, it is, of course, true that when made both the oral agreements were executory as to all the installments to which they related (save, perhaps, that for the month of November, 1922, as to which installment the first agreement was then or at the time it was made executed), and, being oral, and, moreover, unsupported by consideration (Benedict v. Greer-Robbins Co., 26 Cal. App. 468, 147 P. 486), neither could have been coercively enforced at the time the installment for any of the months

named became payable under the contract—that is to say, the plaintiff, before executing the agreements, could not have been compelled to do so. But he acted upon and carried out the agreements as to the payments for all the months named, as each of the installments for said months matured, by accepting from defendants as in satisfaction of the provision as to their payment interest only for the first three months and one-half of the installment and interest for each of the second three months. Thus the agreements of waiver were executed and so became perfectly valid. In other words, the agreements were fully performed. Civ. Code, § 1661. But whether it is to be said that the agreements became executed express agreements of waiver or that by conduct, consisting of said agreements and subsequent acts with reference to the payment of said installments, a waiver arose by implication, the result would be the same.

[7] Obviously, a waiver of a legal right may be implied as well as express, and while it is manifestly true that there can be no presumption of such a waiver contrary to the plain or clear intention of the party whose rights would be injuriously affected by reason thereof, yet it is no less true that where the conduct or the acts of the party whose rights would thus be affected by a waiver have been such as to mislead the other party, to his prejudice, into the honest belief that a waiver was intended or consented to, then such conduct or acts will be held sufficient to work an estoppel as against the former. In other words, a presumptive waiver of a legal right may be shown by proving a clear, unequivocal, and decisive act of the party "showing such a purpose or acts amounting to an estoppel." 27 R. C. L. p. 908 et seq., § 5; First Nat. Bank of Los Angeles v. Maxwell, 123 Cal. 360, 55 P. 980, 69 Am. St. Rep. 64. As before pointed out, there is no foundation in the evidence for a rational doubt that the acts and conduct of the plaintiff with reference to the installments in question were not only sufficient to raise an implied waiver of the payment thereof, as required by the contract, and, therefore, an estoppel as against him, but also clearly show that it was his purpose or intention to waive such payments at the times stipulated in the instrument.

It results from the foregoing considerations that the plaintiff was without authority to declare the contract or the rights of defendants thereunder forfeited by reason of the nonpayment of those installments, since, as we have shown, there was not, and, under the circumstances, there could not be, any default on the part of the defendants within the contemplation of the contract by reason of their nonpayment of the same as stipulated therein. It follows that, if the plaintiff has any legal reason for declaring the contract or the rights of the defendants thereunder forfeited, it must be found in a failure by the defendants either to comply with some other material provision or condition of the engagement or in defaulting in the payment of an installment or installments or accrued interest for some month or months succeeding the month of April, 1923, and this, the plaintiff further contends, is what occurred. The contention is founded upon the claim that the defendants defaulted in the payment of the installment on principal and the interest thereon for the month of May, 1923. The complaint does not specifically charge such default, but tender of payment of the May installment is affirmatively alleged in the answer and is deemed to be denied by the plaintiff (Code Civ. Proc. § 462), and without objection evidence was received upon the question of such tender. The point will, therefore, be considered. There is, however, no merit to the point.

The contract, as seen, provides that:

"Should the purchasers fail to make any of the said payments to said seller, in amounts, manner, and within the time herein provided for (the 1st day of each month, or within 10 days thereafter), * * * said seller may declare the entire purchase price due and payable, without notice," etc.

As also seen, the plaintiff was tendered by the defendants a check, dated the 8th day of May, 1923, covering and as in payment of the full amount of the principal and interest payable on the 1st day of May, 1923, or "within 10 days thereafter." (It should here be explained that, while the check in question as printed in the transcript bears date, May 18, 1923, counsel for defendants, on offering it in evidence, stated that it was dated the 8th day of May, 1923, and this statement was not disputed—in fact, it was admitted by counsel for plaintiff that the "8th day of May, 1923," was the correct date, and that the date it is made to appear to bear in the record is a mistake.) The plaintiff refused to accept the check. It does not appear that the objection of plaintiff to the acceptance of the payment so tendered was on the ground that it was in the form of a check rather than in cash. Calif. Land Security Co. v. Ritchie, etc., 40 Cal. App. 246, 254, 180 P. 625. Indeed, it appears that all monthly payments, made prior to the month of November, 1922, were by check. The evidence, however, does not show the date of the tender of the check. The plaintiff testified that the check was sent to his attorney, and that he (plaintiff) saw it at some time subsequent to the day it was dated, just at what time he could not say. So there is no direct evidence that the check was tendered to plaintiff within the 10 days after the 1st day of May, within which time his tender would be good, nor is there any evidence that it was not so tendered.

[8, 9] The fact that the contract requires

that the monthly payments be made on the 1st day of each month or within 10 days thereafter, and the further fact that the check was dated May 8th, constitute some evidence of a circumstantial character that the check was tendered within due time. In fact, it is to be presumed that the check was tendered to plaintiff within the time at or within which monthly installments were required by the contract to be made, there being no evidence that it was not so tendered. Code Civ. Proc., § 1963, subd. 19; Lattin v. Hazard, 85 Cal. 58, 61, 24 P. 611. Again, forfeitures are never favored by courts of law or equity. Statutes authorizing them are to be liberally construed so as to avoid the imposition of such penalties, if consistently with all the circumstances of the case it may be done. 12 Cal. Juris., p. 633 et seq., and cases therein named.

[10] A party to a contract authorized thereby, upon the happening of a certain contingency, to declare as forfeited the rights of the other party thereto, must bring himself clearly within the condition or conditions upon which such forfeiture may be made effective. Hence, under the circumstances shown, upon the plaintiff rested the burden to show, if such was the fact, that the check in question was not tendered at or within the time required by the contract. This burden, as we have shown, was not sustained, nor, in fact, undertaken by plaintiff.

[11] There is another point well taken by the defendant, which, though, goes to the right of the plaintiff in any event to maintain this action on the alleged default in the payment of the May installment, viz.: That the action was prematurely brought. The installments were due and payable on the 1st day of each month, or "within 10 days thereafter." Thus the defendants, by the terms of the contract, had all of the 11th day of May, 1923, to pay the installment for said month. In other words, the 10 days began to run after the 1st day of the month, or on the 2d day thereof, the 1st day of the month being excluded in the computation of the time. Civ. Code, § 10; Code Civ. Proc., § 12. But regardless of said sections, the language itself of the contract as to the times at which the installments are to be paid clearly and, indeed, unquestionably, in effect declares that the 10 days were not to begin to run until the 2d day of May. The action was brought on the 11th day of May, the last day of the 10; hence the defendants, before action brought, were not given the full 10 days to which they were entitled within which to make the May payment. The bringing of the action was, therefore, premature.

There are no other points which it is conceived merit special notice herein.

For the reasons herein given, the judgment is reversed.

We concur: RICHARDS, J.; LAWLOR, J.; LENNON, J.; SEAWELL, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

---

197 Cal. 17

HARTFORD ACCIDENT & INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al. (L. A. 8675.)

(Supreme Court of California. Sept. 10, 1925.)

1. Master and servant ⟹388—Dependency determined as of date of injury.

In claim by dependent for compensation for death of employee, condition of dependency as being entire or partial and extent thereof is determined as of date of injury.

2. Master and servant ⟹405(5)—Evidence held to justify finding of total dependency.

In claim by dependent sister for compensation, evidence that she was contributing in upkeep of home with decedent, but had been unemployed for three months prior to accident, and had found work a few days thereafter, justified a finding of condition of total dependency at time of accident so as to sustain an award under Workmen's Compensation Act, § 9.

3. Master and servant ⟹405(5)—Evidence held not to show mere temporary dependency.

A dependent sister claiming compensation, who was unemployed for three months prior to accident but found work three days thereafter, is not in temporary condition of dependency only, since it is open to inference that but for death of brother dependency might have continued indefinitely, and it not being required that person be physically or mentally incapable of self-support to be dependent.

In Bank.

Certiorari to Industrial Accident Commission.

Petition by the Hartford Accident & Indemnity Company, insurer, against the Industrial Accident Commission, John A. McGilvray and another, Commissioners, for certiorari to review an order of the Commission awarding compensation to Katherine F. Sampson, claimant, for death of her brother, Dudley Sampson. Writ denied.

George L. Greer, of Los Angeles, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Acc. Commission.

WASTE, J. A petition to have this proceeding heard in the Supreme Court after decision and judgment in the District Court of Appeal was granted for the reason that the principal question here presented and involved in the case of Great Western Power Co. v. Industrial Accident Commission, 191

Cal. 724, 218 P. 1009, relied on by the District Court of Appeal as authority for its conclusion, was, in effect, under reconsideration in a proceeding in certiorari, instituted in this court after a second award made by the Commission in that case. The facts are fully stated in the opinion of the District Court of Appeal, which we have adopted as our own. The sole question presented by the application for a writ of review is the sufficiency of the evidence taken before the Industrial Accident Commission to sustain its finding that the applicant for compensation, a sister of the deceased employee, was wholly dependent upon him for her support.

[1] This court has held in a number of cases, including the decision supra, relied on by the District Court of Appeal, that the question of the condition of dependency, as being entire or partial, must be determined as of the date of the injury to the employee, and also that the extent of dependency should be fixed as of that date. Spreckels v. Industrial Acc. Comm., 186 Cal. 256, 259, 199 P. 8; Great Western Power Co. v. Industrial Acc. Comm., supra; Market Street Ry. Co. v. Industrial Acc. Comm., 193 Cal. 178, 182, 224 P. 95, and (just recently) Great Western Power Co. v. Industrial Acc. Comm.. (Cal. Sup.) 238 P. 662. It follows, therefore, that if the evidence before the respondent Commission supports the finding of total dependency, the award in an amount equal to three times the average annual earnings of the decedent was properly made. Workmen's Compensation Act (St. 1917, p. 836) § 9. We are satisfied that the District Court of Appeal has correctly disposed of the question, and we therefore adopt the opinion of Mr. Presiding Justice Conrey, concurred in by Mr. Justice Curtis and Mr. Justice Houser:

"One Katherine F. Sampson presented to the Industrial Accident Commission her claim for compensation as a dependent of her brother, Dudley Sampson, whose death resulted from an injury received while working as an employee of the California Country Club. The Industrial Accident Commission having made its final award, the employer's insurance carrier brings this proceeding to have the award annulled.

"The amount allowed to the claimant was computed on the basis of total dependency of the applicant. The only question presented herein arises out of petitioner's claim that the evidence wholly fails in proof of such dependency.

[2] "The petition sets forth the entire testimony, together with the admissions and stipulations received at the hearing before the Commission. From this evidence the following facts appear: The death of Dudley Sampson occurred on August 12, 1924, and resulted from an accident which occurred that day. At that time the claimant was living with her brother in a home which they had established together. From the beginning of the year 1924 until the second week in May she had been employed and had paid an equal share with her brother in their common living expenses and in the monthly installments payable on the purchase price of the house where they lived. During the second week in May her employment ceased for the reason that she was 'out of work.' At that time she had no money, and had no property except that she had an interest in the premises where they lived, which property was not fully paid for. From the second week in May until after her brother's death she continued to be unemployed, and received all of her support from moneys contributed by her brother. A few days after his death she again went to work. The evidence does not show what her occupation was or how much she earned then or thereafter.

"We are of the opinion that the evidence was sufficient to justify the Commission in finding the condition of total dependency at the time of the accident. In the case of Great Western Power Company of California v. Industrial Accident Commission, 191 Cal. 724, 730 [218 P. 1009], the Supreme Court quoted the provisions of the statute applicable to this question, and held, referring to the matter of dependency of certain brothers and sisters of the decedent, that the fact of their dependency and the degree thereof must be determined 'in accordance with the existing fact at the time of the injury.'

[3] "Counsel for petitioner suggests 'that the condition of dependency, if any, was a temporary one and not continuing, and, in fact, only existing by reason of a shortage of work, and in no way related to the physical, mental or social condition of his sister.' The evidence, however, is open to the inference that, except for the death of her brother, the condition of dependency of the claimant might have continued indefinitely. 'There is nothing in the act requiring that a person must be physically or mentally incapable of supporting himself in order to be adjudged a dependent.' Peterson v. Industrial Accident Commission, 188 Cal. 15, at page 18 [204 P. 390]. On the following page of the same decision, referring to the fact that the applicants obtained employment subsequent to the death of the person upon whom they were dependent, the court said that this fact could have no bearing upon the state of their dependency 'at the time of the injury of the employee,' but must be regarded only as the performance of an act of necessity to enable them to live."

The petition for the writ is denied.

We concur: LAWLOR, J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; KNIGHT, Justice pro tem.

197 Cal. 1

WILBUR v. WILBUR et al. (Sec. 3600.)

(Supreme Court of California. Aug. 31, 1925. Rehearing Denied Sept. 28, 1925.)

1. Appeal and error ⟸931(1), 1011(1)—All reasonable inferences are indulged in support of trial court's findings, which are conclusive where evidence is conflicting.

All reasonable inferences are indulged in support of trial court's findings, which are conclusive where evidence is conflicting.

2. Appeal and error ⟸901—Burden is on appellant alleging error to show its existence.

Burden is on appellant alleging error to show its existence.

3. Appeal and error ⟸996—Reviewing court cannot substitute its deductions from certain facts or circumstances for those of trial court.

Where different inferences may be reasonably deducted from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of trial court.

4. Deeds ⟸211(3, 5)—Evidence held to sustain finding of want of fraud or coercion in procuring execution of deed sought to be canceled.

In suit to cancel deeds, evidence *held* to support finding that plaintiff, who, before execution of deed, had been associated with defendant in partnership enterprise, was given her choice of buying or selling at a stated figure, and that she, having full possession of her faculties and knowledge of values of the subject, and without fraudulent representations or coercion, elected to sell and executed deed sought to be canceled.

5. Deeds ⟸211(3)—Letter from grantee to grantor after execution of deed held not so self-accusatory as to indicate the taking of an unfair advantage.

In suit to cancel deed from mother to son, letter written shortly after execution of the deed in which the son expressed apprehension lest his mother fear that he had taken advantage of her *held* not so self-accusatory as to establish fraud in procurement of deed in face of contrary evidence.

6. Deeds ⟸210—In suit to cancel deed, evidence held to sustain finding as to adequacy of consideration.

In suit to cancel deed from mother to son, evidence *held* to sustain finding as to adequacy of consideration.

7. Trial ⟸391—Adverse finding on issue of plaintiff's right to cancellation of deed held to render immaterial issues affecting her right to accounting.

In suit to cancel deed from mother to son of property which had been owned and operated by them as a partnership enterprise, and for accounting by son who had managed such property, finding that grantor had received market value for premises, had acted freely, voluntarily, and knowingly in making conveyance *held* to render immaterial other issues relative to her right to an accounting.

8. Partnership ⟸95—Purchase by one partner of another's interest presumptively includes final settlement of all partnership indebtedness existing between them.

Where one partner purchases interest of another, transaction presumptively includes a final settlement of all partnership indebtedness existing between partners.

9. Deeds ⟸72(7)—Mere relation of parent and child is insufficient to invalidate deed from former to latter.

Mere relation of parent and child is insufficient to invalidate deed from former to latter.

10. Deeds ⟸196(2, 3)—Under certain circumstances child as grantee of parent may be required to show want of fraud or undue influence in procurement of deed.

Under certain circumstances, as where parent is of great age or enfeebled, child as grantee of parent has burden to show that deed was obtained without fraud or undue influence.

11. Deeds ⟸72(7)—Want of independent advice to mother making conveyance to son held not to invalidate deed.

Where deed from mother to son was made freely, voluntarily, and with full understanding of all facts and effect of transfer, it was not necessary to validity of deed that grantor acted on independent advice.

12. Deeds ⟸17(1)—Want of security for note given as part consideration for deed held no grounds for attack on validity thereof.

That note given by son to mother as part consideration for deed sought to be canceled was unsecured is no grounds for attack on validity of deed where note was acceptable and there was no intimation that it was not of full value or its maker not solvent.

In Bank.

Appeal from Superior Court, Sutter County; K. S. Mahon, Judge.

Action by Elmira J. Wilbur against Glen A. Wilbur and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Keyes & Erskine, of San Francisco, for appellant.

Frank McGowan and Blaine McGowan, both of San Francisco, and Lawrence Schillig and A. H. Hewitt, both of Yuba City, for respondents.

SEAWELL, J. Mrs. Hazel Wilbur, wife of codefendant Glen A. Wilbur, who was made a party to the suit, appeared and filed her answer, in which she disclaimed all right, title, estate, and interest in and to the lands, premises, and personal property or thing involved in the action.

Plaintiff and appellant, Elmira J. Wilbur, is the mother of Glen A. Wilbur, defendant and respondent herein. The real property, the transfer of which it is claimed by the ap-

pellant was fraudulently made, as will later appear, and which is the basis of the action, was a part of a larger estate originally acquired by A. H. Wilbur, husband of appellant and father of respondent, deceased since 1898. Besides respondent Glen A. Wilbur there are three other children, issue of said A. H. Wilbur, since deceased, and his said wife, Elmira J. Wilbur, plaintiff and appellant, to wit, Edith Mary Wilbur, Lloyd H. Wilbur, and Elaine May Wilbur. Glen A. Wilbur is the youngest member of the family. The estate or lands in question are situate in Sutter county, some four or five miles northerly from Yuba City. In 1858, that being also the year that A. H. Wilbur and appellant were married, the husband purchased the lands involved in this action, and he and his wife went upon them to reside. Other acreages were thereafter added to the original purchase, and the value of the entire estate of A. H. Wilbur at the time of his death, 1898, was inventoried at $110,000. The greater portion of his estate consisted of land. There was some money and bank stock in the estate; the amount thereof is not stated and is not important here. By the decree of distribution one-half of the entire estate was distributed to the widow, appellant herein, and the other one-half was distributed to the four children in equal shares. Presumably by partition proceedings, Edith Wilbur became the owner of the particular parcels which are the subject of this action. On January 29, 1913, Mrs. Elmira J. Wilbur, the mother of said children and appellant herein, and her son, Glen A. Wilbur, respondent, purchased said land from Edith, paying her $40,000 in cash (each paying $20,000) and assumed an existing mortgage thereon in the sum of $18,000. By this purchase each became the owner of an undivided one-half interest therein. The above conveyance also carried with it a transfer of all the personal property on said premises, which consisted of approximately 20,000 raisin trays, 6,000 fruit boxes, cultivating machinery, farming implements, 12 horses and mules, wagons, household furniture, kitchen utensils, men's quarters, pumps, and motors and dry-yard cars for carrying raisin trays. The condition and state of preservation of said raisin trays, fruit boxes, machinery, and farming implements and other personal property at the time of sale was considered by the witnesses who testified as to valuations, and that subject will not be treated separately by us, inasmuch as the personal and real property was considered together in estimating the value of the premises. The lands, at the time respondent and appellant acquired ownership thereof, were and since have been, devoted exclusively to the raising of Thompson seedling grapes and the production of prunes, which crops were processed, cured, prepared, and made ready for the market on the premises. Other crops, such as are sometimes planted on orchard or grape lands incidental to the main business, were also occasionally produced in relatively small quantities. It was for the purpose of conducting the premises along the lines of industry above pointed out as a partnership enterprise that the purchase of said premises and personal property was made. The copartnership relation continued from January 29, 1913, to October 22, 1916, on which last-named day respondent purchased from his mother all of her interest of whatsoever kind in and to said real and personal property and the business which they had formerly conducted. Primarily this action was brought to obtain a decree of court canceling and declaring void the deed executed on said 22d of October, 1916, wherein appellant is grantor and respondent grantee, and also to declare void certain agreements and contracts entered into on the same day which may in anywise affect her rights in the premises, for rescission and restoration, and for a decree adjudging her to be the owner of an undivided one-half interest in the McKenzie ranch, containing about 40 acres, the title to which stands in the name of respondent, but which property, it is claimed, was purchased by partnership funds, and for an accounting and general relief.

The grounds upon which appellant relies as sufficient to sustain her right to have said conveyance set aside and to obtain the other relief sought will appear from the following epitomization of appellant's complaint: It is in four counts. The first count alleges an equal partnership in the premises acquired by the deed of 1913, and that respondent was appellant's agent in selling her portion of the crops raised on said land during the existence of their copartnership, and that defendant had the exclusive control and management of said premises and the marketing of said crops; that on October 22, 1916, the day said deed was executed, appellant was of the age of 68 years, and then was, for some time prior thereto had been, in poor health and was highly nervous and greatly weakened in body and mind; that respondent took her to the office of his attorney, Mr. Blaine McGowan, and by insistence and coercive and persuasive words, conduct, and methods, overcame her better judgment and induced her to execute the deed of October 22, 1916; that she had no independent counsel or advice whatsoever in the matter nor any opportunity to confer with any person other than respondent and his said attorney; that the reasonable value of said land was then not less than $65,000; that she received the sum of $5,000 and the promissory note of respondent for $20,000 in payment for her property, which note has not been paid as the consideration therefor. A tender of all moneys received by her on account of the transaction and a refusal by respondent to accept the same is pleaded as of date October, 1917. The allegations of the second count are substantially to the effect

that respondent failed and neglected to render true accounts of the income derived from said lands during the existence of their said ownership and copartnership, and represented it to be much less in value than it was in fact, and that respondent retained each year a large portion of the share that rightfully belonged to appellant, exceeding in amount $125,000; that respondent was informed as to the income and value of said lands, but that she was not informed as to either; that she believed his representations that her interest in said lands would not exceed the value of $25,000, when, as a matter of fact, its true value was in excess of $65,000; that because of her great love and affection for respondent and because of the trust and faith she had in him she believed these and other false representations and acted upon them to her damage. A tender of all she received from respondent in said transaction and a refusal of the latter to accept the same made prior to the commencement of the action is alleged. The allegation of count 3 is that no accounting had ever been made by respondent to appellant, and she prays that he be compelled to render a report and account. By count 4 it is alleged that the respondent purchased with partnership funds the premises known as the McKenzie ranch and holds the legal title in himself. Appellant claims that she is the owner of an undivided one-half interest therein, and prays for an order directing respondent to convey said interest to her.

The fraudulent acts and conduct alleged to have been resorted to by respondent as a means of inducing or procuring the execution of the deed dated October 22, 1916, or the employment of any false or fraudulent representations made by him as to any matter or thing relating to the transactions as unduly affecting or influencing the action or conduct of appellant as alleged in the several counts of the complaint, whether said misrepresentations or wrongful acts or conduct be charged as suppressions or concealments of existing facts about which appellant was entitled to be informed, or whether said wrongful acts or conduct are alleged to consist in the employment of persuasion, solicitation, or deceit with a purpose of overreaching appellant, who, it is claimed, was infirm in mind and body, are specifically and separately denied. It is affirmatively alleged in the answer that appellant was under no physical, mental, or legal disability, and was not ill or infirm in mind or body at any time during the full period covered by the transactions described in the complaint, and that no undue or unfair advantage was taken of her in any manner or at any time, but that she acted in each instance freely, voluntarily, knowingly, and advisedly.

In addition to the aforementioned specific denials, the offer to rescind is challenged as to the promptness with which it was made and as to the sufficiency of the amount of money offered in restoration of the moneys paid out by respondent (pursuant to the agreement of the parties) in liquidation of claims aggregating a very large indebtedness against the partnership business, including taxes amounting to about $800 and a mortgage incumbrance amounting to approximately $12,229.58. It is not pretended by appellant that a tender was made purporting to cover the payments of said outstanding indebtedness, taxes and incumbrances, as a court of equity, it is claimed, in the circumstances of the instant case, will excuse a tender. The bar of the statute, section 338, subd. 4, Code of Civil Procedure, is pleaded against each count or cause of action. It is further urged as a bar to this action that a judgment of dismissal was made and entered in the superior court in and for the county of Sutter on November 24, 1919, in an action commenced in that court on November 20, 1917, wherein it is alleged that the grounds which constituted the cause of action in that case are the same grounds relied upon to constitute a cause of action in the instant case, demanding the same relief and between the same parties. It is admitted by the answer that respondent and appellant were owners as tenants in common of the land conveyed to them by deed dated January 29, 1913, and were copartners in the business of raising grapes and fruits until October 22, 1916, on which day the copartnership was terminated. It is alleged by way of answer that the ownership of said lands as tenants in common was voluntarily terminated November 27, 1914, by an instrument executed by respondent and appellant, whereby their respective tenures were converted into a joint tenancy with the right of survivorship.

The trial court found against appellant and in favor of respondent upon every material issue made by the pleadings or presented at the trial. The appeal is before us upon a bill of exceptions, the sufficiency and completeness of which is open to the serious objections made to it by respondent upon several specified grounds. The record is brought here in piecemeal fashion, portions of it being printed and other portions being typewritten, and it lacks orderly and convenient arrangement. Nevertheless, we have taken the pains to examine it. The fact that the appellant is represented to be in an impecunious position has inclined us not to regard too critically the objections made by respondent as to the deficiencies in appellant's specifications of the insufficiency of the evidence to support the findings. We repeat, however, that the record comes dangerously near being vulnerable to the objections made as to its insufficiency and incompleteness.

[1-3] The findings of the trial court upon conflicting evidence are conclusive, and all reasonable inferences are to be indulged in support of the findings. Treadwell v. Nickel, 194 Cal. 243, 261, 228 P. 25. The burden is

upon appellant who claims error to show its existence. Hayne on New Trial and Appeal (Rev. Ed.) § 285, p. 1576, and cases cited. Where two or more inferences may reasonably be deduced from a certain state of facts or circumstances, a reviewing court is not permitted to substitute its deductions for those of the trial court.

The present action was commenced March 20, 1920, three years and a few months after the execution of the deed which is here attempted to be set aside on the ground that it was fraudulently obtained. We will refer briefly to that portion of the evidence in the case which supports the findings of the trial court:

Appellant had been familiar with and resided upon the premises in question since 1858; she had assisted in planting them to vines and trees, and had farmed and cultivated them generally. She also had a personal knowledge of the quality of the soil and the uses to which it was best adapted, and was at all times informed as to the value of said land and of land values in that vicinity generally. The evidence indicates that Mrs. Wilbur was at all times an active and rather keen-sighted woman with progressive and speculative tendencies. Many years of her life were spent at the Wilbur home in Sutter county. In about 1910 she took up her residence in San Francisco, but kept herself informed, by visits to the farm, correspondence, and through other channels of information, as to the management of the ranch and the conduct of the business in connection therewith. Her son, Glen, it seems to be conceded, was a hard-working, economical young man, who was unusually attentive to the business of the partnership enterprise, and had, according to numerous letters written by the mother, made many personal sacrifices and endured hardships uncomplainingly to the end that the enterprise might become a profitable investment. He not only carried the burden of husbandry, but it also devolved upon him to weather several financial storms. It is true that the mother assisted him by her advice and counsel, and upon several occasions advanced money from her own personal estate, but the greater burdens fell upon the son. The mother and son seemed to have been in perfect accord and harmony in all their business relations until she and the daughter Edith became interested in the purchase of a four-story hotel or apartment house situate on Bush street, in San Francisco. On October 9, 1916, appellant and Edith submitted to one Thomas O'Day an offer in exchange for said Bush street hotel a list of properties consisting of a 40-acre farm situate in Yolo county, a residence property situate in the city of Santa Cruz, five lots situate in the city of Richmond, and $5,000 in cash or negotiable paper at the rate of 7 per cent. per annum. The Bush street property was incumbered with a $30,000 mortgage, which Mrs. Wilbur and her daughter Edith proposed to assume. On the day following said offer Thomas O'Day accepted it in writing. Ten days were reserved by Mrs. Wilbur and her daughter from the day of O'Day's acceptance in which to furnish a marketable title to their properties. This would carry forward the last day for exchange of deeds to October 20, 1916.

In contemplation of said exchange of properties, Mrs. Wilbur, on October 19, 1916, demanded of her son that he send her at least $2,000 immediately. This money was to be applied as the agreement of exchange provided. She had earlier in the month received $500 from respondent. The son strenuously opposed the purchase of the hotel by her as thus mortgaged. He felt that she was undertaking a project beyond her strength and ability to handle, and eventually she would lose everything and her interest in the ranch would most likely become entangled and eventually fall into the hands of persons who might not be acceptable to him as partners in the business or as tenants in common in the ownership of the property. Encouraged by her daughter Edith, the mother insisted that the son meet her demand, and, in the event that he did not, she had resolved to incumber her interest in the ranch to enable her to complete the purchase. After much discussion on the subject the mother reduced her demand to $1,250 cash, together with a request for a deed of the son's interest in a 40-acre Yolo county farm, which interest was valued at $250. This demand was complied with. Following the demands of the mother and her expressed intentions as to the purchase of the hotel, respondent related the whole matter to his sister Elaine, who was then at his home, and to Mr. J. W. Eager, and to his brother, Lloyd H. Wilbur, also to Mr. George Boyd, cashier of the First National Bank of Sutter county, and expressed to them his misgivings as to the ultimate result, and advised with them as to what he should do. After said consultation he decided to go to San Francisco on the following morning. He then called up Mr. Blaine McGowan and advised him that he had arrived at the point where he felt that he would have to sever his business connections with his mother, and that he was coming to San Francisco prepared to sell his interest. Respondent arrived in San Francisco at about 12 o'clock, Saturday, October 21, 1919, and made a number of attempts during the afternoon to reach his mother by telephone, but, failing therein, he proceeded to her residence and found no one at her home. He visited Mr. Blaine McGowan at his law offices and instructed him to prepare a deed conveying the mother's interest to him, and to prepare one or two papers which had the effect, so it was thought, of converting the title by which the property was held, to wit, a joint tenancy, back to a tenancy in common, and to prepare one or two other subsidiary papers or documents. He made an appointment with Mr.

Blaine McGowan, who was a mutual friend of the family and who had performed legal services for several members of the family, including Mrs. Wilbur, to meet him at his office on the following day, where he would bring his mother and attempt to close up the transaction which had brought him to San Francisco. He went to his mother's home in San Francisco the following morning, arriving at about 8 o'clock. He remained at the home for a short time, and invited his mother to ride with him in his automobile. They took up the business that had brought the son to San Francisco and discussed it for several hours. The mother decided to sell. They then proceeded to Mr. McGowan's office to close the transaction.

The proposition submitted by the son was that one should sell to the other at the fixed sum of $25,000, the purchaser to retain all moneys due the partnership and assume all the indebtedness. The transaction was discussed in all of its details by them in private and also in the presence of Mr. McGowan and Mr. Samuels, the notary. The latter was a stranger to all the parties, including Mr. McGowan, and his services were secured simply because he chanced to be accessible. The son was prepared to pay the full amount in cash, but the mother preferred that he should pay $5,000 by check and give a one-year note for $20,000, with interest at the rate of 6 per cent. per annum, payable each and every month thereafter. This being agreeable to the son, the transaction was completed, and no dissatisfaction was found with the price or the manner in which the bargain had been consummated until the mother had talked it over with her daughter Edith shortly thereafter, and both came to the conclusion that the price was inadequate and the mother had been "cheated." It is quite convincing from the testimony that both Mrs. Wilbur and her daughter Edith had their hearts set upon the purchase of the Bush street hotel or apartment house. Whatever the son's influence may have been theretofore with his mother in matters of business or otherwise, it is very clear that upon this occasion and in this transaction it was not equal to the task of turning her from her fixed intention of disassociating herself from him in the business in which they were engaged if necessary to attain her purpose, and associating herself with the daughter in the ownership of the hotel property. Doubtless it was the judgment of herself and daughter that a rare opportunity had presented itself which should not be permitted to be lost. That she had greater faith in the hotel property as an investment than she had in the business of grape and fruit raising, there can be but little doubt. Had she heeded the son's advice she would not have disposed of her interest in the ranch to raise money to put into the hotel property, which investment, it seems, proved to have been an unfortunate exercise of judgment. The respondent did not initiate or encourage the purchase of the latter property, but, it would seem, did everything he reasonably could to prevent it. He was attempting to protect her from financial entanglements as well as himself.

[4] While there is a conflict in the evidence as between Mrs. Wilbur on the one hand and Glen Wilbur, Blaine McGowan, and Mr. Samuels on the other hand as to what took place or what was done or said by the respective parties during their negotiations in the law offices of Mr. McGowan and that which preceded said meeting, there is ample evidence to support the court's findings that Mrs. Wilbur was given her choice of purchasing the property for herself at the price of $25,000 or of selling it to her son at the same figure (which amount the court found to be a fair and adequate price), and that she was then and there in full possession of her faculties and had full knowledge of the values of the subject-matter of the conveyance and acted freely and voluntarily in said matter, and no false or fraudulent representations were made or force or coercion employed to induce or cause her to execute said deed.

[5] As against many circumstances and considerable direct evidence which tends to support the court's findings of free and voluntary action on the part of Mrs. Wilbur, her counsel lays stress upon a letter which her son wrote to her two days after said transaction, which it is claimed is self-accusatory in effect and carries with it a consciousness of having taken an unfair advantage of her. The letter in part reads:

"My Dearest, Dearest, Dearest Mother: I just feel dreadful to-night and have all day to-day for fear you might feel now or might after while feel that I was trying to take advantage of you or did take advantage.

"Mother dear, my heart would just break if you even thought that or felt that way for a single moment. My thoughts are always for your happiness, and I always have an aching heart when I come and see the way you work all the while. * * *"

The letter is an isolated circumstance in the transaction, and cannot be taken as sufficient to overturn many other circumstances and other evidence which tends to support the court's findings. Considering all the circumstances of the case and the relation of the parties to each other, the letter cannot be said to be open to but the single construction placed upon it by appellant. It does not in any way indicate an inadequate consideration, but expresses anxiety lest the mother should thereafter, as frequently happens in such matters, be led into the belief that she was not fairly dealt with. The mother, however, expressed no feelings of dissatisfaction at the price she had received for said property until a member of the family thereafter suggested to her that it was not an adequate consideration.

[6] One-half of the entire mortgage incum-

brance which rested upon the whole property would reduce the value of Mrs. Wilbur's interest slightly below $25,000. The finding as to adequacy of price cannot, in view of the evidence and the finding of the court, be disturbed. The value of said property was not a subject suddenly thrust upon the mind of Mrs. Wilbur, the consideration of which she had had no previous opportunity or occasion to devote her thought upon. She had known it as a family property for a period of more than 50 years, was thoroughly familiar with its improvements and the productiveness and quality of soil, and had been one of its owners in connection with her son for a period of almost four years immediately prior to the day the deed was executed. Besides, she doubtless considered its market value at the time she was contemplating incumbering it to raise money to enable her to acquire the Bush street property. That she was not taken by surprise in the transaction is an inference fairly deducible from all the facts and transactions in the case. A number of disinterested witnesses, several of whom had resided in the immediate vicinity for many years, and who, beyond the possibility of doubt, knew the value of the land in controversy, placed Mrs. Wilbur's interest therein, including all personal property, at $31,000. Some of said witnesses had cultivated the soil and had assisted in setting it to vines and trees. If this testimony is to be believed, and the trial court certainly accepted it as true, $25,000 in the clear was a fair market value of the interest of Mrs. Wilbur.

If Mrs. Wilbur was acting freely and voluntarily and under no legal restraint or disability she had the right to make such disposition of her property and at such a figure as she thought the exigencies of her situation required. If the price was reasonably adequate to the value of the property and she was acting under no disabilities, but freely and voluntarily and knowingly, as the court found, the question of the accounting would become eliminated from the case. The price paid by Mrs. Wilbur for the property was $20,000, and she sold it for $25,000. The report of Accountant Cline, who made a detailed statement of accounts covering the entire period of copartnership, would indicate that Mrs. Wilbur had advanced to the partnership $4,812.90 and had withdrawn therefrom $4,488.20, leaving a balance to her credit on October 16, 1922, of $324.70. Under the management of Glen A. Wilbur, the mortgage of $18,000 was reduced to $12,000. Of this fact Mrs. Wilbur was well aware. A number of the items of the account as prepared by Accountant Cline were attacked as not being proper charges against the partnership, but as being individual charges against the son. A charge of $9,000 made by Glen as salary for services for a period of 45 months at $200 per month was opposed on the theory that "a partner is not entitled to any compensation for services rendered by him to the partnership," as provided by section 2413, Civil Code. There is some evidence to the effect that it was agreed between the parties that the son, who gave his entire time and attention to the cultivation, harvesting, curing and marketing of crops, while the mother was residing in San Francisco and had no representative to perform her part of said services, was to receive extra or additional compensation. An agreement for additional compensation would not have been unreasonable or unlikely under the circumstances of the case.

What relevancy the controversy as to the salary claim made by the son on account of his services, or the loss suffered by reason of the Rosenberg contract, or whether $1,000 of the $5,000 that was paid by the son on the purchase price came from sales of partnership produce or from his private funds, or what relevancy any other disputed item may have to the major question, to wit, whether or not the deed was subject to be canceled for the reasons alleged by appellant, is not apparent. The market value of the land and the fairness of the transaction were the major issues. The market value of the land and the abundances of crops which it yielded were not and could not have been affected by a misapplication of moneys derived from sales of produce, if such occurred.

[7, 8] The court having found that Mrs. Wilbur was not deceived as to the market value of said premises, but that she acted freely, voluntarily, and knowingly in the matter, renders all other issues made by the pleadings immaterial. Nevertheless the court found against appellant on the contested items of the account. It is the law of partnerships that when one partner purchases the interest of the other the transaction presumptively includes a final settlement of all partnership indebtedness existing between the partners. Bates on Partnerships, §§ 629, 630, pp. 664, 665; Hattenhauer v. Adamick, 70 Ill. App. 602; Edens v. Williams, 36 Ill. 252.

[9, 10] It is insistently urged as one of the claims of appellant that there existed an actual relationship of trust and confidence between Mrs. Wilbur and her son, and that he acted as her agent in all business matters connected with the partnership. It is further urged that she acted in the matter alone and without having had the benefit of independent advice. A number of cases are cited to sustain her position as to these several points. It is the well-settled rule of decision of this state that:

"The mere relation of parent and child is not sufficient to invalidate a deed from the former to the latter. It is a circumstance, of course, inviting careful consideration to the transaction, but before it can justify the inference of undue influence there must be added, imposition, fraud, importunity or something of

that kind." Broaddus v. James, 13 Cal. App. 464, 472, 110 P. 158, 161.

"The mere fact that the conveyance is from parent to child does not change the rule nor render the deed presumptively invalid. Pomeroy's Equity Jurisprudence, § 962; Bowdoin College v. Merritt (C. C.) 75 F. 488. However, under certain circumstances, the burden is upon the grantee to show that a deed from his parent was obtained without fraud or undue influence. The doctrine is announced in Soberanes v. Soberanes, 97 Cal. 145, 31 P. 910, through Mr. Justice Paterson, as follows: 'Some of the cases hold that undue influence is not to be inferred from the relation of parent and child where the gift is from the parent to the child (Millican v. Millican, 24 Tex. 446); but when the parent is of great age, or is enfeebled by disease, and conveys his entire estate to one child, to the exclusion of other children dependent upon his bounty, the burden is unquestionably upon the donee to show that the gift was made freely and voluntarily and with full knowledge of all the facts and with perfect understanding of the effect of the transfer.'

"In the case at bar it cannot be said that the grantor was of great age, although she was 64. [Here, she was 68.] She was, though, somewhat enfeebled by disease, and she conveyed all her property to an only child, to the exclusion, however, of a grandchild. But the evidence seems clear that her mental faculties were unclouded, and there is no question that she understood the effect of a transfer of her property. If we assume that under the peculiar circumstances of the transaction the burden was cast upon the grantee to show that the conveyance was made freely and voluntarily and with the intention to vest the title immediately and irrevocably in him, still we would not be justified in disturbing the judgment of the lower court, because there is sufficient evidence in behalf of respondent's contention to sustain that burden and support the corresponding finding." Becker v. Schwerdtle, 6 Cal. App. 462, 464, 92 P. 398.

Likewise in the instant case the court found upon substantial evidence that appellant acted with full knowledge and understanding and freely and voluntarily in the execution of said deed, and was in good physical and mental health, and whatever burden that the law may have cast upon the son by reason of a confidential relationship was fully met.

[11] Appellant relies upon Nobles v. Hutton, 7 Cal. App. 14, 93 P. 289, and other cases following the rule applied to certain cases in which cancellations of deeds were directed to be made. All of the cases in which attempted transfers failed contain some ingredient showing undue influence, or menace or mental weakness or want of full understanding of all the facts and the effect of the transfer or inadequacy of consideration, or that some species of imposition was practiced. The evidence in this case shows, and the court found, that the deed was made freely, voluntarily, and with a full understanding of all the facts and the effect of the transfer. This being so, it was not necessary to show that the grantor acted upon independent advice. Soberanes v. Soberanes, 97 Cal. 140, 31 P. 910. The facts of a case may so conclusively show that an actor acted advisedly as not to require direct proof of the fact.

In view of what we have already said it becomes unnecessary to discuss the effect of the alleged tender other than to say that there was considerable delay shown in making it, and its sufficiency as a tender is questionable.

Having disposed of the case upon its merits, it also becomes unnecessary to discuss the bar of the statute and the effect of the judgment of dismissal, both of which were specially pleaded by defendant as heretofore stated.

[12] There is no merit in the objection to the promissory note made upon the ground that it was unsecured. It met with Mrs. Wilbur's approval, and no intimation has been made that it was not of the value written upon its face or that its maker was not solvent. In fact, the evidence shows that the note was pledged by her in some undisclosed transaction.

The finding that the McKenzie transaction was a separate affair of the defendant is supported by the evidence.

The record contains much conflicting evidence, and, following the rule of decision, we have only referred to the portions thereof which have a tendency to support the findings. We are not at liberty to pass judgment upon the credibility of witnesses. The judgment is affirmed.

We concur: LAWLOR, Acting C. J.; RICHARDS, J.; WASTE, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

73 Cal. App. 726

HINDES et al. v. INDUSTRIAL ACCIDENT COMMISSION et al. (Civ. 5227.)

(District Court of Appeal, First District, Division 1, California. July 25, 1925. Rehearing Denied Aug. 24, 1925. Hearing Denied by Supreme Court Sept. 21, 1925.)

1. Master and servant ⊂⊃419 — Supplemental award may not be used for correcting error.

Supplemental award by Industrial Accident Commission may not be used for correcting error in original award.

2. Master and servant ⊂⊃419 — Supplemental award for disability held not precluded by prior award.

Finding of Industrial Accident Commission that employé had sustained strain of sacroiliac joint, but that paralysis of legs, occurring about two weeks after injury, was caused by some obscure spinal trouble, rather than the injury, which finding became final by lapse of time, *held* not to preclude supplemental award, on petition under Workmen's Compensation Act, § 20 (d), based on finding that sacroiliac strain had resulted in further and recurrent disability, independently of paralysis.

Proceeding under the Workmen's Compensation Act by Emil Nasta, claimant, against S. G. Hindes and the General Accident, Fire & Life Assurance Company. On application of S. G. Hindes and the General Accident, Fire & Life Assurance Company for certiorari to review the order of the Industrial Accident Commission awarding compensation. Award affirmed.

R. P. Wisecarver and Redman & Alexander, all of San Francisco, for petitioners.

Warren H. Pillsbury and Geo. C. Faulkner, both of San Francisco, for respondents.

TYLER, P. J. Certiorari by which petitioners seek to have set aside and annulled an award of the Industrial Accident Commission, upon the ground that the commission, in entering the same, acted without and in excess of its powers, that the findings and award are unreasonable, that the evidence does not sustain the findings of fact, and that such findings do not support the award.

It is admitted that petitioners' statement of the facts are in all material essentials correct. It appears therefrom, in substance, that by an application dated July 10, 1922, the respondent Emil Nasta applied for a hearing before the Industrial Accident Commission upon a claim wherein he asserted that on the 5th day of May, 1922, he was injured in a task arising out of and in the course of his employment for petitioner S. C. Hindes. Thereafter hearings were regularly had before the commission, from which the following facts appeared: That on or about May 5, 1922, Nasta, while working for Hindes, sustained a strain of the sacroiliac joint in the sacrum; that he was under the care of doctors for a period of 16 days; that he awoke one morning and found his lower limbs paralyzed. Nasta had previously, in 1920, suffered from an illness extending from the lumbar region of the spine to the lower extremities, which caused him pain and numbness with consequent disability for a period of 6 months. X-rays taken at that time showed a vertebral anomaly in the nature of a wedge-shaped vertebra. Subsequently Nasta had recovered the function of his legs, and had been working up to the time of the strain of the sacroiliac joint on May 5, 1922. The medical evidence upon the original hearing herein, relating to the paralysis suffered by Nasta, was conflicting. There was, however, evidence to show that it was in no wise connected with nor caused by the strain of the sacroiliac joint on May 5, 1922; that it was of spinal cord origin, caused by disease affecting that member, the exact nature of which could not be determined without an operation exposing the same, but it probably was related to and caused by the same disease originating in the illness of 1920.

In accordance with this medical evidence the Industrial Accident Commission made and filed its findings of fact and award under date of October 16, 1922, wherein it was held that the disability caused by the strain of May 5, 1922, was a temporary one only, and entitled the applicant to compensation for 4 weeks of disability, amounting to 3 weeks of indemnity at $20.83 a week, a total of $62.49. This temporary disability ended on June 2, 1922. The commission further found that about 2 weeks after the injury, the employee developed a paralysis of the legs, caused by some obscure spinal trouble. It also found that such spinal disease was not caused by the injury, and no compensation was allowed for the paralysis, but only for the period the employee was presumably disabled as a result of the back strain directly.

Within 20 days after this conclusion by the commission, Nasta filed a petition for rehearing. On December 18, 1922, his petition was granted. Thereafter, upon proceedings regularly had, further medical testimony was taken upon the question of paralysis. There was a sharp conflict in this evidence. Some of the experts were of the opinion that the suffered strain could have caused a hemorrhage into the spinal cord, which would account for the paralysis. Others were of a contrary opinion, as they testified that the condition of Nasta showed that his ailment was strictly of systemic origin, not arising from injury.

With this evidence before it, the commission subsequently and on the 26th day of February, 1924, made and filed its findings of fact and decision. It found, as upon the first hearing, that the applicant had sustained an injury in the course of and arising out of his employment, consisting of a strain of the right sacroiliac joint; that about two weeks

after this injury he developed paralysis of the legs, caused by some obscure spinal trouble. The commission accordingly determined that such spinal disease and the paralysis of the legs was not caused by the injury, and that no compensation was due for such paralysis, but only for the period the employee would presumably have been disabled as a result of the back and sacroiliac strain, which was fixed at 3 months from the date of the injury. An award was accordingly made for the sum of $252.94, to cover this period of temporary disability due to the strain. This amount was paid to the applicant by the defendant insurance carrier.

No petition for a rehearing was made to this decision within the 20 days prescribed by the Workmen's Compensation Act, nor was any petition for writ of review made to an appellate court therefrom within 30 days, and the decision became final March 28, 1924. Seven months thereafter, on the 31st day of October, 1924, Nasta filed with the commission a petition for reopening of his case under St. 1917, p. 850, § 20 (d), wherein it was set forth that the injury suffered by him had become permanent and should be treated as a "permanent disability." Defendants appeared and contested the jurisdiction of the commission, setting forth that no appeal or other proceedings had been initiated by the applicant within the time allowed by law, and that the matter had therefore become res judicata; that, the condition from which the applicant suffered having been held to be noncompensable, it was immaterial whether it was "permanent" or "temporary" in character, and that the decision was final.

Thereafter hearings were held before the commission upon the application where it appeared, according to evidence produced by the applicant, that about January, 1924, Nasta had burned his left foot, and that he had been confined to his home by reason thereof until the latter part of May, 1924; that, although still totally disabled from work, due to his paralysis, he became ambulatory about the latter period, and visited the office of the commission, at which time he discussed the case with its medical director; that by reason of this use of his leg he broke a blister on his left foot, and was again confined to his home until approximately September 7, 1924, when he began to get around; that previously, by the use of a foot brace stabilizing his lower extremities, he had been able to shuffle about, notwithstanding his paralysis; that the brace which he used to correct his right "foot drop" had worn out, and that he had discarded it; that on or about September 15, 1924, he visited the University of California Hospital Clinic to consult doctors as to what might be done for the pain and weakness of his right leg, and while going down a stairway, using a cane to aid him in his progress, he fell and strained and wrenched his right side. The applicant further testified that he had been troubled with this pain and weakness in his back and leg ever since the original accident, and that, while his condition was improved and he was getting better while he had remained in bed, when he had commenced to walk around and visit the clinic the pain and weakness again returned, and at the time of his fall he had not slipped, but his leg had buckled up or given way under him.

After this hearing, and on February 3, 1925, the commission made and filed a supplemental award, wherein it found that the original injury and the sacroiliac strain resulting therefrom had resulted in further and recurrent disability independently of the paralysis, and allowed compensation in the sum of $20.83 a week, beginning September 15, 1924, and continuing indefinitely thereafter, until the termination of said disability or the further order of the commission. Within 20 days thereafter defendants petitioned for a rehearing upon the same grounds as are here urged. They claimed that the applicant's condition is one of progressive paralysis; that the injury due to the fall was not, therefore, an industrial injury, but was a new and separate one, in no wise compensable, and for which, in any event, the employer and his insurance carrier could not be held liable; that the commission was without power to rate the condition as a permanent one for the paralysis, nor was it empowered to give compensation for any temporary disability due either to the paralysis or the fall; that the fall was due to the weakened condition of the right leg, which was caused by paralysis, which the commission had previously held to be noncompensable; that the commission had therefore no authority to reopen the case, as the evidence shows that there is no new development of the compensable injury present, but only a progression of the paralytic symptoms caused by the spinal cord disease. The application was denied.

[1] There is no question but that the original award, wherein the commission found the paralysis from which the applicant is suffering to be noncompensable, has become final, and that the commission therefore was without authority to reconsider the case, or make an award based upon this ailment. Georgia Casualty Co. v. Ind. Acc. Comm., 177 Cal. 289, 170 P. 625; McBride v. Ind. Acc. Comm., 182 Cal. 407, 187 P. 1050. Supplemental awards may not be used for the purpose of correcting error in the original award. Grand Union Hotel v. Ind. Acc. Comm. (Cal. App.) 226 P. 948.

[2] The jurisdiction of the commission to mke an award due to the applicant's paralysis was exhausted. But it must be remembered that there were two conditions involved in petitioner's case upon the original hearing, viz. the original injury and the sacroiliac strain resulting therefrom and the paralysis immediately following. The commission has

only determined by the supplemental award that the sacroiliac strain has resulted in further and recurrent disability independently of the paralysis.

As to this injury the commission retained a continuing jurisdiction to alter or amend its award under section 20(d) of the act. The evidence as above narrated shows that new facts have arisen since the making of the award, which relate to this particular injury. It shows that the applicant suffered from a fall, and in our opinion it justifies the inference that the fall and consequent injury was due to the weakness resulting from the sacroiliac strain, and is sufficient to support the award.

This being so, the finding of the commission is just as conclusive upon this question as was its former finding, upon conflicting evidence, that the paralysis which followed so closely upon the original injury was not due to the injury, and therefore noncompensable.

The award is affirmed.

We concur: KNIGHT, J.; CASHIN, J.

---

74 Cal. App. 68

MURPHY et al. v. LUTHY BATTERY CO. et al. (Civ. 4975.)

(District Court of Appeal, First District, Division 1, California. July 29, 1925.)

1. Assignments ⟸18—Guaranty of lease held assignable chose in action, and guarantors not exonerated by assignment of original lessor.

Where guaranty of lease was not limited by its terms to original lessor, it was an assignable chose in action, and guarantors were not exonerated from liability by virtue of the assignment by one of original lessors to one of parties plaintiff.

2. Assignments ⟸18—Whether a contract is assignable may be question of intent of party to be determined by terms of contract.

Whether a contract is assignable may be question of intent of party to be determined by terms of contract.

3. Assignments ⟸19—When a contract is not assignable stated.

A contract is not held assignable, where the parties expressly stipulate to the contrary, where its language excludes the idea of performance by another, where it is entered into because of special knowledge, skill, or ability of party, or in reliance upon his credit and solvency, and where performance by another would be different from that contracted for.

4. Assignments ⟸18—Right to receive money due under contract assignable without consent of other party.

Personal confidence is not ordinarily involved in right to receive money due or to become due under contract, and the right is generally assignable without consent of other party.

5. Guaranty ⟸36(9)—Guarantors, held liable under lease, chargeable with attorney's fees for enforcement of its terms.

Where guarantors were held liable for the rental due under lease, they were also chargeable with attorney's fees for the enforcement of its terms.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Action by John Murphy and another against the Luthy Battery Company and others. From a judgment for plaintiffs, certain defendants appeal. Affirmed.

Edward F. Treadwell and R. S. Laughlin, both of San Francisco, for appellant Taylor.

Charles S. Wheeler and Charles S. Wheeler, Jr., both of San Francisco, for appellants Miller and Denny.

Norman A. Eisner, of San Francisco, for respondents.

KNIGHT, J. An appeal by defendants Denny, Miller, and Taylor from a judgment awarded to plaintiffs for unpaid rental of real property. The appellants were sued and held liable as guarantors of a lease under which said rental accrued. Their sole contention is that they were released from the obligation of guaranty when one of the original lessors assigned his interest in said lease and guaranty to one of the plaintiffs herein.

The facts are not disputed and are substantially as follows: On March 11, 1920, Morris G. Jonas and John Murphy leased certain premises in San Francisco to Joseph P. Schiller for a term of five years at a stipulated total rental of $19,920, payable in monthly installments of $332; four installments thereof being paid in advance, on the execution of the lease. With permission of the lessors said lease was thereafter assigned by Schiller to defendant Luthy Battery Company, a corporation. The lease provided, among other things, that it should bind the heirs, executors, administrators, successors, and assigns of any and all of the parties thereto, and provision was also made therein for the payment of a reasonable attorney's fee in the event action was brought to enforce its terms. Contemporaneously with the execution of said lease, as part of the same transaction, and on the same document, appellants guaranteed the performance of the covenants of said lease on the part of the lessees in a guaranty reading as follows:

"In consideration of the foregoing lease or agreement, and one dollar ($1.00) to us paid, we do hereby covenant, promise and agree to and with the said Morris G. Jonas and John Murphy that the said Joseph P. Schiller or his assigns shall well and truly pay all rents and

perform and execute all the covenants therein contained on his part, or on the part of his assigns, and that on his failure, or the failure of his assigns, to do so in any particular, we will forthwith pay in United States gold coin unto the said Morris G. Jonas and John Murphy all rents or damages that may happen by reason of such failure, not exceeding the sum of eighteen thousand five hundred and ninety-two dollars ($18,592).

"Dated and signed this 11th day of March, 1920. Joseph P. Schiller.
"Omer Denny.
"Carlton Earle Miller.
"Wm. M. Taylor."

On May 21, 1923, Jonas assigned to Emile E. Kahn, one of the plaintiffs and respondents herein, all of his right, title, and interest in said lease and guaranty. After the execution of said assignment the corporate defendant, Luthy Battery Company, failed to pay the rent, and this action was brought by John Murphy, one of the original lessors, and Emile E. Kahn, assignee of Jonas, against said Luthy Battery Company and the guarantors, to recover the rental due on May 23, 1923, part of which accrued prior and part subsequent to said assignment from Jonas to Kahn. Defendants Schiller and Luthy Battery Company defaulted, but these appellants appeared and defended the action upon the ground that said guaranty did not extend to the benefit of the assigns of the original promisees, and that the assignment of said lease and guaranty from Jonas to Kahn, on May 21, 1923, operated as a release and exoneration of them from any liability accruing subsequent to the date of said assignment. They also denied liability for the arrearages accruing prior to said assignment. The trial court held that plaintiffs were not entitled to recover the rental accruing prior to the assignment from Jonas to Kahn, but held appellants liable for the amount falling due subsequent to said assignment. Judgment for plaintiffs and against appellants was entered accordingly for the sum of $332, which amount represented the installment of rental falling due after the assignment, and for the further sum of $75, attorneys' fees and costs. The basis for the trial court's ruling against appellants was that the guaranty in question, not being limited by its terms to Jonas and Murphy, the original lessors, was not a special guaranty, but was an assignable chose in action, and that, therefore, appellants were not exonerated from liability by virtue of said assignment from Jonas to Kahn.

[1] We are of the opinion that the conclusions reached by the trial court are sustained by the case of Reios v. Mardis, 18 Cal. App. 277, 122 P. 1091, and that the case mentioned is decisive of the contentions urged by appellants on this appeal. There the guaranty, like the one in the instant case, was executed contemporaneously with the lease, was made a part thereof, and the express consideration therefor was the execution of the lease. The guarantor there agreed that the lessee would pay the rent and perform the conditions thereof, or upon default the guarantor would hold the lessor harmless to the extent of a certain amount therein specified. Subsequently, the lease and guaranty were assigned, and, upon default in payment of rent, suit to collect the same was commenced by the assignees. The trial court sustained a demurrer to the complaint without leave to amend, and judgment was given for the defendant. Plaintiffs appealed. It was contended by the respondent there, as the appellants are contending here, that the contract of guaranty could not be enforced except by the party to whom it was given; that the guaranty was addressed to the lessor named in the lease without a provision permitting its assignment and therefore was personal to him, and could not be assigned so as to give the assignees a right of action therein. These contentions were held to be without merit, the court saying:

"This contention is based upon the common-law rule which prohibited an assignee from suing in his own name upon a chose in action, or any promise or other liability other than negotiable paper, originally running to his assignors. 2 Blackstone, 467, 468; 2 Chitty on Contracts, p. 1357; Daniel on Negotiable Instruments, § 1.

"The common-law rule that a chose in action was not negotiable in the sense that it was transferable so as to enable the assignee to maintain an action thereon has been materially modified, if not entirely superseded, by statute in this state, save, therefore, as a matter of history, the numerous cases cited by respondents from other jurisdictions, where, in the absence of statutory regulation, the rule of the common law prevails, have little, if any bearing upon the question presented here, and, in so far as they are in conflict with the statutory rule in force in this state, must be disregarded.

"The right to recover money by a judicial proceeding is defined to be a thing in action, which, if it arises out of an obligation, may be transferred by the owner without prejudice to any set-offs or other defense existing at the time of or before notice of assignment; and a written contract for the payment of money, even though it be nonnegotiable in form, may be transferred with all the rights of the assignor in like manner with negotiable instruments, subject, however, to all the equities and defenses existing in favor of the maker of the contract at the time of the transfer. Civ. Code, §§ 953, 954, 1458, 1459; Code Civ. Proc. § 368.

"In this state 'every action must be prosecuted in the name of the real party in interest' (Code Civ. Proc. § 367); and whatever the common-law rule, or the reason for its origin, may have been, it is certain that the immediate effect of the several Code sections just cited is to permit the assignee of a contract of guaranty, which is but a chose in action, to sue thereon in his own name (La Rue v. Groe-

zinger, 84 Cal. 281, 24 P. 42, 18 Am. St. Rep. 179; Rued v. Cooper, 109 Cal. 682, 34 P. 98; Simmons v. Zimmerman, 144 Cal. 256, 79 P. 451, 1 Ann. Cas. 850; Weir v. Anthony, 35 Neb. 396, 53 N. W. 206; Small v. Sloan, 14 N. Y. Super. Ct. 352; Wood v. Farmer, 200 Mass. 209, 86 N. E. 297; First Nat. Bank v. Carpenter, 41 Iowa, 518; Cunningham v. Norton, 5 Cal. Unrep. 35, 40 P. 491).

"If the contract of guaranty in the case at bar had been specifically limited to the lessor named in the lease, there would have been much force in the contention that the obligation of the guarantor was purely personal, and that its assignment, before default of the lessee, operated as a discharge of the obligation. Here, however, there was no limitation of the guaranty, either expressly or impliedly, to the lessor personally, and, like any other promise made to him, it could be assigned and sued on by the assignee. 20 Cyc. 1431, 1483; Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379."

The same general doctrine as to assignability of choses in action is set forth as being the law of this state in California Jurisprudence (3 Cal. Jur. p. 236), and in Union Collection Co. v. Oliver, 23 Cal. App. 318, 137 P. 1082, wherein the defendant Oliver addressed to plaintiff's assignor an instrument of guaranty in the following form:

"San Francisco, Cal., July 3, 1902.

"Mr. H. J. Miller, City—Dear Sir: I hereby guarantee to refund all moneys paid by you for the purchase of Zubiate stock in twelve months from date, in the event that you are not satisfied with your investment.

"[Signed] Dew. R. Oliver, President."

The court said upon this particular subject:

"Nor is there any merit in the argument of defendant that the contract was personal, and therefore unassignable. The contract does not provide that it shall not be assigned. Neither is it in its nature strictly personal, and therefore unassignable. 2 Am. & Eng. Ency. pp. 1010, 1018; 4 Cyc. 22; Taylor v. Black Diamond, 86 Cal. 589, 25 P. 51."

In Stillman v. Northrup, 109 N. Y. 473, 17 N. E. 379, cited approvingly in Reios v. Mardis, supra, the rule is clearly stated that—

"In order thus to limit a guaranty, the language should be plain and peculiar, and the intention of the parties should not be left in uncertainty."

In that case, like here, there was no limitation of the guaranty to the promisee personally. The court in that case further held that—

"Even if the guaranty should be construed as a guaranty of payment to Nelson F. Stillman [the original promisee], it would yet be a guaranty which he could assign with the mortgage. Like any other promise made to him, it could be assigned and could be enforced by any party to whom it was assigned."

To the same effect is the case of Lindenberg Corporation v. Howland, 115 Misc. Rep. 244, 187 N. Y. S. 917, in which it was claimed that a guaranty annexed to the lease, running to the lessor and his "legal representatives," did not include the assigns of the lessor. The court there said:

"There is no provision in the lease that the landlord cannot assign it, and providing, as it does, that it shall inure to the benefit of the successor in interest of the landlord, which must be read in connection with the guaranty, which refers to the lease, it is a fair and necessary inference that the defendant understood that impliedly, if not expressly, the landlord had a right to and might assign the lease, and that his rights thereunder would pass to his assignee, his successor in interest."

It will be observed that in the case before us the guarantors guaranteed the payment of the entire rental for the full five-year period of the lease, to wit, the sum of $18,592, from which fact it may be fairly inferred, as the trial court held, that it was intended that the guaranty should inure to the benefit of the assignees of the original lessors, in the event that lease was assigned at any time during the life thereof.

[2-4] Whether or not a given contract is assignable may be a question of the intention of the parties to be determined by construction of the terms of the contract. Montgomery v. De Picot, 153 Cal. 509, 96 P. 305, 126 Am. St. Rep. 84. Thus a contract is not to be held assignable where the parties expressly stipulate to the contrary, or where its language excludes the idea of performance by another, or where it was entered into because of special knowledge, skill, or ability of the party (La Rue v. Groezinger, 84 Cal. 281, 24 P. 42, 18 Am. St. Rep. 179), or in reliance upon his credit and solvency, and where a performance by another would be an essentially different thing from that contracted for (Montgomery v. De Picot, supra; 3 Cal. Jur. p. 239). But none of those exceptions are present here, nor does the guaranty in question embrace any relationship of trust and confidence between the guarantors and the original lessors. The obligation guaranteed was one merely relating to the receipt of money. Personal confidence is not ordinarily involved in a right to receive money due or to become due under a contract, and the right is generally assignable without the consent of the other party. In re Wright, 157 F. 544, 85 C. C. A. 206, 18 L. R. A. (N. S.) 193. In this connection may be cited the case of Levy v. Cohen, 103 App. Div. 195, 92 N. Y. S. 1074, in which the guarantors guaranteed to a contractor payments to be made on a building contract, and which contract was afterwards assigned to plaintiff. In holding that the guaranty was assignable, the court said:

"The original contract being assignable, and there being no trust or confidence reposed in Margovitz [the original promisee], the guar-

anty must be regarded as a general one, and passes with the principal obligation, for it is entirely immaterial to whom the money was paid, so long as the contract was performed. Everson v. Gere, 122 N. Y. 290, 25 N. E. 492. Notwithstanding its being a guaranty to pay Margovitz, it is one which he could assign with the principal contract, as was held in Stillman v. Northrup, 109 N. Y. 480, 481, 17 N. E. 379."

Appellants endeavor to differentiate the case of Reios v. Mardis, supra, from the case at bar upon two particular grounds: First, that it appears from the decision therein that the guarantors consented to the assignment of the lease and guaranty; and, secondly, that, by the terms of the guaranty there, the agreement was to indemnify the "lessor" against loss, while here the agreement was "to pay to said Morris G. Jonas and John Murphy all rents and damages that may happen" by reason of the failure of the lessee and his assigns to pay the rent and perform and execute the covenants of said lease. We believe that neither of those distinctions renders that case ineffectual as a controlling authority. While it is true the guarantor there did consent to the assignment, its liability as such was not declared by the court upon the theory of either consent or ratification, but was placed upon the broader ground of the right of the promisee to make the assignment. In reference to the second proposition, the case of Levy v. Cohen, supra, seems directly applicable, wherein it holds that where the contract is assignable, and there is no trust or confidence reposed in the original promisee, the guaranty must be regarded as a general one and passes with the original obligation, for it is entirely immaterial to whom the money is paid, so long as the contract is performed.

The case of Garfield v. Ford, 191 Cal. 69, 214 P. 963, cited, and more or less relied upon by appellants, is readily distinguishable, we think, from the instant case on account of the facts. There the guarantor promised that an intending buyer would pay for goods which should be purchased from the promisee. But no contract of purchase was ever made with, nor were any goods ever delivered by, said promisee. The sale of the goods was actually made by a different individual, and consequently no question of assignability of guaranty arose or was considered. In other words, the guaranty was a mere offer to pay a prospective debt, if the promisee therein named extended the credit (Herron v. Flack, 46 Cal. App. 374, 189 P. 294), which offer did not become operative until acted upon by the promisee, and the promisee having never acted upon the same, the guaranty did not become effective, and consequently was not transferable (28 Cor. Jur. 943), and could not be converted in a security for the benefit of a stranger.

Appellants also cite and emphasize the case of Murphy v. Ottmann, 127 App. Div. 563, 111 N. Y. S. 912. There the guarantors agreed to indemnify the lessors against default on the part of one Hammond, the lessee. The lessors sought to hold the guarantors liable for the default of the assigns of Hammond. It is at once apparent that this could not be done because as between Hammond and the guarantors there existed a relationship of trust and confidence that did not extend to any other person without the consent of the guarantors. The case of Bank v. Webster, 70 Okl. 73, 172 P. 942, L. R. A. 1918F, 696, is not in point for the same reason. The case of Skinkle v. American National Bank of San Francisco, 36 Cal. App. 225, 171 P. 967, dealt with a rule of construction; it being held, in that respect, that, where there was a contradiction of terms between the main obligation and the guaranty, the terms of the guaranty governed. That situation did not arise here. The case of Johnson v. Quinby, 62 Cal. App. 137, 216 P. 397, is not pertinent to the issues of this case, and the other cases cited by appellant are distinguishable because of their facts or else they follow the common-rule against assignability, which, as already shown by the case of Reios v. Mardis, supra, does not prevail in this state.

[5] The guarantors being liable for the rental due under the lease, they were also chargeable with attorneys' fees for the enforcement of its terms. Grace v. Croninger, 56 Cal. App. 659, 206 P. 130; Henne v. Summers, 23 Cal. App. 763, 139 P. 907.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 712

FIKE v. SAN JOAQUIN LIGHT & POWER CORPORATION. (Civ. 5097.)

(District Court of Appeal, First District, Division 2, California. March 22, 1925. Hearing Denied by Supreme Court Sept. 21, 1925.)

1. Negligence ⟸136(26)—Contributory negligence question for jury.

Question of contributory negligence, like that of negligence, is a question for the jury, and only when facts are clear and undisputed, and no other inference than that of negligence can be drawn from the facts, is court authorized in withdrawing such question from jury.

2. Electricity ⟸19(5)—Recovery for death sustained by evidence.

In action for death caused by negligently maintaining high voltage wires in exposed and unguarded condition, *held*, that the evidence supported verdict of the jury for plaintiff.

3. Electricity ⟸19(6)—Whether warning signs were sufficient held question for jury.

In an action for death caused by unguarded high voltage wires of defendant, it was a question of fact for the jury whether warning signs posted on the posts 10 feet from the wires was sufficient warning, and it was therefore proper for the court to submit the question of negligence to the jury.

4. Electricity ⟸15(1)—Contention workman was trespasser or licensee held without merit.

In an action for death caused by unguarded high-voltage wire on top of building of employer of deceased, defendant electric company's contention that deceased was mere trespasser or licensee *held* without merit, in view of evidence that deceased was carrying out orders of superior for his employer.

5. Trial ⟸296(8)—Erroneous instruction on preponderance of evidence held harmless in view of other instructions.

In an action for wrongful death, erroneous instructions by the court upon preponderance of the evidence *held* harmless, in view of other instructions which fully and correctly stated the law.

6. Electricity ⟸19(4)—Evidence as to instructions to employees held irrelevant.

In an action for wrongful death caused by unguarded high-voltage wires, rejection of evidence of employer's manager as to giving of instructions to employees relative to electric wires on top of employer's building properly rejected as irrelevant, inasmuch as it was immaterial what instructions other employees had received if it were not shown that deceased had received them.

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by Marion Fike, as administratrix of the estate of R. S. Fike, deceased, against the San Joaquin Light & Power Corporation, defendant. From a judgment for plaintiff, defendant appeals. Affirmed.

Lindsay & Conley, W. M. Conley, and Philip Conley, all of Fresno, for appellant.

Everts, Ewing, Wild & Everts and Dan F. Conway, all of Fresno, for respondent.

PRESTON, Justice pro tem. This is an appeal by the defendant, San Joaquin Light & Power Corporation, from a judgment entered against it upon a verdict of a jury in the sum of $26,000.

Plaintiff brought this action as administratrix of the estate of her deceased husband, R. S. Fike, charging that his death was due to the negligence of the defendant corporation. The facts necessary for a correct understanding of the questions involved on this appeal, and which are practically uncontroverted may be thus briefly stated:

It was stipulated at the trial that deceased died from an electric shock, which he received on the roof of the Valley Ice Company's building on the 22d day of March, 1919. The Valley Ice Company, a corporation owned and operated a plant for the manufacture of ice, located about one mile southeast of the city of Fresno. The ice company's plant was divided into two cement one-story buildings, of the same height, one of which we shall refer to as the "old building," and the second as the "new building." The new building had recently been built to the west of the old building. In the operation of its plant the ice company used certain electrical power, furnished by the defendant corporation. This power was furnished by defendant at points inside of said Valley Ice Company's plant. Prior to the erection of the new building the high-voltage wires of defendant had entered the old building at the top of two poles which stood on the west side of the old building. In order to facilitate the construction of the new building, the wires were changed so that they ran to the top of the old building from two poles situated about 5 or 6 feet from the northwest corner of the old building. Three electric wires, from 30 to 36 inches apart, ran from these last-named poles to the insulators near the northwest corner of the roof of the old building, and through these insulators through the roof to the transformers under the roof, and then to the machinery below. These insulators extended approximately 34 inches above the top of the roof, and were about 10 inches in diameter. The wires entered the insulators on the roof of the old building approximately 18 inches east of the west side of the old building, and near where the roofs of the old and new buildings met, and about 18 inches west of the insulators and wire, and on the roof of the old building, was a small cement coping about 7 inches in height on the north end, and tapering toward the south, along the west side of the old building, to the level of the roof. On the east and south of these insulators and wires was a seven-foot galvanized screen, which ran from the north edge of the old building to the south edge, and thence west to the southwest corner of the old building. On the south side of these insulators, wires, and screen was the north wall of another building belonging to the ice company, known as the "condenser house." On the north side of these wires and insulators was the north side of the old building, and there was no screen or barrier on that side, but no access could be gained to the roof on this side except by scaling the wall or by means of a ladder, etc. There was no screen or barrier of any kind on the west side of the wires next to the roof of the new building; in fact, this side of defendant's electrical equipment was entirely exposed, and there was nothing to prevent a person who might be on the roof of the new building from walking directly into these live wires, which carried a current of

60,000 volts. On each of the poles, near the ground, on the north side of the old building, were cloth-warning signs with the word "Danger" written thereon, and there was another similar sign on each pole about 4 or 5 feet above the level of the top of the old building, and about 10 feet from where the wires went through the insulators in the roof.

There were two means of access to the roofs of the buildings; one through the condenser room in the old building, directly south of the live wires, and the other by means of a movable ladder reaching to the roof of the new building, which ladder was located on the north side of the new building near the west end thereof.

For some time prior to March 22, 1919, the date of the injury to the deceased, the defendant had been engaged in altering the electrical equipment upon said roof; in fact, a new substation was being constructed upon the west end of the roof of the new building, preparatory to moving the high-voltage wires and equipment from the old building to the new location so as to enlarge the plant. The defendant had, in the course of this work, bored several holes in and through the roof of the new building in order to anchor its electrical wires and equipment, etc. Three of these holes came through the roof into the room immediately underneath.

It will be borne in mind that the defendant corporation not only owned all of the electrical equipment on the roof of the Valley Ice Company's plant on the date of the injury to deceased, but, under an agreement with the Valley Ice Company, had agreed to maintain and control all said electrical equipment. On the day of the injury, a Mr. Nichols, the foreman in charge of the alterations and installations of the electrical equipment for defendant corporation, requested Mr. Whitney, who was chief engineer of the ice company's plant, to patch up the holes which had been drilled in the roof by defendant, and this Mr. Whitney agreed to do. On this point Mr. Whitney testified as follows:

"Q. You may state to the jury what, if anything, Mr. Nichols said to you regarding the patching up of the holes on the roof. A. Mr. Nichols came to me and said he was about through the job, and where they had drilled the holes through the roof it needed patching up, but, as we had cement there and had a man who understood the handling of cement, he asked me if I wouldn't have it done—a short job—as an accommodation to him, and I said, 'Yes; we will;' and that was all I said to him concerning that."

These holes referred to by Mr. Nichols were in the roof of the new building, about 30 feet from the dangerous wires, and there was no obstruction, as we have seen, between these holes and the live wires. Mr. Nichols did not inform Mr. Whitney as to the exact location of the holes on the roof. The new equipment or substation on the roof of the new building was not in operation, and the current was still passing through the wires on the roof of the old building on the date of the accident.

R. S. Fike, the deceased, was 48 years of age, a common laborer, and was a married man with a wife and 8 children, and employed by the Valley Ice Company as a common laborer, and unaccustomed to electricity or electrical apparatus of any kind, and had only been employed by the ice company 4 or 5 days. On the said 22d day of March, 1919, the date he received the injury from which he died the following day, he was doing odd jobs for the Valley Ice Company around its plant on the ground floor. His immediate foreman was a Mr. Stanford. At about 11 o'clock a. m. on the morning of the accident he was engaged in cleaning a large wheel in the engine or condenser room on the first floor of the new part of the ice plant. When Mr. Nichols requested Mr. Whitney to have the holes filled, Mr. Whitney turned to the foreman, Mr. Stanford, and told him to take a man and go up and fill the holes. Mr. Stanford at that time asked Mr. Whitney what man he should take, and during this conversation Mr. Fike passed along through the engine or transformer room, where these men were talking, and Mr. Whitney replied: "Take this man here," referring to Mr. Fike. Whether Mr Fike heard the conversation between Stanford and Whitney the evidence does not reveal.

Just what followed this conversation up to the time of the accident can best be shown by the testimony of Mr. Stanford, Mr. Fike's foreman, which is as follows:

"Q. Did you know a man named R. S. Fike there? A. Yes, sir.

"Q. Do you know what he was doing in the forenoon of March 22d? A. He was painting the flywheel in the engine room.

"Q. Do you know what time in the forenoon he finished painting the flywheel in the engine room? A. Somewhere around 11 o'clock.

"Q. And did you have any conversation with him after that? A. Yes, I told him to come; that Mr. Whitney came to me and told me to do a job, and I told him to come with me and patch up some roofs.

"Q. What did Fike do immediately after that, if anything? A. Why, he came with me and asked me, he said, 'I have done that job;' and we went into the transformer room and started patching up.

"Q. You went in the transformer room and started patching up? A. Yes, sir.

"Q. What part did you patch up in the transformer room? A. The roof.

"Q. The inside of the roof? A. Yes, sir.

"Q. Still you were downstairs? A. Yes, sir; down on the ground floor.

"Q. In the transformer room? A. Yes, sir.

"Q. What did you patch up in there? A. The two holes over the switchboard.

"Q. And what did Fike patch up? A. He patched up the one in the alleyway, between the pump room and transformer room—there is

an alleyway through there and he patched up the roof there.

"Q. Was there a hole down in the corner on the inside; who patched that up? A. I patched that up in the engine room—I mean in the transformer room.

"Q. In that far corner of the transformer room? A. Yes, sir.

"Q. This is the transformer room? A. Yes, sir.

"Q. And the hole you patched up was in this corner? A. Yes, sir; that one and the other one.

"Q. And where were the others? A. One here, and one there.

"Q. After Fike and you got through patching the holes on the inside of the rooms, what time of day was it then, about? A. It was after lunch when he finished that hole.

"Q. What, if anything, did you say to Fike then? A. I said, 'We will go up on the roof and finish up there; put some tar, asphaltum, in the holes.'

"Q. Where did you go then? A. I told him to go and get the tar pot; I says, 'You go one way, and I will go the other.'

"Q. The tar bucket? A. The tar bucket; he met me in the blacksmith shop with the tar bucket.

"Q. And you went to the blacksmith shop? A. He met me at the blacksmith shop.

"Q. When you told him about going up on the roof to patch these holes, where were you standing? A. Inside of the alleyway, between the transformer room and the pump room.

"Q. When you went to look for the tar bucket, which way did you go? A. I think I went to the left and he came to the right.

"Q. And he met you where? A. At the blacksmith shop.

"Q. What were you doing there? A. I met him there, and I took the tar bucket to put it on the forge to melt the asphaltum.

"Q. Was there asphaltum in the tar bucket? A. Yes; what we call tar, asphaltum.

"Q. And did Fike stay there while you melted the tar or asphaltum? A. No; he said to me, 'There isn't sufficient in there;' and I said, 'Yes, there is plenty in there, you will see;' and with that he left me.

"Q. What direction did he go? A. He went around straight ahead, and then to the left where we had been working.

"Q. Towards the place where you had been working? A. Yes, sir.

"Q. And did you, after that, hear any report? A. I heard a report, sir.

"Q. What kind of a report? A. Oh, a kind of report and flash.

"Q. Now, from the time that Mr. Fike left you in the forge room, where you had the tar melting it, from that time until the time you heard the flash, about how long was that—about what length of time intervened? A. Why, from 2 to 3 minutes.

"Q. From 2 to 3 minutes? A. Yes, sir.

"Q. And what did you do after you heard the flash? A. Why, I run around there to see what was the matter, and somebody was picking him up in a tarpaulin. I didn't see him laying down, but seen him in the tarpaulin.

"Q. Did you see him when he was up on top of the roof? A. I saw him in the tarpaulin.

"Q. What is it? A. I saw him in the tarpaulin; I didn't see him laying down on the roof.

"Q. On, in a tarpaulin? A. Yes, or canvas. I saw him up there but he was in the canvas.

"Q. You never told him to go up on the roof, did you? A. I didn't tell him to go up, nor I didn't tell him to stay down.

"Q. Did you say anything to him at all about any high-powered wires on the roof? A. No, sir.

"Q. He was working under your orders? A. Yes, sir. * * *

"Q. Do you know whether Fike knew anything about the danger of those high-power wires? A. I don't think he did.

"Q. And didn't you and Fike have a little talk about the danger of those wires? A. I told him not to touch any wires down there because they was hot, and he said, 'Don't be afraid; I am scared of it.'

"Q. Do you know whether he knew it was electricity that was coming through them? A. I don't know anything about what he knew, but I told him the wires was hot in the transformer room, but I didn't tell him anything about the roof."

It is the theory of respondent, which was evidently accepted by the jury, that deceased ascended the roof of the new building by means of the same ladder used by the employees of appellant, located near the west end of the new building, and was looking over the entire roof of the new building for holes to be filled, when he came in contact with appellant's high-voltage wire or wires, and therefore in pursuit of his lawful employment, when he received the injuries from which he died the following day.

The particular act of negligence relied upon by respondent is that the defendant's wires were maintained in an unguarded, exposed, and dangerous position, and without proper warnings or barriers of any kind to prevent employees of the Valley Ice Company from coming in contact with appellant's live wires.

Appellant, by its answer, has denied negligence upon its part, and has affirmatively pleaded sole negligence on the part of the deceased, Fike, and also contributory negligence on the part of the deceased. The appellant's main contention is "that the evidence in the case shows without question, that the death of Fike was the proximate result of his own negligence, and that a directed verdict should have been given for the defendant."

[1] With this contention we cannot agree, for it is well settled that the question of contributory negligence, like that of negligence, is a question for the jury, and only when the facts are clear and undisputed, and when no other inference than that of negligence or contributory negligence can be drawn from such facts, is the court authorized in withdrawing the question from the consideration of the jury. Studer v. Southern Pacific Co., 121 Cal. 400, 53 P. 942, 66 Am. St. Rep. 39; Nagle v. Cal. Southern R. Co., 88 Cal. 86, 25 P. 1106; Fernandes v. Sacramento City Railroad Co., 52 Cal. 45; Orcutt v. Pacific Coast

Railroad Co., 85 Cal. 291, 24 P. 661; Shade v. Bay Counties Power Co., 152 Cal. 10, 92 P. 62; Stephenson v. Southern Pacific Co., 102 Cal. 143, 34 P. 618, 36 P. 407; Zibbell v. Southern Pacific Co., 160 Cal. 237, 116 P. 513; and many other cases that could be cited.

In Stephenson v. Southern Pacific Co., supra, the court said:

"The nonsuit was properly denied. * * * Where the facts are admitted or proven without contradiction the court will determine whether or not they establish negligence, or show contributory negligence; but where the conclusion is open to debate it is one for the jury under proper instructions from the court."

Again, in Zibbell v. Southern Pacific Co., supra, the court said upon this subject:

"It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say, as a matter of law, that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury."

There is a very wide difference between the inferences drawn and the conclusions reached by appellant from the testimony in this case and those contended for by respondent, which emphasizes the fact that reasonable minds might reach different conclusions from the same testimony and therefore, in such case, it is a question of fact for the jury to determine.

[2] We are of the opinion that the verdict of the jury finds ample support in the evidence, when all the facts and circumstances of the case are taken into consideration; and especially when it was shown that the deceased was a common laborer; had only been employed by the Valley Ice Company for 4 or 5 days; had never lived in a house that contained electric lights; was entirely ignorant of the high voltage contained in these wires; that neither deceased nor Stanford, his foreman were ever upon the roof of the building; the location of the holes had never been pointed out to either of them, and deceased had received no warning of the danger lurking in the live wires on the roof of the building. The holes that deceased had assisted in patching underneath the roof were many feet apart, and the holes that were to be filled on top of the roof did not extend through the roof, and no physical barrier of any kind was placed at any point on either roof which would prevent a person from coming in contact with the high-voltage wires.

[3] It will also be remembered that the defendant company had maintained galvanized iron screens 7 feet high on the old building, which completely protected any one on the roof of the old building from coming in contact with these high-voltage wires, but failed to construct any screen whatsoever between the new building, where the people were working, and these high-power wires. Appellant admits they had no screen or barrier between the roofs of the old and new buildings and relies wholly upon the warning signs upon the posts, which were, as above stated, some 10 feet from the wires, as a sufficient warning sign. Whether this was sufficient warning under all of the facts and circumstances in this case was likewise a question of fact for the jury. It was therefore perfectly proper for the court to submit the question of negligence to the jury.

Appellant seeks to bring this case within the rule laid down in such cases as Shade v. Bay Counties Power Co., 152 Cal. 10, 92 P. 62, and Jacobson v. Northwestern Pacific Railway Co., 175 Cal. 468, 166 P. 3, and similar cases. In each of those cases the court held that the plaintiff was guilty of contributory negligence as a matter of law. But the facts in those cases are very different in many respects from the facts in the case at bar. A careful reading of the Shade Case will show that he was not engaged in any business; was traveling for pleasure; had been warned and knew of the danger of coming in contact with the live wires; with full knowledge of the dangerous character of the wires heedlessly and recklessly placed himself in a mose dangerous position. In fact, Shade was simply attempting a "foolhardy proposition." In the Jacobson Case, Jacobson was expressly warned of the dangerous character of the platform; there was no occasion for his going upon the platform; he was entirely outside of his duties; was actuated solely by motives of curiosity or for his own convenience; was not in the performance of any duty enjoined upon him by his employer, but, in strict violation of the instructions of his employer, entered the forbidden zone, and was killed by the high-voltage wires that he had been warned to stay away from.

Likewise, in all the other cases cited by appellant, it appears that the injured party knew of the dangerous character of the coming in contact with the live wires, and after knowing such danger, either through forgetfulness or after their duties had been performed, through motives of curiosity or convenience, placed themselves in a dangerous position.

In all those cases cited by appellant, there were at least two elements present which are missing in the instant case: First, lack of knowledge on the part of Fike of the propensities of electricity and the dangerous character of the high-voltage wires on the roof of the building; second, express warning of the danger incurred in approaching near these heavily charged transmission wires.

[4] It is also contended by appellant:

"That the evidence shows that deceased was a trespasser or, at best, a bare licensee in going upon the roof of the Valley Ice Company plant, and that he put himself in the way

of an obvious and well-understood danger. Having done so he is guilty of negligence, which bars any recovery by his administratrix as a matter of law."

It is obvious from what we have already said that we cannot agree with this contention. On the contrary, it seems to us clearly established from the evidence that deceased had the right to be on the roof of the new building of the Valley Ice Company, and was there with the knowledge and consent of appellant, and in the performance of his duties as an employee of the ice company, carrying out the orders of his superior, Mr. Stanford, and the jury was amply justified in so concluding by its verdict.

It is difficult to conceive how Fike could have been a trespasser or a bare licensee in being upon the roof of the building when he had been expressly directed by his foreman, Mr. Stanford, to go there. Stanford said to Fike just a few minutes before the accident:

"We will go up now on the roof and finish up there—put some tar asphaltum in the holes."

Mr. Fike certainly would not fall into the class of a trespasser or licensee simply because he ascended the ladder and reached the roof a few minutes in advance of Stanford after receiving the instructions above mentioned.

[5] It is next claimed by appellant that the court erred in instructing the jury as to what constitutes a preponderance of the evidence. A part of the instruction complained of is as follows:

"If the weight of all the evidence in the case tending to prove the facts is of greater weight than the evidence tending to disprove such facts, then the plaintiff has proven such facts by a preponderance of the evidence, and is entitled to a verdict in her favor. Preponderance of evidence is not determined by the number of witnesses."

This passage taken alone is, of course, erroneous. This precise situation was presented in the case of Ergo v. Merced Falls Gas & Electric Co., 161 Cal. 339, 119 P. 103, and what the court said there of the situation is applicable here to wit:

"It is obvious that the evidence tending to prove a fact might be so slight that it would fail to satisfy the jury of the existence of the fact, and yet it might be of greater weight than other evidence introduced which would tend to disprove the fact. In such case the fact could not be said to be proven either by a preponderance of the evidence or at all. But this passage cannot be thus taken from the context, nor separated from the other instructions given."

This passage complained of, above quoted, was contained in an instruction pointing out to the jury the difference between the proof beyond a reasonable doubt that was necessary to justify a conviction in a criminal case, and the proof by preponderance of the evidence necessary in a civil case.

The court instructed the jury that the entire case should be considered together, and that all the evidence must be taken into consideration before arriving at a verdict, and in at least two other instructions fully and correctly stated the law with reference to a preponderance of the evidence. All the instructions must be considered together, and when so considered they fully and correctly state the law applicable to all phases of the case. Therefore we cannot say that the passage from the instructions first quoted was of any injury to appellant. There is some confusion in the record as to just what instructions were in fact given and refused. One of the instructions claimed by appellant to have been refused by the court which defined a trespasser and a bare licensee was in fact given. However, this confusion was eliminated by a stipulation between the respective attorneys after the case was submitted to this court.

[6] It is also contended by appellant that the court erred in rejecting certain evidence offered by appellant. This relates to questions asked of the witness Erskine, who was manager of the Valley Ice Company, relative to whether or not he had given general instructions to the employees of the Valley Ice Company of the danger of coming in contact with the high-tension wires on the roof of the building. Some of the questions were as follows:

"Q. What instructions did you give your employee (respondent claims the word should be employees) with reference to electric wire line that may have come into the building?"

To this question an objection was interposed by respondent that it was irrelevant, incompetent, and immaterial unless it included Mr. Fike. The court said:

"I think it is enough if you show actual instructions to Mr. Fike by some one; that would be enough."

Thereupon the following question was asked:

"Q. I will ask you this; were any of your employees ever permitted to go on that roof, unless expressly directed to do so? A. They had no occasion."

After one or two similar questions were asked of the witness Erskine by appellant's counsel and considerable argument between respective counsel, the court said:

"If it was a question of notice, that whatever was said by Stanford would be relevant, by general instructions I don't think it would be relevant on cross-examination."

Thus the court opened the door for appellant to prove, if it could, that any instructions were given to Fike by any one warning him to look out for the wires on the roof. It is entirely immaterial what instructions Mr.

Erskine gave to other employees if they were not shown to have been given to Fike. Appellant did not attempt to show that deceased, Fike had received any instructions from any one about the danger of the high-voltage wires on the roof of the building. Therefore the court's ruling under the circumstances was entirely proper.

After a careful examination of the rather voluminous record, we find no substantial error therein.

The judgment is affirmed.

I concur: NOURSE, J.

---

73 Cal. App. 732

GIBBS v. HERSMAN et al. (Civ. 5122.)

(District Court of Appeal, First District, Division 1, California. July 27, 1925. Hearing Denied by Supreme Court Sept. 24, 1925.)

1. Sales ⟸68—Term "suitable for Eastern shipment" in contract for sale of grapes defined.

Term "suitable for Eastern shipment," as used in contract for sale of grapes, has a definite meaning in the grape shipping industry, indicating a condition which will permit grapes to be shipped to, and arrive at, Eastern points in a sound condition, allowing normal time for transportation.

2. Appeal and error ⟸1010(1)—Finding of court not open to review, where supported by substantial evidence.

In action for breach of contract for purchase and sale of grapes, finding of court, that buyer was justified in rescinding contract because crop had become unsuitable for Eastern market, was not open for review, where supported by substantial evidence.

3. Sales ⟸85(2)—Termination of contract for purchase of grapes held authorized by terms of contract.

Where contract for purchase of grapes called for fruit crop suitable for Eastern shipment, provided for cancellation by buyer for any reason beyond buyer's control affecting his ability to perform contract, and providing that seller assumed all risk of loss and depreciation of undelivered part of crop, the buyer was authorized to cancel contract where it was shown that grapes were spoiled by rains and frosts prior to completion of deliveries.

4. Contracts ⟸309(2)—Where parties contract with reference to continued existence of matter to which it relates, perishment or destruction of such matter will excuse performance.

Where parties contract with reference to the continued existence of a thing, the subsequent perishment or destruction of the thing will excuse the performance, and, where the performance necessarily depends on its continued existence, the condition is implied by law that the impossibility of performance, because of its destruction, shall excuse the performance.

5. Trial ⟸396(3)—Cancellation of contract for reasons found by trial court held authorized by contract and pleadings.

In action for breach of the contract to purchase grapes, where court found that defendants' refusal to accept crop was because fruit had become unsuitable for shipment on account of rain and frost, *held*, that findings in these respects were in accord with defendants' pleadings in their answer, it being there alleged that, because of fruit being rendered unsuitable for shipment directly affecting defendants' ability to perform contract, contract was canceled pursuant to terms therein.

6. Sales ⟸119—Defendant held entitled to cancellation of contract, not only pursuant to cancellation section therein but independently thereof as well.

Where grapes were spoiled by frost and rain, *held*, defendants were not only entitled to cancel contract pursuant to cancellation section of contract but independently thereof because they were excused from performance, as finding of court that grapes were spoiled was in effect finding that subject-matter of contract had been destroyed and it was immaterial whether termination of contract was based on cancellation of contract or excuse for performance.

7. Contracts ⟸161—Whole of each contract must be taken together and effect given each part thereof, each clause helping to interpret other.

Whole of each contract must be taken together and effect given each part thereof, each clause helping to interpret other.

8. Sales ⟸85(2)—Spoiling of grapes held to prevent delivery, acceptance, and shipment thereof within cancellation clause of contract.

Where contract for purchase of grapes contained seven specific cancellation clauses, and the eighth was general in operation and effect, and included all reasons beyond the control of the buyer, which caused delay or wholly prevented delivery, acceptance, and shipment of fruit contracted for, *held*, that the spoiling of grapes by frost and rain prevented delivery, acceptance, and shipment thereof within such general cancellation clause.

9. Sales ⟸85(2)—Harvest, delivery, and culling of grapes not necessary before buyer had right to reject them under contract.

Under contract for the sale of grapes, where grapes were spoiled by frost and rain, *held*, that it was not a prerequisite to buyer's right to reject grapes that they be first harvested, delivered, and culled.

10. Sales ⟸181(11)—Record held not to show that buyer was not diligent in exercising legal rights under contract or acted in an unwarranted manner thereunder.

In an action for breach of contract for sale of grapes, *held*, that there was nothing in the record to indicate that buyers were not diligent in exercise of their legal rights or to have acted in an unwarranted manner in causing delay of delivery of grapes or in canceling contract.

---

11. Sales ⊂=54—Party entitled to have terms of contract carried into effect irrespective of harshness on other party, where voluntarily entered into and admittedly legal.

Where parties voluntarily entered into contract for sale of grapes, wherein time of delivery was under absolute control of buyer, and seller assumed risk in dealing with product prior to delivery, buyer was entitled to have contract carried into effect irrespective of harshness upon seller, inasmuch as it was admittedly legal.

Appeal from Superior Court, Santa Clara County; P. F. Gosbey, Judge.

Action by Irene M. Gibbs against H. S. Hersman and another, copartners doing business under the firm name and style of the Gilroy Packing Company. From a judgment for defendants, plaintiff appeals. Affirmed.

Bradley & Supple, of San Francisco, and Jones & Boalt, of San Jose, for appellant.

Crawford & Mayock, of Gilroy, and Owen D. Richardson, of San Jose, for respondents.

KNIGHT, J. The purpose of this action was to recover damages for the alleged breach of two written contracts for the purchase and sale of wine grapes. Judgment was for the defendants, and plaintiff appeals.

At all times herein mentioned defendants were engaged in the business of buying and shipping wine grapes near Gilroy, and plaintiff was a grower of grapes in that locality. On September 21, 1922, the parties entered into a contract calling for the delivery of 50 tons of grapes, suitable for Eastern shipment, at $95 a ton, and on September 28, 1922, made a second contract for the purchase and sale of the balance of plaintiff's crop, estimated to be 50 tons, at $100 a ton. Defendants accepted delivery of approximately 19½ tons of grapes under both contracts, whereupon, and on November 3, 1922, they refused to accept further deliveries upon the ground that said grapes had been rendered unsuitable and unfit for Eastern shipment as a result of rain and frost. The main question presented for determination is whether or not the trial court was correct in its conclusion that the termination of these transactions by defendants was authorized by the provisions of the contracts.

The documents were prepared on printed forms furnished by defendants, and are substantially alike, except as to the quantity and variety of grapes, and the price to be paid therefor. Those portions of the contract material for consideration read as follows:

"That in consideration of one dollar, and other valuable consideration hereinafter specified, the seller has sold, and the buyer has bought, all of the hereinafter mentioned fruit crop, suitable for Eastern shipment, produced during the year 1922 on the following described premises:

"Irene Gibbs Ranch, Valley View Vineyard, Gilroy.

"The seller agrees to pick and deliver all of said fruit at his own expense, in good condition, entirely free from mildew, or smut, or rain, or sand damage, and free from any damage whatsoever, and at the times directed by the buyer. All clippings, faulty, and damaged fruit to be weighed and charged back to seller as culls.

"The contract is understood by the parties hereto to constitute an immediate sale transferring title to buyer, but until delivery has been completed, seller agrees to, and does, assume all risks of loss, depreciation, or damage, of whatsoever kind or nature, to any undelivered part of said crops.

"Seller declares he is sole and absolute owner of the crops herein sold, and a sale of the real property shall not affect the rights of the buyer herein. * * *

"*Vineyard Run*—It is understood and agreed that grapes when purchased under this contract and designated as 'vineyard run' shall be sound ripe grapes, free from mildew, smut, or rain damage and shall contain not more than five (5) per cent. by count of raisins or immature sunburned grapes, and shall comply with any rule or rules, law or laws, regulating the shipment, sale, and distribution of unpacked grapes. * * *

"The buyer shall issue proper receipt or weight certificate covering each delivery of fruit made by the seller, and shall make cash payment within 10 days for said fruit upon surrender of such receipt or weight certificate, less weight of culls, shown on regular cull weight certificate, at its office in Gilroy, Cal., or upon surrender of such weight receipt or weight certificates to its authorized representative at Gilroy, Cal.

"In the event of a strike, quarantine, boycott, embargo, fire, or failure of transportation companies to provide refrigerator cars, shortage of box material, or other reasons beyond our control, directly or indirectly affecting buyer's ability to perform this contract, buyer may cancel this contract, or extend time of delivery for a period equal to that so lost, and may designate a different reasonable point of delivery, and buyer shall not be held liable for any damage that may occur through such delay. * * *

"Time is of the essence of this agreement, and no understanding other than herein expressed shall vary or modify this transaction."

[1] The term "suitable for Eastern shipment," used in said contracts, has a definite meaning in the grape-shipping industry, indicating a condition that will permit the fruit to be shipped to, and arrive at, Eastern points in sound condition, allowing normal time for transportation.

It appears from the evidence that the grape-shipping season in the vicinity of Gilroy begins between the 5th and the 15th days of September and continues until about November 15th, the heaviest shipping being done in October. During the entire shipping season of 1922, a serious shortage of refrigerator cars existed, due to strikes and also to an embargo on Eastern shipments declared by various transportation companies. All available cars were distributed to the shippers in proportion to the amount of acreage contract-

ed for. Sometimes the car shortage was less tensive than at other times. Under ordinary conditions it required 12 days to transport grapes from Gilroy to New York, but during the strike period double that time was consumed. These unfavorable transportation conditions necessarily limited and delayed acceptance of deliveries of grapes, and, consequently, up to October 27, less than one-fifth of the plaintiff's entire crop had been delivered and accepted under both contracts. On October 27 and 28, the regions of Gilroy were visited by rains and frost, the effects of which weakened the fiber of the grapes, produced mildew, and thereby rendered the grapes unsuitable for Eastern shipment. Thereupon, and on November 3, 1922, defendants informed plaintiff that they would not accept the balance of the crop. Plaintiff at that time protested that the grapes were not sufficiently damaged to disqualify the remainder of the crop from acceptance under the contracts, and requested that an inspection thereof be made by disinterested persons, but defendants failed to respond to this proposition and stood upon their refusal to accept the same. Later, under date of November 8, 1922, plaintiff wrote defendants to the effect that she was harvesting and marketing, for defendants' account, all grapes covered by said contracts, and would hold defendants responsible for the difference between the amount of the proceeds received from the sale of the grapes and the contract prices. Between the 6th and 11th days of November heavy rains occurred in that locality. On November 11, defendants wrote plaintiff as follows:

"You are hereby notified that we are ready at any time to receive the black grapes which we contracted to buy from you, and we hereby notify you to deliver the same, providing the grapes are undamaged, and in fit and proper condition for shipping as provided in our contract. * * *"

Subsequent to the refusal of defendants to accept the grapes on November 3, however, plaintiff sold the balance of the crop to others for the best obtainable market price, realizing therefrom $7,245.01 less than she would have received from defendants under the prices fixed by said contracts. Plaintiff's action is for the recovery of that difference in amount.

[2] The trial court found that the existence of said embargo and strikes, and the failure of transportation companies to provide cars, directly affected the ability of defendants to perform their contracts; that on October 27 and 28 the grape crop was rendered unsuitable and unfit, by rains and frost, for Eastern shipment, and that said defendants, on the 3d day of November, 1922, notified the plaintiff that said contracts were canceled, by reason of said crops of grapes having become unsuitable and unfit for Eastern shipment, as a result of rain and frost.

[3] The decision of the trial court upon these issues of fact is not open to review, inasmuch as its determination thereon is supported by substantial evidence. We are concerned, therefore, with only the legal question of whether the termination of said contracts by the defendants under the circumstances shown by the findings, and upon the grounds stated therein, was authorized by the terms of said contracts. We are of the opinion that the conclusion reached by the trial court upon this question must be sustained.

It will be noted that the contracts called for a "fruit crop suitable for Eastern shipment." The grade of grapes specified constituted the paramount feature of the contracts. The quality of the grapes to be delivered was further particularized by a provision requiring that they should "be sound grapes, free from mildew, smut, or rain damage. * * *" The cancellation section of said contracts, after enumerating seven specific causes for cancellation, provided that for "any other reason beyond our (buyer's) control, directly or indirectly affecting buyer's ability to perform the contract, buyer may cancel this contract. * * *" It was furthermore expressly provided that until completion of delivery the "seller agrees to, and does, assume all risks of loss, depreciation, or damage, of whatsoever kind and nature, to any undelivered part of said crop." In view of the established fact that the grapes were spoiled by rains and frost prior to completion of delivery, these plain provisions of the contracts manifestly gave to the defendants the right to terminate the sale thereunder, for the reason that the subject-matter of the contracts has been destroyed, and the sole purpose for which the engagements were entered into had been defeated, namely, the obtaining of grapes suitable for Eastern shipment.

[4] It is a fundamental rule of contracts that where, from the nature of the contract, it is evident that the parties contracted on the basis of the continued existence of the thing to which it relates, the subsequent perishing or destruction of the thing will excuse the performance; and, consequently, when the contract relates to any dealing with specific things, in which the performance necessarily depends on the existence of the particular things, the condition is implied by law that the impossibility arising from the destruction of the things, without fault in the party, shall excuse the performance, because, from the nature of the contract, it is apparent that the parties contracted on the basis of the continued existence of the subject of the contract. 9 Cyc. 631, quoted approvingly in Potts Drug Co. v. Benedict, 156 Cal. 322, 104 P. 432, 25 L. R. A. (N. S.) 609; 6 Cal. Jur. p. 443; 5 Page on Contracts (2d Ed.) § 2709. True, title to all grapes grown by plaintiff and suitable for Eastern shipment was, by these contracts, vested in the buyers at the time the contracts were signed, but it was

also provided, as already pointed out, that until completion of delivery the seller agreed to and did "assume all risks of loss, depreciation, or damage, of whatsoever kind and nature, to any undelivered part of said crop." It necessarily follows that when the elements spoiled the undelivered portion of the crop so that the grapes became useless for the purpose for which the purchase and sale thereof was made, the loss fell upon plaintiff as the seller.

[5] Plaintiff contends that the cancellation of the contracts, for the reasons found by the court, was not authorized by the contracts or the pleadings, and that, therefore, there has been in fact no legal cancellation thereof. Supporting this contention, plaintiff argues that the contracts embodied two distinct features, one dealing with their performance, which had particular reference to the alternative to be exercised by the buyer in the event the fruit was damaged, and the other having to do with the cancellation of the contracts; that performance of the contracts by defendants was a necessary prerequisite to the exercise of their right to reject damaged fruit, that is, that it was necessary for them first to perform the contracts by receiving the fruit and then afterwards ascertain the damage, if any, and charge it back to the seller under the provision of the contracts requiring that "all clippings, faulty, and damaged fruit (should) to be weighed and charged back to seller as culls"; that such was the exclusive remedy available to the buyer in the matter of rejecting damaged crops. In reference to the other feature of the contract permitting cancellation, plaintiff contends that the buyer was restricted to the specific causes therein stated, which, she claims, do not include the element of damaged crops. It is further asserted that these two remedies, arising under different phases of the contract, were inconsistent with each other; that both could not be invoked, nor was one available to accomplish the purposes of the other.

We are satisfied the propositions thus advanced by plaintiff are not maintainable. It may be conceded, as plaintiff contends, that final refusal of defendants to accept the balance of the crop was based, as found by the trial court, upon the fact that the fruit was rendered unsuitable, on account of rain and frost, for Eastern shipment; and it is also true that the matters set forth in the findings, relating to the car shortage, were important only for the purpose of showing that defendants were justified in delaying deliveries of grapes, and that those justifiable delays directly affected the ability of defendants to perform their contracts up to the time the fruit was ruined by the elements for Eastern shipment. But the findings in this respect are in full accord with the defense pleaded in defendants' answer, it being there alleged, after setting forth all of these facts and circumstances, as follows:

"Defendants further aver, in that behalf, that on or about the said date, and by reason of said matters hereinbefore set forth, which directly affected their ability to perform said contracts, and each of them, the defendants notified said plaintiff that said contracts, and each of them, were and thereafter would be canceled, pursuant to the terms of said contracts, and each of them."

[6] And in reference to the questions of the construction of the contracts, and of the availability of defendants' remedies thereunder, it is our opinion that not only pursuant to the cancellation section of said contracts, but also independently of it, defendants were entitled to terminate said contracts for the reasons assigned by the court in its findings, which were in effect that the subject-matter of said contracts had been destroyed; and it is entirely immaterial, we think, whether such termination be construed as a "cancellation" of the contracts, or "an excuse for nonperformance," for both remedies arise out of the same state of facts and are, to all intents and purposes, controlled by the same legal principles. In claiming that the so-called cancellation section did not allow defendants to cancel the contracts on account of spoiled fruit, plaintiff fails, we think, to give full effect or proper interpretation to the concluding portion thereof, which allows defendants to cancel the contracts for reasons beyond their control and affecting their ability to perform the same.

[7, 8] The whole of each contract must be taken together, and effect must be given to every part thereof, each clause helping to interpret the other. Civ. Code, § 1641. When the parties entered into their engagements they must have contemplated that the vital condition of fulfillment was that only such grapes be delivered, received, and shipped as proved suitable for Eastern shipment. The seven specific causes contained in said cancellation section obviously related to matters which might either delay or wholly prevent the accomplishment of that purpose, namely, the delivery, acceptance, and shipment of such fruit as was suitable for Eastern shipment; and the eighth clause of said cancellation section, being general in its operation and effect, manifestly included all other reasons, beyond the control of the buyers, which caused delay or wholly prevented the delivery, acceptance, and shipment of a grade of fruit contracted for. The grapes having been rendered unsuitable by the elements for the purpose for which they were purchased and sold, therefore did in fact wholly prevent delivery, acceptance, and shipment thereof, made performance of the contracts an impossibility, and consequently constituted ground for cancellation.

The subject-matter of these contracts was highly perishable, and of necessity required expeditious handling even if delivered in condition for Eastern shipment; consequently,

the interests of the seller as well as of the buyer demanded that the right of cancellation be exercised as to the whole crop if the fruit did not measure up to the high standard prescribed by the contracts; it would therefore seem that the only reasonable and fair construction that can be placed upon the general clause of said cancellation section is that impairment of the subject-matter of the contracts, arising from causes beyond the control of the buyer, which made it unfit for the purpose for which it was purchased, warranted cancellation of the contracts.

[9] But, as above stated, aside from the question of cancellation under the clause of the contract just adverted to, we are convinced that upon ascertainment of the fact that the subject-matter of the contracts had been rendered useless, defendants were entitled, under the fundamental rule of contracts hereinbefore mentioned, to terminate said contracts on that ground. And, in order to do so, it was not necessary, as plaintiff contends, that all of the fruit should have been first harvested, delivered, and culled, for the reason that the crop was not partially but entirely spoiled. It was not a case of sorting out from a larger lot the faulty and damaged fruit, and it would have been an obviously idle act for the seller to have delivered the balance of the crop, consisting of some 90-odd tons, to the buyer merely for the purpose of having the entire lot weighed and charged back to the seller as faulty fruit; besides, by such an operation the interests of the sellers would have suffered more than those of the buyers, because, in addition to the expense of hauling and delivery, the delay occasioned thereby would doubtless have affected subsequent sale of the crop by the grower to local markets.

[10] We find nothing in the record indicating that defendants were not diligent in the exercise of their legal rights under the contracts, or that they have acted in a manner not warranted by the provisions thereof. True, deliveries of grapes were delayed at defendants' instance until finally the rains and frosts came and spoiled the grapes for Eastern shipment; but owing to transportation conditions it was the legal right of defendants, under the plain reading of the contracts, to effectuate such delays, and the evidence given by transportation officials, to the effect that the car shortage situation looked brighter sometimes than it did at others, is sufficient to show that defendants' conduct in the premises, both as to causing delays in delivery and in failing to cancel the contracts absolutely upon that ground before the grapes were spoiled, was based upon the faith of the information received by defendants from those officials. But as soon as it was ascertained that the rains and frosts of October 27 and 28 had ruined the grapes for Eastern shipment, the car shortage question ceased to be a factor, and defendants immediately notified plaintiff that they could not accept the balance of the crop.

[11] Plaintiff during oral argument complained that the contracts, in thus giving to the buyers absolute control of the delivery of the crop, were harsh upon the grower. This was not denied by the defendants, but as an offset thereto defendants called attention to the risk assumed by them as buyers and shippers in dealing with a highly perishable product, even when there was no interference with deliveries or shipment. However that may be, the parties having voluntarily entered into such agreements, the provisions and purposes of which were admittedly legal, defendants are entitled to have the terms thereof carried into effect.

The contents of the letter written by defendants to plaintiff, under date of November 11, is unimportant, for the reason that the contracts at that time had already been canceled; defendants on November 3 having expressly refused to proceed with the sale, and plaintiff acting upon such refusal thereafter disposed of the grapes to other parties. The question of waiver of the right to cancel the contracts upon the ground of car shortage conditions is also immaterial, because final refusal to take the crop was not placed on that ground.

The other points made by plaintiff were incidental to those theories advanced by plaintiff, which we hold are not maintainable.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

74 Cal. App. 77

CURTIN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5065.)

(District Court of Appeal, First District, Division 1, California. July 29, 1925. Hearing Denied by Supreme Court Sept. 21, 1925.)

1. Limitation of actions ⟸34(2)—Mandamus ⟸143(2)—Petition by police officer for reinstatement held barred by limitations and laches.

Petition of police officer for writ of mandamus to compel reinstatement, not commenced until nearly four years after his dismissal, *held* barred by limitations in view of Code Civ. Proc. § 338, subd. 1, and by laches.

2. Municipal corporations ⟸185(7)—Departmental rule relating to constructive service of charges and notice of trial on police officer held not to conflict with charter.

Departmental rule of police department of city of San Francisco, permitting constructive service of charges and order for trial of a police officer in dismissal proceedings, *held* not to conflict with San Francisco Charter, c. 3, art. 8, § 1, subd. 2, and section 3.

3. Municipal corporations ⟸185(7)—Police officer quitting department and leaving city held not entitled to personal service of notice of dismissal proceedings.

Member of police department, and therefore subject to and having knowledge of its rules and regulations, who, in open defiance of commission's order that he remain on duty, quit department and left city for regions wherein it was extremely impractical, if not impossible, to secure personal service on him, *held* not entitled to personal service of notice of dismissal proceedings.

4. Municipal corporations ⟸185(11)—Presumption in favor of board of police commissioners' judgment of dismissal.

Every presumption is in favor of validity of judgment of board of police commissioners dismissing a policeman, where it contains recital showing jurisdiction to hear and determine the charges.

Appeal from Superior Court, City and County of San Francisco; Walter Perry Johnson, Judge.

Proceeding in mandamus by Robert A. Curtin against the Board of Police Commissioners of the City and County of San Francisco and others. From a judgment denying the writ, plaintiff appeals. Affirmed.

J. J. Dunne and R. H. Morrow, both of San Francisco, for appellant.

George Lull, City Atty., and Charles S. Peery, Asst. City Atty., both of San Francisco, for respondents.

KNIGHT, J. On October 14, 1918, the board of police commissioners of the city and county of San Francisco dismissed the petitioner herein, Robert A. Curtin, as a member of the San Francisco police department, for disobedience to orders, to wit, failing to report for duty in compliance with the order of the police commissioners and his superior officers. Nearly three years thereafter, to wit, on September 24, 1921, petitioner applied for reinstatement, but his application was denied. About a year subsequent to such denial, and on August 24, 1922, he commenced this proceeding in mandamus against said police commission and the individual members thereof to compel his restoration as a member of said department. Judgment was given for defendants, and petitioner appeals.

The findings of the trial court, which, we think, are supported by substantial evidence, disclose the following facts:

For several years prior to his dismissal Curtin had been a police officer in said city, and on September 30, 1918, submitted his resignation to said commission, protesting that he was doing so because he had theretofore applied for a leave of absence for the period of the war, but which leave was not granted. In his resignation he further stated that for the few following months he would engage in agricultural pursuits and assist in the management of a large cattle ranch, but if called in the draft he would enter the service, and, at the conclusion of the war, demand reinstatement as a member of the police department. On that date, September 30, 1918, said commissioners, for reasons which appeared to them sufficient, refused to accept said resignation, and ordered Curtin to report for regular duty. Under date of October 1, Curtin sent a second letter of resignation, this time to Captain Shea, his superior officer, stating that in doing so he was protecting his rights to reinstatement; he further added: "I will not report for duty to-morrow, October 1st, 1918." He was, nevertheless, ordered to report for duty on his regular watch commencing the next morning at 8 o'clock, which he failed to do; and thereupon, and on October 2, 1918, Captain Shea filed charges against Curtin, which were verified before Chief of Police D. A. White, charging Curtin with disobedience of orders, and specifying the particular acts of such disobedience. Curtin was thereupon suspended from his position, and said charges were set for trial on October 7, 1918.

On October 2, 1918, Officer John P. Collins called at Curtin's residence, No. 1147 Sanchez street, in said city, for the purpose of serving copies of said charges, notice of trial and the order of suspension, but was informed by the landlady of said premises that Curtin had departed from San Francisco for Chinese Camp, California. Thereupon said copies were left at said residence in the room occupied by the said Curtin, and where his personal effects still remained. On that same day other copies of said documents were posted in a conspicuous place in the Harbor police station,

that being the station to which Curtin was required to report for duty, and copies of said charges, together with a notice of suspension signed by the chief of police, and a notice directing Curtin to appear for trial of said charges on the 7th day of October, 1918, at 7:30 p. m. of said day before the police commissioners were also sent by registered mail in the official envelope of said commission, bearing a return indorsement, addressed to the said Robert A. Curtin at Chinese Camp, Cal., with the postage thereon prepaid. As a matter of fact, Curtin departed for Tuolumne and Mariposa counties on the morning of October 2, passing through Chinese Camp in order to reach the ranch on which he afterwards remained for many months. On October 7, 1918, Curtin failed to appear in answer to said charges, and the hearing was regularly postponed to October 14, 1918, at which time Curtin again failed to appear; whereupon said commissioners proceeded with the hearing, received evidence supporting the charges, found Curtin guilty thereof, and by resolution dismissed him from said police department, the vacancy caused by his dismissal being shortly afterwards filled by the appointment of another officer to the position. Two days prior to said hearing, to wit, on October 12, 1918, Curtin through one Carlon, a fellow police officer, sent to the office of the chief of police his star, book of rules, and club.

It appears from the evidence that Curtin did not at any time enter the military service. During the several months he was engaged in cattle raising, he visited San Francisco "very frequently, once a month or once in two or three months in three or four months," the length of these visits being "two or three days, maybe one day and maybe three days," but that during those visits he did not call upon or get in touch with the police department, nor did he at any time make inquiries as to the disposition of his case before said commissioners.

Although Curtin denied ever having received said registered letter, it was shown that said letter was never returned, and, for the purpose of proving that he did receive it, evidence was offered of certain circumstances showing that the Curtin family was extensively known in Tuolumne county and in the regions of Chinese Camp, also the manner in which they received their mail, and that soon after October 15, 1918, Officer Carlon, who also had relatives living in those parts, while passing through that country, delivered at the Curtin ranch certain mail he had obtained for them on the way in, although in this regard he testified he had no recollection of having delivered a registered letter. Irrespective of whether or not Curtin did receive said letter, the court found that on December 2, 1918, he had actual knowledge of his dismissal, and he admits that during January or February, 1919, he learned of that fact.

Appellant contends, first, that the proceedings pursuant to which he was dismissed from the police force are void for want of jurisdiction, it being claimed that, notwithstanding the rule of the department permitting constructive service of the charges and order for trial, the city charter requires personal service, and does not authorize constructive service; and, secondly, that assuming constructive service is permissible, no compliance with the constructive service rule of the police department (rule 41) has been established.

Respondents urge at the outset that in view of the facts already related, and the further fact that appellant's proceeding was not commenced until nearly four years after his dismissal, his cause of action, if any he had, became barred by the statute of limitations (subdivision 1, § 338, Code Civ. Proc.), and by laches. Such were the conclusions reached by the trial court, there being express findings to the effect that said statute of limitations applied, and also that the proceeding was barred by the laches of appellant in delaying the bringing of said proceeding for more than three years.

[1] We are of the opinion that the contentions made by respondents and the conclusions reached by the trial court must be sustained. Wittman v. Board of Police Commissioners, 19 Cal. App. 229, 125 P. 265; Kramer v. Board of Police Commissioners, 39 Cal. App. 396, 179 P. 216; Donovan v. Board of Police Commissioners, 32 Cal. App. 392, 163 P. 69; Harby v. Board of Education, 2 Cal. App. 418, 83 P. 1081; Jones v. Board of Police Commissioners, 141 Cal. 96, 74 P. 696. In Wittman v. Board of Police Commissioners, supra, where a three-year period elapsed before suit was brought, it was said:

"Appellant was in form dismissed from the department on the 24th day of March, 1905, and ever since has been debarred from exercising any of the functions of a member of the department. For reasons not now necessary to be discussed, he claims that such attempted dismissal was illegal and void, and did not have the effect to remove him from his position of captain of police. It is the dismissal from the department that really lies at the bottom of appellant's cause of action. It is this alleged wrong that he seeks to have redressed by the action of the court invoked more than three years after its commission. The denial of his right to hold a position in the police department occurred when he was formally dismissed by the board of police commissioners from the department. This dismissal occurred at a definitely fixed time, and was an unequivocal denial of his right to longer hold the position of captain of police or any other position in the department. If his contention as to the illegality of such dismissal is well founded, he could immediately upon his dismissal have perfected his right to the remedy by mandate by making his demand for reinstatement or assignment to duty as such captain of police.

"These considerations bring the case within the rule followed and recognized in many cases, that where a right has fully accrued except for some demand to be made as a condition precedent to legal relief, which the claimant can at any time make, if he so chooses, the cause of action has accrued for the purpose of setting the statute of limitations running." Palmer v. Palmer, 36 Mich. 487, 24 Am. Rep. 605; Harrigan v. Home Life Co., 128 Cal. 531, 548, 58 P. 180, 61 P. 99; Union Sav. Bank of San Jose v. Leiter, 145 Cal. 696, 79 P. 441; San Luis Obispo v. Gage, 139 Cal. 398, 73 P. 174; Barnes v. Glide, 117 Cal. 1, 59 Am. St. Rep. 153, 48 P. 804.

In considering the same question in the case of Kramer v. Board of Police Commissioners, supra, the court used the following language:

"In addition to these deficiencies in the plaintiff's petition it may be further stated that no showing whatever is made that the position in the police department vacated by the plaintiff's resignation has not been long since filled, or that his reinstatement after so long a period has elapsed [more than three years] would not result either in ousting a successor, or in entailing the payment on the part of the municipality of two salaries for the same position. We think as to this latter point that upon the plaintiff's own affirmative showing, as well as by these deficiencies therein, he was debarred by laches from the remedy which he sought and obtained by the judgment and order for the issuance of the writ from which this appeal has been taken. Harby v. Board of Education, 2 Cal. App. 419, 83 P. 1081; Donovan v. Board of Police Commissioners, 32 Cal. 392, 163 P. 69."

In Donovan v. Board of Police Commissioners, supra, in holding that a delay of 14 months after dismissal was a bar to the remedy of certiorari, the court was even more emphatic in applying the doctrine of laches, saying:

"In the absence of a showing sufficient to excuse this delay it certainly constituted laches. While it is true, as counsel for the plaintiff contends, that mere lapse of time short of that prescribed by a statute of limitations in any given similar case will not in itself suffice to constitute laches so as to bar a remedy, nevertheless, if in addition it appears from all the circumstances of the case that prejudice must or, from the very nature of the case, may be reasonably expected to result, the remedy will be denied (Cahill v. Superior Court, 145 Cal. 42, 78 P. 467; Cook v. Ceas, 147 Cal. 614, 82 P. 370; McGibbon v. Schmidt, 172 Cal. 70, 155 P. 460); and, whenever public inconvenience might result from the annulment of the proceedings sought to be reviewed, the rule of laches relative to applications for the writ is applied and enforced with particular strictness (4 Standard Encyclopedia of Law and Procedure, 912). As was stated in the case of Murphy v. Keller, 61 App. Div. 145, 70 N. Y. S. 405: 'In all proceedings of this character, where a person removed from public office is entitled to receive from the public compensation for the services he performs, if he intends to insist that his removal was illegal, or that the law entitles him to be reinstated, his application for reinstatement should be promptly made so as to protect the city from the necessity of paying two persons for the same services.' It would be contrary to common knowledge of the needs of the police department of a great city, and the well-known practice of the appointing powers to fill vacancies created in such department, to suppose that the defendants in the present case allowed the vacancy created by the dismissal of the plaintiff to long remain unfilled; and therefore it may fairly be said that the particular circumstances of the case as disclosed by the petition for the writ show with sufficient certainty that prejudice as a result of the plaintiff's laches would follow the granting of the writ."

Between the time of appellant's dismissal and the date on which he commenced this proceeding the deaths of Chief of Police White, Captain Shea, and Officer Douglass occurred, all of whom would have given material evidence to refute some of the numerous points of irregularity made by appellant against the validity of the dismissal proceedings, and the deaths of whom may be considered as having an important bearing upon the application of the doctrine of laches.

[2] We are convinced that the situation in the instant proceeding has been brought clearly within the rule of the cases above cited, which rule obviously disposes of all questions of alleged irregularity made against the validity of the dismissal proceedings, with the possible exception of the one relating to the asserted conflict between said departmental rule number 41 and the charter provision in reference to the service upon the accused officer of copies of the charges and notice of trial. Assuming that appellant may still attack the dismissal proceedings upon that ground, we are of the opinion that appellant's contention is not maintainable. We believe that said rule, allowing constructive service to be made under the circumstances stated in the rule, not only does not conflict with the charter provision, but is in entire harmony therewith, is reasonable in its operation, and wholly essential for the orderly and efficient administration of the affairs of the police department. The charter in this respect provides that the board of police commissioners has power "to prescribe rules and regulations for the government, discipline, equipment, and uniform of the department, and from time to time to alter or repeal the same, and to prescribe penalties for the violations of any such rules and regulations." Subdivision 2, § 1, art. VIII, c. III. Section 3 of the same article provides:

"No member of the department shall be subject to dismissal for any cause, or to punishment for any breach of duty or misconduct therein, except after a fair and impartial trial before the commissioners upon a verified complaint filed with the board setting forth specifically the acts complained of, *and after such reasonable notice to him of the time and place*

*of hearing as the Board may by rule prescribe. * * *"* (Italics ours.)

Section 3 of rule 41, the validity of which is challenged, reads:

"3. When, after due and diligent search, a member or employee of the police department is reported by competent authority as missing, and in such case as said absence prevents personal service of notice and copy of charges filed against him, and is, in itself, a violation of the rules and regulations of the department, reasonable notice of the time and place of hearing within the provisions of section 3 of chapter VII of article VIII of the charter of the city and county of San Francisco shall be deemed as follows: A copy of the charges, setting forth the time and place of hearing, with notice to report to answer said charges, shall be sent by mail to the defendant's last known place of residence, at least five days previous to the time set for the hearing of the charges, and a written notice addressed to the defendant ordering him to report to answer charges, setting forth the fact that charges have been filed against him; the particulars of time and place of hearing shall be conspicuously posted in the station or place where the defendant should report for duty at least five days previous to the time set for the hearing of the charges."

[3] Besides the fact that there is nothing in the language of the charter provision indicating that only personal service is permitted, we think the peculiar circumstances of this case are sufficiently convincing to show that the requirement of personal service is not, and ought not be, necessary. Appellant was a member of the department, and therefore subject to and had knowledge of its rules and regulations. Owing to the exigencies of war the ranks of the police department were being depleted of its younger members so that a real demand for police officers existed. In open defiance of the order of the commission that appellant remain on duty as a member of the department rather than take up agricultural pursuits, he quit the department, and left the city for regions wherein it was extremely impractical, if not impossible at that season of the year, to secure personal service upon him, and knowing, too, that charges of disobedience and dismissal would necessarily follow the order of the commission refusing his resignation. If, under those or like circumstances—for instance, an officer leaving the state without permission or embarking upon the high seas—the department were compelled to suspend action in reference to his case, and thus allow the vacancy caused by his absence to remain unfilled until personal service could be had upon the absentee, the administration of police affairs would apparently be much interfered with if not seriously impaired. As before stated, the language of the charter provision does not in terms require personal notice, and, moreover, no reason has been presented to show that such was the intent or meaning thereof.

There is no merit in appellant's contention that the rule upon which these charges were based was violative of the charter in that said rule failed to prescribe a penalty. Section 2 of article VIII, chapter VII of the charter, itself fixes the penalties for members "guilty of any offense, or violation of rules or regulations" of the department, and one of those penalties is "dismissal from the department." The questions of the sufficiency of the verification of the charges and of the charges themselves are, at best, irregularities which, as already pointed out, may not be taken advantage of by appellant on account of his laches.

[4] The minutes of the board of police commissioners, which, in effect constitute the judgment of dismissal, contain recitals showing jurisdiction to hear and determine the charges. Every presumption is in favor of the validity thereof. Gaylord v. Pasadena, 175 Cal. 433, 166 P. 348. The judgment of dismissal by the board was one that was clearly within their power under the charter to render, and, being valid on its face, was and is, in view of the running of the statute of limitations and of appellant's laches, binding upon appellant. People v. Greene, 74 Cal. 400, 16 P. 197, 5 Am. St. Rep. 448.

The judgment is affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

73 Cal. App. 769

WEINBERG CO. v. HELLER. (Civ. 4005.)

(District Court of Appeal, Second District, Division 2, California. July 27, 1925. Rehearing Denied Aug. 13, 1925. Hearing Denied by Supreme Court Sept. 24, 1925.)

1. Contracts ⊜206—Party, agreeing to pay portion of expenses of proposed litigation, held bound to pay portion of costs in case settling questions involved.

Where party, interested in actions to abate nuisance from overflowing lands, agreed with another party to pay certain proportion of costs and expenses incurred, including costs of appeal, and, on advice of attorney, action was brought in name of the other party to agreement, she was bound to pay specified portion of costs and expenses incurred in such case, regardless of fact that contract provided for separate suits, and actions were separately instituted, as against contention that she did not contract with the other party, but jointly with him to employ attorneys.

2. Contracts ⊜206—Contract between parties, as to conduct of proposed litigation, in which both were interested, held not changed by acceptance thereof by attorneys.

Where parties, interested in proposed litigation to abate nuisance from overflowing their lands, and for damages, signed contract to pay specified portion of expenses, incurred in such litigation, acceptance of terms of employ-

ment therein by counsel did not alter instrument or change its nature.

3. Contracts ⊜245(2)—Written contract, providing for proportion of payment of expenses and costs incurred in proposed litigation, held to control oral negotiations or understanding.

Even if provision of contract by parties, interested in proposed litigation, that each party would pay certain proportion of costs and expenses incurred therein, was subject to understanding and agreement that it should not be final, but be subject to reapportionment at end of litigation, under Civ. Code, § 1625, written instrument controlled any oral negotiations or understandings occurring previously to execution thereof.

4. Corporations ⊜426(10)—Beginning action on contract by corporation held ratification thereof.

Under Civ. Code, § 1588, providing that contract, voidable for want of due consent, may be ratified by subsequent consent, and section 1589 making voluntary acceptance of benefit of transaction equivalent to consent to obligations arising therefrom, even if contract by corporation to pay certain proportion of proposed litigation, in which it was interested, was not binding on corporation, its beginning action against party to such contract to recover portion of costs and expenses incurred therein amounted to complete ratification.

5. Corporations ⊜426(10)—Action by corporation, under contract, held to prevent party thereto escaping liability on theory that corporation was not bound.

Where corporation and person, interested in litigation, contracted that each should pay certain proportion of costs and expenses incurred therein, and corporation at once started suit, as did person, in pursuance of terms and conditions of contract, and corporation expended moneys for costs and expenses and accepted benefits of agreement, it could not have denied liability under contract which it had ratified by performance, on theory that president of corporation was not authorized to bind it, in view of Civ. Code, § 1589, providing that voluntary acceptance of benefit of transaction is equivalent to consent to obligations arising therefrom.

6. Contribution ⊜4—Contribution held not appropriate action for breach of contract to pay specified part of costs and expenses of litigation.

Where parties, interested in proposed litigation, contracted to pay specified portions of costs and expenses incurred therein, and to commence and prosecute actions separately, and did not intend to have community of interest in result of any judgment, doctrine of contribution was not involved in action by one party against other for recovery of specified proportion of expenses and costs incurred in litigation, but action was founded on express contract, in view of Civ. Code, § 1432, limiting action for contribution to cases of joint, or joint and several, obligations.

7. Contribution ⊜4—Principle, on which right of contribution is founded, applies only where parties are under common burden of liability.

Principle of equity, on which right of contribution is founded, applies only where parties are under common burden of liability, and where they are severally bound for specific portion of debt as principals and one pays more than he is bound for, he is entitled to no contribution from other for such excess.

8. Contracts ⊜206—Party, contracting to pay specified portion of costs and expenses incurred in proposal litigation, not entitled to require proof of actual payment before being required to pay her share.

Where parties, interested in proposed litigation, contracted each to pay specified proportion of costs and expenses incurred therein, and on advice of attorneys, action by one party thereto was prosecuted in action by plaintiff in such action against other party to recover her proportionate share for costs and expenses incurred, defendant could not require proof of actual payment of such costs and expenses, before being required to pay her share, she becoming liable when expense was incurred.

9. Words and phrases, "incurred" and "incur" defined.

"Incurred" means to become liable for, or subject to, to render liable or subject to; "incur" means something beyond contract, something not embraced in the word "debt."

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Incur.]

10. Action ⊜62—Party, defending action to repay expenditures, held not entitled to object to jurisdiction because plaintiff had not paid sufficient amount before suit.

Where party contracted each to pay specified proportion of costs and expenses incurred in proposed litigation, and other party thereto, after incurring costs in contemplated litigation, sued party on contract, defendant could not object that superior court had no jurisdiction because plaintiff had not paid sufficient amount at time of suit to confer jurisdiction thereon.

11. Contracts ⊜56—Promise to pay specified proportion of costs and expenses incurred in certain case held sufficient consideration for promise of other party thereto to pay specified proportion of costs and expenses incurred in another case.

Contract of corporation, interested with other party in proposed litigation, that it would pay certain proportion of expenses and costs incurred in case of such other party against certain defendants, was sufficient consideration for promise of other party to contract that it would pay specified proportion of costs and expenses incurred in action by corporation.

12. Contracts ⊜206—Contract held not to require one of parties to defray all costs and expenses incurred in trial and appeal of either case referred to therein.

Contract between corporation and person, interested in proposed litigation, that each should pay specified proportion of costs and ex-

penses incurred therein, and that they should pay such amount in specified proportion in each action of corporation against certain defendants and in case of the person against certain defendants, did not require one of parties thereto to defray all costs and expenses incurred in trial and appeal of either case, although separate cases by each party were contemplated.

13. Limitation of actions ⇐27 — Action on written contract held not barred by two-year limitation.

Action on written contract by party thereto to recover specified proportion of costs and expenses incurred in certain litigation was not subject to Code Civ. Proc. § 339, requiring action on contract, not founded on written instrument, to be brought within two years especially in view of fact that action was brought within three months from time total costs and expenses of litigation were ascertained.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by the Weinberg Company against Rosa Heller on a contract. Judgment for plaintiff, and defendant appeals. Affirmed.

James, Pace & Smith, of Los Angeles, for appellant.

Fredericks & Hanna, of Los Angeles, for respondent.

CRAIG, J. The subject of this action consists of an alleged obligation of the appellant to pay one-half of all expenses incurred in the preparation, trial, and appeal of a suit for injunction and damages, instituted by said corporation. A concise statement of the relations of the above-named parties, and the subject-matter of the former suit, are best presented by the language of a contract in writing, denominated "Agreement of Employment," dated November 22, 1915, which forms the basis of this proceeding. We therefore quote therefrom the provisions which are essential to a determination of the questions here involved, as follows:

"That whereas, the undersigned is interested in certain lands lying southeast of the Los Angeles river (also known as the San Gabriel river), within and near the limits of the city of Long Beach, all in the county of Los Angeles; * * *

"Whereas, the undersigned has sustained loss and damage to his said lands referred to above by reason of the diversion and overflow of waters of said river from and out of its natural course; and

"Whereas, the undersigned claims damages growing out of the same; and

"Whereas, the undersigned has determined to institute proceedings in court against the parties responsible for the diversion of said waters, and for the recovery of damages therefor, and also to abate the nuisance as an incident to such action for damages, and to pursue any and all other necessary courses at law:

"Now, therefore, the undersigned hereby employs [certain firms of lawyers named, for the purpose above specified, upon conditions and for a contingent compensation specified in detail].

"It is agreed, that the undersigned shall not be required to advance or pay any cost or expense incurred by said attorneys, except that the Weinberg Company, a corporation, shall advance and pay eight-fifteenths (8/15ths), and that Rosa Heller shall advance and pay seven-fifteenths (7/15ths) of all the costs of court incurred in this action, including court costs, reporters' fees, jury fees, and costs of appeal; and said Weinberg Company, a corporation, and Rosa Heller shall pay said amount in said portions in each action of the Weinberg Company against George Bixby or George Bixby and/or other defendants and in the case of Rosa Heller against George Bixby or George Bixby and/or other defendants.

"It is agreed, that said attorneys shall commence action or actions to abate said nuisance and/or recover said damages as soon as reasonably possible after the signing of this agreement and shall prosecute said actions with reasonable diligence until they shall have been finally disposed of in any court to which the same may be carried by any party thereto; provided further that it shall be discretionary with the said attorneys whether or not they shall institute or conduct any proceedings on appeal on behalf of the undersigned in any action commenced herein. * * *

"In witness whereof, the parties hereto set their hands and seals this 22d day of November, 1915.

"[Signed] The Weinberg Co.,
"By I. Weinberg, Pres.
"Rosa Heller.

"We hereby accept the above terms of employment.

"[Signed] Vietch & Richardson,
"Andrews, Toland & Andrews."

Thereafter an action was commenced by the Weinberg Company against the Pacific Electric Railway Company and others for the damages mentioned in the agreement, in the sum of $80,000, and a like suit was instituted in the name of Rosa Heller, against the same defendants, for damages in the sum of $70,000. After issue joined in each suit, there was some discussion by the attorneys whom Weinberg and Mrs. Heller had by said contract agreed to employ, with counsel for the defendants in said suits, and with the above-named contracting parties, plaintiff and respondent, and defendant and appellant herein, regarding efforts to persuade the defendants' counsel to consolidate them, and upon the advice of a civil engineer as to the expediency of trying the Weinberg Case first, the latter was set for trial. It appears that Weinberg and Mrs. Heller were advised by their counsel that in the event of success in the trial of one case they could probably negotiate a settlement of the other, but failing in this they might more easily prosecute the same to judgment; that the Weinberg Case was considered as involving all the facts,

was the best case to try first, and a final decision therein would be determinative of the Heller Case.

The action filed by the Weinberg Company was, therefore, by consent of all parties tried, and a judgment was rendered in the superior court in favor of the plaintiff therein against all the defendants except the Pacific Electric Railway Company, for the sum of $40,000; the railway company receiving a judgment against Weinberg for costs. Practically all the plaintiff's costs and expenses of the trial were paid by the respective parties to this appeal, in the proportions specified in said contract. Appeal from such judgment was thereupon taken to the Supreme Court by the defendants against whom it was rendered, and was reversed. Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25. The action was not retried, nor was the case of Heller v. Bixby et al. ever brought to trial.

Following said reversal, Weinberg, acting on behalf of his corporation, demanded that Mrs. Heller pay the sum of $2,025.08, which was seven-fifteenths of the costs and expenses incurred upon appeal, including judgments for costs obtained by the several defendants, and a portion of the expenses of the original trial, which remained unpaid. Appellant declined to pay any portion of the amount demanded, and the respondent thereupon instituted this action, wherein he received a judgment for $1,979.75.

There is no dispute as to the parties having executed the agreement, nor that the costs and expenses were incurred as alleged in the complaint herein. A number of grounds have been advanced as a defense, however, principal of which are, (1) that there were no contractual obligations between the Weinberg Company and Rosa Heller; that the signed agreement was no more than a simultaneous agreement to employ the same attorneys; that appellant did not agree to pay any costs except such as should be incurred by their attorneys; (2) that the sole consideration for the agreement as to any division of costs incurred by said attorneys was a further agreement that the two cases should be consolidated and tried together, and that the proportionate responsibilities of the plaintiffs therein were but tentatively fixed as a basis of the written contract of employment, and were subject to certain reapportionment at the termination of the litigation; (3) that, since the cases were not consolidated, the defendant herein was relieved from any obligation which she may have assumed as to payment of costs.

[1] In the first place, we think appellant is incorrect in the contention that there was no contractual obligation between the Weinberg Company and Rosa Heller. In this connection, appellant devotes quite extensive argument and quotation from authorities to an attempted application of well-established principles of law to a construction of the agreement which assumes that the transaction was a joint undertaking, for the prosecution of a single action, or the pursuit of a common cause. She insists that she did not contract with Weinberg, but jointly with him employed the attorneys named, and that her legal obligation, if any, was only to pay them, and that if Weinberg may have paid the whole amount, he might seek a contribution, and hence that this action upon the contract is without foundation.

[2] This position is novel, but not tenable. Appellant signed the contract with Weinberg, expressly promising to pay seven-fifteenths of the costs and expenses incurred in the Weinberg Case "including court costs, reporters' fees, jury fees, witness fees, and costs of appeal." The contract specifically fixes the proportion of all costs and expenses which Rosa Heller agreed to pay when incurred in the trial and appeal of the Weinberg Case. The costs and expenses were concededly incurred, and she paid her proportionate share of many items during the trial, which stamped the contract with her approval and partial performance, and, when hope for success vanished, she denied further liability for costs and expenses incurred, contending that Weinberg had agreed to have both cases tried together, and sought to vary the express provisions of the written instrument. It is not contended that fraud was practiced upon her, or that there was any mutual misunderstanding of the contract which would warrant its cancellation or modification; and it is plainly obvious that the instrument is silent as to consolidation. It clearly provides that she shall pay seven-fifteenths of all court costs and expenses incurred in each case by said attorneys; the attorneys incurred costs and expenses in one case, the result of which obviated the necessity for further costs or expenses in the other case. Separate suits are provided for by the contract, and the actions were in fact separately instituted. There is no claim that the interests of Weinberg and Mrs. Heller were in common, nor was the same land affected; and it was not contemplated that either of the plaintiffs should share in the proceeds of any judgment which might be obtained by the other. The contract outlined shows it to contain first a recital of the conditions giving rise to certain anticipated litigation; then, the terms upon which counsel shall be employed; and next, the provisions here in controversy, beginning with the words, "It is agreed," and which have to do with the payment of certain costs and expenses by the respective parties. The instrument is signed by both parties. Thereafter appears an acceptance of the terms of employment, signed by counsel. This addendum amounts to nothing more than an approval and consent on the part of counsel to act in accordance with the terms

and provisions of the contract, as agreed between the parties. Had this acceptance been omitted, appellant's construction of the contract would have been impossible. Yet, it cannot be said that this addition had the effect of altering the instrument and changing its nature.

[3] One of appellant's contentions is that the provision of the contract by which the Weinberg Company stipulated that it would pay eight-fifteenths, and Mrs. Heller agreed to pay seven-fifteenths, of the enumerated expenses incurred, was understood by the parties to furnish only a tentative arrangement, and that the proportions to be borne by the parties were to be rearranged. The second answer of the defendant contained an allegation to this general effect, which the court found to be true. This allegation is that there was an express "understanding and agreement that such contract should not be final, but subject to reapportionment at the end of the litigation in the ratio that the recoveries of the respective parties should bear to each share." The obvious reply to this defense is that the contract clearly contemplated that the parties should pay in the ratio of eight-fifteenths and seven-fifteenths as expenses were incurred. It is immaterial that a further oral agreement for contingent reapportionment was made before the written agreement was executed. This instrument contains no reference to reapportionment. Appellant did not plead fraud or mistake. If there were any oral negotiations or understandings occurring previously to the execution of the written instrument, they were merged therein. Civ. Code, § 1625.

[4, 5] It is also asserted that the evidence failed to sustain the finding that Weinberg was authorized to bind the corporation, and that the plaintiff was not therefore obligated to appellant by such instrument, and the contract was not mutual, since had Mrs. Heller instituted an action against the corporation, it could have denied the authority of Weinberg to sign the name of the Weinberg Company. The citation of authority is hardly necessary to the disposal of this point in her argument. Section 1588 of the Civil Code provides that:

"A contract which is voidable solely for want of due consent, may be ratified by a subsequent consent."

The beginning of the present action was in itself a complete ratification of the contract, which forms the basis of this controversy. Again, section 1589 of the same Code provides that:

"A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting."

The respondent corporation at once started suit, as did appellant, in pursuance of the terms and conditions of said contract; it expended moneys for the costs and expenses which are the subject of this action, thus performing the conditions, and accepting the benefits, of the agreement. It could not, therefore, have denied liability under the provisions of the contract which it had fully ratified by performance.

[6] In support of her claim that the facts furnished grounds for no other action than one of contribution, appellant cites authorities applying to facts constituting a combined interest of the parties to the litigation. Huston v. Fisk, 10 La. Ann. 769, is representative, and is decided upon sound principles of law, but it did not involve variant and several interests, or disunited properties. The plaintiffs and defendants were proprietors of a property from which they had been threatened with eviction. They agreed to contribute proportionately to their respective interests in the property, for the purpose of prosecuting a writ of error to the Supreme Court of the United States. It was agreed by the parties that a fund of $4,000 be thus provided, which the defendants failed to assist in assembling, for the defense of the litigation. The plaintiffs paid all of the expenses, and sued the defendants for the proportionate share, which they had agreed to pay. The Supreme Court of Louisiana, in affirming a judgment against the latter said:

"They chose to employ other counsel than those already employed by all the proprietors, for the purpose of remedying the mischief occasioned by their own laches or bad faith. The payment of such counsel was their own affair. They might have paid their share when it was due, and gone to Mr. Pierce to prosecute their writ of error, without any additional expense. But because, by their own act, they incurred an additional charge, we cannot relieve them from the obligation of their contract to pay their quota towards the expenses which accrued under the joint resolutions for the joint benefit, and of which the defendants have reaped the profits, in common with their coproprietors."

The facts before us, in the case at bar, do not permit a holding that contribution would have been the appropriate action. A single writ of error, for the joint benefit of all the contracting parties, was contemplated in the case quoted, whereas, in the instant case, the parties contracted to commence and prosecute actions, not of coproprietors, co-owners, or coplaintiffs. There was no joint interest, or joint action, or community of interest in the result of any judgment intended. In Security Insurance Co. v. St. Paul F. & M. Ins. Co., 50 Conn. 233, an agreement was signed by several insurance companies which created a joint liability, each agreeing to contribute in proportion to their respective interests for the defense of a claim for loss. They appointed a committee to manage the defense, with full power to incur all neces-

sary expenses. The plaintiff, one of said companies, was afterwards sued by an employee of such committee, for his services in the original action, and recovered judgment for the full amount demanded. Said plaintiff thereupon brought suit against its cocontractors for contribution, and it was held that the latter, though not joined in the action of the employee, were at liberty to have joined in an effort to defeat it, had they seen fit to do so; but that the claim had been approved by the committee, and that the plaintiff could safely have paid it without waiting to be sued. It therefore at once becomes apparent that the employee could have prosecuted his action against either one or all of the contracting parties, whereas, in the case at bar, Mrs. Heller, under her contract, was liable to no one but Weinberg for expenses incurred in prosecuting his action against Bixby et al. It was agreed that she should "advance and pay" her seven-fifteenths of the costs and expenses incurred; Weinberg incurred them, but she failed to pay her share. He testified that the reason for such provision was that he did not have the means with which to pay the entire expense contemplated when the agreement was made. The doctrine of contribution is not involved in the facts of this case. Plaintiff's right of action, if any it has, does not arise out of the theory of contribution, but is founded upon defendant's express contract to pay seven-fifteenths of the court costs and other expenses mentioned. It does not arise out of any implied contract, as in the case of contribution. If the corporation became individually liable for all of the court costs and expenses of the litigation, it is not because of any contractual obligation arising out of this contract. It is because, and only because, it was the sole party plaintiff and the sole losing party in the action in which the costs and expenses were incurred; that is, it was the sole losing party after the decision of the Supreme Court.

"A party to a joint, or joint and several obligations, who satisfies more than his share of the claim against all, may require a proportionate contribution from all the parties joined with him." Civ. Code, § 1432.

[7] The obligation must be joint, or joint and several. In the contract under consideration there was no joint contract of Weinberg and Heller with any one. If Weinberg and Mrs. Heller, jointly, or jointly and severally, had agreed with some third person to compensate him, each would then be liable to such party for the whole amount, and if one paid all, he might seek contribution from the other. The principle of equity, on which the right of contribution is founded, applies only where the parties are under a common burden of liability. Where the parties are severally bound for a specific portion of a debt, as principals, and one pays more than he is bound for, he is entitled to no contribution from the other for such excess. 13 Corp. Jur. p. 82, and cases cited in note 20, viz.: Los Angeles Nat. Bank v. Vance, 9 Cal. App. 57, 98 P. 58; McArthur v. Board, 119 Iowa, 562, 93 N. W. 580; Briggs v. Barnett, 108 Va. 404, 61 S. E. 797.

[8, 9] Nor could appellant require proof of actual payment by respondent before she should "advance and pay" her share; when the expense was incurred, Weinberg became liable therefor, and by the terms of the contract seven-fifteenths thereof then became due from the appellant. The legal definition of the term to "incur" has been announced in many decisions in various jurisdictions. The Supreme Court of Oklahoma, in Bank v. Eckles, 19 Okl. 159, 91 P. 695, said:

"The word 'incurred' is defined by Webster as 'to become liable or subject to; to render liable or subject to.' Black says: 'Men contract debts. They incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by operation of law. "Incur" means something beyond contracts, something not embraced in the word "debt."' In Scott v. Tyler, 14 Barb. (N. Y.) 202, 'incur' is held to mean 'to become liable for.' Flanagan v. Baltimore & O. R. Co., 83 Iowa, 639, 50 N. W. 60: 'To become liable for.' In Beekman v. Van Dolsen [70 Hun, 288] 24 N. Y. S. 414: 'To become liable for.' In Deyo v. Stewart, 4 Denio (N. Y.) 101: 'Brought on himself.' In Ashe v. Young, 68 Tex. 123, 3 S. W. 454: 'Brought on, occasioned, or caused.'"

In re McElheny, 91 App. Div. 131, 86 N. Y. S. 326, held that the provision, "The above note is left as collateral security for all liabilities incurred," should be construed as intending to cover an indebtedness brought into existence, and that "a lien attached in their favor * * * when such indebtedness existed and was due." And in Beekman v. Van Dolsen, 70 Hun, 288, 24 N. Y. S. 414, which involved a contract containing the provision: "We hold ourselves responsible for any cost or damage which may be incurred by said Van Dolsen in treating said Thompson according to law as a trespasser," it was said:

"It is urged that the law is settled in this state that, where the guaranty is against any liability, then the costs and legal damages which may have been incurred may be recovered, but where the contract is a guaranty against damage or a guaranty against loss, actual damage or actual loss must be shown before a recovery can be had. But it seems to us that, applying the rule above claimed, the point urged is not well taken. The guaranty is not against damage which may be suffered, but against cost and damage which may be incurred. 'Suffered' means 'paid,' 'incurred' means 'become liable for.' The language is, 'we hold ourselves responsible for any costs and damages which may be incurred by said Van Dolsen,' not 'which he may suffer;' and the purport of the

language is the same as though it read 'which he may become liable for,' because the incurring of a liability does not necessarily mean that such liability has been paid."

[10] Appellant makes the point in the instant case that, should she be held liable for her portion of the costs and expenses incurred by respondent, he had not actually paid a sufficient amount thereof at the time his suit was commenced against her to confer jurisdiction upon the superior court, and that his action was therefore premature. However, as indicated, the respondent incurred costs and expenses in fulfillment of his part of the contract; he brought them upon himself, and became liable for them, and at that moment appellant became liable under the express provisions of her contract for the portion which she agreed to pay when incurred. It was not contemplated by the parties, nor was it agreed, that appellant should be liable only after respondent could show actual payment which the contract was, in part at least, intended to avoid.

[11, 12] An element of the defense which appellant contends establishes her right to a reversal upon this appeal is that there was no consideration for the promise which the respondent seeks to enforce. However, the Weinberg Company reciprocally obligated itself to pay eight-fifteenths of all costs and expenses which might be incurred in "the case of Rosa Heller against George Bixby or against George Bixby and/or other defendants." It appears that appellant's rights were adjudicated at about one-half the cost of litigating one of the cases, and that it was originally understood that a victory in one case would doubtless obviate the necessity for a trial of the other. Weinberg testified that his corporation could not have maintained the expense alone, and that such was not the intention of either party at the time the contract was signed; nor do we think the language of the instrument in question is susceptible of a construction which would require one of the parties to defray all the costs and expenses incurred in the trial and appeal of either case. The successful termination of one of the suits was not made a contingency as to the obligation of the parties to the contract; and, this being true, it cannot be said that an adverse decision would relieve them therefrom.

[13] Again, it is contended that the action was barred by the provisions of section 339 of the Code of Civil Procedure, which requires that an action upon a contract, obligation, or liability, not founded upon an instrument in writing, must be brought within two years. This action being, as we have shown, founded upon an obligation arising from an instrument in writing, the point is not tenable. Weinberg v. Bixby, supra, was reversed March 26, 1921, and the complaint herein was filed June 6, 1921, within about three months from the time the total costs and expenses were ascertained.

No other points appear worthy of discussion, and, no error having been shown, the judgment is affirmed.

We concur: FINLAYSON, P. J.; WORKS, J.

---

74 Cal. App. 48

In re CARSON'S ESTATE. (Civ. 2964.)

(District Court of Appeal, Third District, California. July 28, 1925. Rehearing Denied Aug. 27, 1925. Hearing Denied by Supreme Court Sept. 24, 1925.)

1. Wills ⇐166(1) — Evidence held to show last will of testatrix expressed her wishes.

Evidence *held* to show last will of testatrix expressed her wishes.

2. Wills ⇐155(1)—What constitutes "undue influence" stated.

In order to establish that a will has been executed under "undue influence," it is not only necessary to show that such influence has been exercised, but that it has produced an effect upon the mind of the testator by which the will which he executes is not an expression of his own desires, constraining him to make a disposition of his property contrary to that he would have made if permitted to follow his own inclination or judgment.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Undue Influence.]

3. Wills ⇐155(4) — Kindness and consideration shown testatrix by husband and beneficiary cannot be considered as undue influence impeaching testatrix's will.

Kindness and consideration shown testatrix by husband and beneficiary cannot be considered as undue influence impeaching testatrix's will.

4. Wills ⇐155(1)—Prejudice or aversion of testatrix for some of natural objects of bounty does not constitute undue influence, though will is clearly fruit of resentment or dislike.

Prejudice or aversion of testatrix for some of natural objects of bounty does not constitute undue influence, though will is clearly fruit of resentment or dislike.

5. Wills ⇐55(1) — Evidence of what took place at execution of will held to irresistibly show that testatrix was able and free to execute same.

In view of testimony of attorney who drew will and doctor and nurse who attended testatrix, *held*, that evidence as to what took place at execution of will irresistibly showed that testatrix was able to make a will and was, at the time, free to act in executing same.

6. Wills ⇐166(12)—Testatrix's change of attorney held to have no bearing on question of validity of will.

In a will contest on the ground of undue influence, where it was shown that will was

drawn by a different attorney than usually employed by testatrix, *held*, that such circumstance had no bearing on question of will's validity.

7. Wills ⇐166(12)—Undue influence may be established by circumstantial evidence, but such evidence must do more than raise suspicion.

Undue influence may be established by circumstantial evidence, but such evidence must do more than raise a suspicion and must amount to proof, and has force or proof only when circumstances are proven which are inconsistent with the claim that will was spontaneous act of alleged testator.

8. Wills ⇐158, 159, 166(5)—Undue influence must destroy free agency of testator at time of making testament.

Undue influence to avoid a will must destroy the free agency of the testator at the time and in the very act of making the will and must bear directly upon the testamentary act, and fact that a testator makes a foolish, unnatural, or unjust will does not show undue influence.

9. Evidence ⇐568(2)—Opinion of witness as to testatrix's capacity can be of no more weight than reasons upon which based.

The opinion of a witness that a person is of unsound mind can be no stronger than or of superior evidentiary weight to reasons on which he bases his opinion.

10. Wills ⇐45—Law permits wills to be made on deathbed, and duty devolves upon courts to give effect to and protect such wills.

The law permits will to be made on deathbed of testator, and a duty devolves upon the courts to give effect to every safeguard the law has provided to protect the will, if it appears to be the true will, and to see that it stands, though made in some degree of weakness.

11. Wills ⇐163(2)—No presumption against validity of will on ground of undue influence from relation of husband and wife.

No presumption against the validity of a will upon the ground of undue influence will be permitted to be indulged in this state from the relation of husband and wife.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

In the matter of the estate of Laura Jane Carson, deceased. From a judgment in favor of Emma Jeannette Chase, as contestant of deceased's will, Lawrence E. Carson, as proponent, appeals. Reversed.

T. W. Chester and Lee Gebhart, both of Sacramento, for appellant.

H. W. Zagoren, Markham Johnston, and Howe, Hibbitt & Johnston, all of Sacramento, for respondent.

ANDERSON, Justice pro tem. Laura Jane Carson of Sacramento county died testate on or about the 8th day of February, 1923, leaving her, surviving, Lawrence E. Carson, a husband, and Mrs. Emma Jane Chase, a daughter. Deceased was 80 years of age past. Her will was executed February 1, 1923, while she was ill with pneumonia. In this will Lawrence E. Carson, her husband, was named executor, a legacy of $10 was left to Emma J. Chase, a daughter, a legacy of $500 to Carrie Johnson, a niece, and the residue was left to the husband. The estimated value of the estate was about $7,000. She had several months before, conveyed other property to the husband. The validity of the will was contested by Mrs. Emma J. Chase, the daughter. The grounds of contest were unsoundness of mind and undue influence. The undue influence was alleged to have been exercised by the husband, Lawrence E. Carson. The case was twice tried by the court, sitting with a jury, and upon each trial the court refused to submit the question of unsoundness of mind to the jury. On the second trial the jury rendered a verdict in favor of the contestant on the question of undue influence.

The contention of appellant is that the verdict of the jury is not substantially supported, or supported at all, by evidence, and that the question of undue influence should not have been submitted to the jury. It is also contended that the court erred in permitting a nonexpert witness to express an opinion on the question of unsoundness of mind, particularly as the court had, at the first trial, granted a nonsuit on the question of unsoundness of mind and no appeal had been taken therefrom.

It will be necessary to refer to the evidence to determine as a matter of law whether the evidence substantially and fairly supports the verdict of undue influence. It seems that the contestant's mother and father separated (whether or not they were divorced does not appear) about the year 1910. The exact time is unimportant. Before the separation they were living in a home which the mother had built (the evidence is not clear as to whether or not this was the mother's separate property before marriage). The mother continued to live in this house until her death. After the separation the father lived a few years in Sacramento in a separate residence and the daughter lived with the mother. Thereafter the father moved to Los Angeles and in a few years the daughter went to Los Angeles to live with the father. This residence continued for a duration of about 16 years, until the father's death. The father accumulated apparently $12,000 worth of property, several thousand of which were used by him in his last sickness, according to the testimony of the daughter. The balance was given to the daughter. During this period of 16 years the daughter visited the mother once. After the death of the father the daughter returned to live with the mother and continued to live with her until August

4, 1922. The daughter's maiden name was Burke. It does not appear when she was married. It appears from the evidence that it was the father's desire that the daughter should keep the property he gave her for herself, and, if there was anything left, it should be given to orphan children. The daughter testified that she told her mother this. She testified in her deposition first taken to that effect, and at the trial testified that she told her mother when "we" are through with it, it is to go to the orphans. There is testimony in the record to the effect that the mother had said that as the daughter, Mrs. Chase, was going to follow the father's wishes and the daughter did not intend to give the mother any of her property, she would see that the daughter received none of hers. There is also much evidence in the record to the effect that the mother was fearful that the daughter was trying to get the mother's property so that it might be given to the church. This seems to have worried the mother much, and immediately after the will was made she remarked to the nurse: "I can rest easy now, the minister, Rev. Bartlan, and the rest of them cannot spend my money." She made other declarations that the daughter spent too much money in the church, and she also told many people that she was usually left alone; the daughter was not much company to her as she practically lived in the church. The daughter admitted she spent much of her time with the church. This is corroborated by the Rev. Bartlan:

"Q. Did she frequently attend every night in the week? A. Yes; I think I can say yes.

"Q. In regard to the daytime; did she have occasion to visit your church in the daytime? A. Once or twice a week she might come up there for services in the church.

"Q. Did she have any particular duties or any services she performed there? A. Yes; she had.

"Q. The question was, What were the usual hours that she was in attendance, had any activity with the church? A. At night.

"Q. At night? A. It would vary from 10:30 to 11:30, perhaps later, sometimes later."

We quote further to show the influence the minister had with the said daughter:

"Q. What did she say in regard to leaving Sacramento prior to August? A. Well, she asked me whether it would be advisable for her to leave Sacramento, detailing the circumstances of her environment at her home.

"Q. And you told her what? A. I advised her to leave, at least temporarily.

"Q. Did Mrs. Chase go to Oakland? A. Yes.

"Q. And do you know when she returned? A. About a week after her mother's death."

When the trouble occurred between Mr. Carson and Mrs. Carson, as will appear further on, because Mr. Carson went away about August 1, 1922, it seems that the Rev. Bartlan was present with the mother and daughter on the way to Attorney Dunn's office, apparently to talk about the divorce matter.

About the month of February, 1921, Lawrence E. Carson, the proponent, went to work at the home of Laura Jane Burke at Thirtieth and B streets, Sacramento. Soon thereafter he was given a room, and he did garden work a short time. Prior to this he had been discharged, it seems honorably, from the United States army; this was his second enlistment. It will be necessary to refer to this again. There is some dispute as to his age, and we deem it fair to say it was slightly upwards of 50 years, while Mrs. Burke's age was slightly upwards of 80 years. This acquaintanceship grew into a marriage at Marysville November 7, 1921. After the marriage they lived at the old home residence of Mrs. Carson, together with her daughter. Then came the old story of the child objecting to a parent marrying a younger person or any one else. The evidence reveals the attitude of some of the neighbors sympathizing with the daughter by reason of the marriage; some of them refused to visit Mrs. Carson. This trouble between Mr. and Mrs. Carson occurred early in August, 1922, when Mr. Carson went to the southern part of the state to see his daughter by a former marriage. He did not inform his wife that he was going away at the time he left. The evidence, and a fair inference therefrom, reveal that something occurred which entirely turned Mrs. Carson against her husband. Attorneys were consulted, divorce was discussed, ministers of the Gospel apparently appealed to, banks were visited, safe deposit boxes were searched, the husband was accused of taking valuable documents away, etc. At about the time the fever of excitement was highest, the husband returned. The explanation of the husband seemed to satisfy the wife; but the daughter, about the 4th day of August, 1922, very clandestinely left the city and did everything she could thereafter to conceal her whereabouts from her mother, and never again, it seems, tried to see her mother, although she was in Sacramento a month before the mother's death and was further notified of her mother's last illness, which notice she admitted receiving.

It is at least insinuated by the contestant that Carson was not the right man for Mrs. Carson to marry; that he was too young, etc. This could be said more effectively in Estate of Anderson, 185 Cal. 700, 198 P. 407, and many other cases. Every case of the kind depends largely upon circumstances. Carson may be called a gambler because he had something to do with cards upon a certain occasion. He may be considered not thrifty because he did not own much of this world's possessions, but one fact stands out all through the testimony, that he was always willing to work and did work. This naturally appealed to Mrs. Carson, as she, it seems, had worked hard all her life, and it is a mat-

ter of common experience that people who have worked hard for a living do have much respect for people who perform manual labor. If he did not have much means it must be borne in mind that many years of his life were spent in the army and every one knows that the government does not pay very much. He did well to save what he did from his last enlistment. He claimed to have deposited several hundred dollars in a well-known San Francisco bank at a certain time. Contestant seemed to doubt this. If Carson was not telling the truth about this, there was ample time to impeach his statement by evidence that would be indisputable, but this was not done and it might have been important for contestant if it could have been done. He met Mrs. Carson shortly after he left the army at the conclusion of the world war. At that time enthusiasm for the soldier had not yet subsided, as it sometimes unfortunately does in time, and so Mrs. Carson may have been very proud to claim, as we might say, an old soldier for a companion. There may have been other reasons why she might have liked him, although others might not, but we have no concern with that. There is, however, abundant evidence in the record to show that he was kind to her. He even did much of the housework, and this while performing his daily garden work for others, and he seems always to have been at home at night with her. Many witnesses testified that Mrs. Carson often declared that her life had been made happy and her work and duties much easier after her marriage to Mr. Carson and that she wished she had met him long before she did. Much of the record is taken up with testimony in relation to what his earnings were before and after the marriage, and about the placing of the husband's name in certain instruments and not putting it in others, etc., and putting it on and taking it off of safe deposit boxes. The most of the matters in relation to this occurred about the time the trouble happened in August, 1922, and we think it shows that Mrs. Carson had strength of mind sufficient to do as she pleased and expressed herself with considerable firmness even, according to the daughter's testimony. It seems that Mr. Carson had nothing to do about putting his name in the Hartman mortgage, one of the instruments, it appears, he was accused of having taken away with him at the time of his absence. Mr. Hartman, the mortgagor, explained this quite fully. Mr. Carson seems to have had but little education and practically no business knowledge. He probably did think that if the home should be placed in his name, he being a discharged soldier, they would escape the taxes. Another matter which is much stressed is: The daughter stated that Mr. Carson urged the testatrix to deed her home to him in order to escape payment of taxes, he being an ex-soldier, and that when the testatrix refused "he told her he would go down and see Judge Glenn and have her declared incompetent and * * * get it that way." Mr. Carson denied this, but testified:

"I told her that Mrs. Chase had run away with her money and her securities. * * * I told her I would go before the superior court, if she wanted me to, and have the public administrator take care of her affairs. She told me, 'No, rather I attend to her affairs.'"

He said he thought this would be a relief to Mrs. Carson as she was at that time so nervous, no doubt on account of the quarrels between the daughter and husband. Had it been his intention to do this, surely he was not then trying to exert undue influence upon Mrs. Carson, because such an act probably would have entirely destroyed the possible results of the undue influence, had any been attempted. He may have said, "Jennie is crazy," referring to Mrs. Chase, but he had a right to his own opinion, and this was merely opinion. However, according to the mother, the daughter, Jennie, was "peculiar" and had "spells," but statements by the husband against the daughter, if the mother had any great affection for her, would only tend to make the mother cling more closely to her daughter out of pity for her, thus defeating the effect of any purpose that may have been intended. This feature is revealed and commented upon in Estate of Bryson, 191 Cal. 521, 217 P. 525, and in other cases.

At least three reasons appear why the daughter was not provided for in the will, any one of which might have been sufficient to produce the terms of the will: First, it appears from the testimony that Mrs. Chase told her mother what her father told her she should do with the property he had given her (Mrs. Chase). It does not appear what occasioned the separation between the father and mother, but it seemed to be sufficiently strong to last until death. No doubt the mother reasoned that the daughter cared more for the father than she did for the mother, as she seemed to adhere so steadfastly to his wishes, and it is not hard to believe that she declared, in effect, that—

"Jennie shall not have any of my property, as she does not intend to give me any of hers."

The second reason is that she no doubt encouraged her mother to believe Mr. Carson took her papers away and that he probably had no intention of returning, and she no doubt did what she could to turn the mother against him, and when the husband returned and explained everything, apparently to the satisfaction of the mother Mrs. Carson probably then felt her husband had been wronged. This, no doubt, intensified her feeling for Carson, if anything was lacking before. Our Supreme Court, in Estate of Wilson, 117 Cal. at page 279, 49 P. 172, 177,

comment upon the effect of such a reconciliation:

"But during her last sickness, and after she had made the will of February 27th, her husband frequently went to see her, and they were often together alone; and it was quite natural that under these circumstances, her animosity to him should soften, as it evidently did."

It was but natural for the mother then to criticize the daughter, probably charging her with trying to cause her to divorce her husband, which the daughter resented by leaving. If any hope still remained for her to be the recipient of her mother's bounty, in the face of the last two reasons against her, she must have destroyed every vestige of chance by concealing her whereabouts and permitting only the minister, Rev. Bartlan, to know where she was, the minister refusing to tell the mother at all because the daughter had warned him not to, thus aggravating an already very tender grievance with the mother, caused by the daughter paying too much heed to the minister's advice. Naturally this would influence the mother more against both the minister and the daughter, and she gave expression to these feelings at the time she made the will, as before quoted, but the effect of this conduct was augmented and reinforced by what must have appeared to the mother as nothing less than cruelty when, in her last sickness, she had a telegram sent to the daughter stating she was very ill and asking her to come; the daughter receiving the message, but making no reply. The telegram was sent about 7 days before the mother died, and the daughter could have responded in person in less than 24 hours, or, had she been ill, as claimed, she could have afforded her mother the consolation of a message in recognition of the telegram. This might have, even at this late date, caused the mother to redraft the will. The mother died February 8th. About a week after the mother was buried, the daughter returned to Sacramento, according to Rev. Bartlan's testimony.

[1, 2] With these reasons before us, we cannot say that the will does not express the wishes of the testatrix, and upon this we quote from Estate of Bryson, 191 Cal. at page 541, 217 P. 525, 533:

"'In order to establish that a will has been executed under undue influence, it is necessary to show, not only that such influence has been exercised, but also that it has produced an effect upon the mind of the testator by which the will which he executes is not the expression of his own desires' (Estate of Calkins, 112 Cal. 296, 44 P. 577), * * * constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment (Estate of Kilborn, 162 Cal. 11, 120 P. 762)."

The daughter stated, in explanation of her failure to answer the telegram, that she thought the telegram was sent as a hoax to induce her to come home, and also that she was ill at the time the telegram was read to her. The daughter may have been actuated by what she considered the best of motives by refusing to see and concealing herself from her mother, but that does not soften the harshness of her conduct as it must have appeared unexplained to the mother, and we can only consider what would be the usual effect of her conduct upon the mother, and we feel that this would be the same whether the mother was strong or weak, sick or well, but the effect probably would have been aggravated had she been, as the daughter claimed, sick and weak. We find no place in the testimony where Mr. Carson tried to keep the daughter from visiting the mother when Mrs. Chase was in Sacramento in January, 1923, or at any other time before the mother was taken ill. In the letter Mrs. Schardin wrote about the 1st of January, 1923, Mrs. Carson had her write Jennie that she would not make her any trouble if she would return the papers, and told her to tell her also that she had deeded the home place to Mr. Carson. The daughter did not answer the letter, but apparently received it, as about January 8th she came to Sacramento and returned the papers. In regard to the papers, the following occurred in the testimony of Rev. Bartlan:

"Q. Did she inform you at any time prior to her departure in August, 1922, about having papers and moneys, etc., belonging to Mrs. Carson? A. I doubt it very much; I don't remember.

"Q. Will you say she did not? A. I cannot be pinned down; I do not remember."

Rev. Bartlan also testified in regard to the papers of Mrs. Carson:

"Q. Will you state what was said by her and by yourself at that time regarding the disposition of the papers? A. I told her I was glad she came back and had restored the papers."

When Mrs. Carson had Mrs. Schardin state in the letter to the daughter that she had deeded the home place to the husband, this put Mrs. Chase on notice so she could have interviewed the mother when she came to Sacramento on this January trip and she could have ascertained then, if she desired, if Mr. Carson had used any undue influence or force to procure the deed, and, if justified, she thus would have had the mother's assistance to prove the undue influence, if any had been exerted; but she did not attempt to go near her mother for any purpose.

[3] Instead of the will being an unnatural will, it is only a fair illustration of the ordinary display of the operation of natural resentment by a parent of real or fancied wrongs. The cases are full of instances where the reasons for the resentment were more indirect and more trifling as compared with the reasons here shown and no doubt

were the turning point against the child, and in some cases the beneficiary disgustingly encouraged the resentment. We refer to one case cited by our Supreme Court in the Estate of Kaufman, 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179, being Clapp v. Fullerton, 34 N. Y. 190, 90 Am. Dec. 681. Mrs. Carson may not have reasoned like a philosopher, but it cannot be said that she did not reason as a majority of people would when angered, as she probably was, about the daughter's intention as to the disposition of her own property and at the way her daughter left her and apparently ignored her wishes to the last. Common experience teaches us that a child, or any one else, expecting to be the recipient of the bounty of others, who gives cause for anger and resentment, does so at his peril. If, then, Carson took the other course, and by being kind and considerate thereby gained the testatrix's affections and bounty, it was legitimate, and we must permit it to have its proper effect. The Supreme Court in the Estate of Donovan, 140 Cal. pp. 394 and 395, 73 P. 1081, 1082, quoting with approval a decision in another jurisdiction, speaking of the effect of kindness, etc., say:

"'If a wife by her virtues had gained such an ascendency over her husband, and so riveted his affections that her good pleasure is a law to him, such an influence can never be reason for impeaching a will made in her favor, even to the exclusion of the residue of his family.'"

Mr. Carson was not present when the will was executed and we find the unusual condition in this case of the one charged with exerting the undue influence with having advised the testatrix not to make a will at the time she did. He said to her:

"That she had been ill before just like that, and she would be all right in a few days."

[4] Upon the question of resentment and dislikes, we quote the following from Mr. Freeman's notes in Re Hess, 31 Am. St. Rep. at page 680:

"The fact that the testator was prejudiced against or had an aversion for some of the natural objects of his bounty, and therefore disinherited them in favor of others, whether related to him or not, does not establish undue influence, though the will is clearly the fruit of his resentment and dislike [citing cases]. Nor, when family dissensions arise, will the fact that a child not only shared in the feelings of his parent respecting the conduct of another child, and perhaps kept alive and increased the parental resentment, constitute undue influence vitiating a will in favor of the former and against the latter. Woodward v. James, 3 Strob. (S. C.) 552, 51 Am. Dec. 649."

[5] Unusual proof is furnished in the instant case of the deliberate act in the execution of the will. It is first shown that the testatrix herself directed arrangements to be made for its execution. When the attorney arrived, a reasonable range of discussion followed between himself and the testatrix and, after ascertaining the wishes of Mrs. Carson, Mr. Gebhart began preparing the will. Before it was finished, the doctor arrived, and Mrs. Carson discussed matters in his presence, and, after the doctor read the will to her, and she had signed it, he, with the attorney, signed as witnesses. The attorney left taking the will with him. About the time he was leaving, the nurse had returned from another patient she had been attending and Mrs. Carson told her she arrived too late to be present when the will was made, but seemed relieved that the task was over and said: "I can rest easy now," etc. And she told the nurse how she had made the will and how happy she had been with Mr. Carson and told her that she had told the daughter before: "That she did not need to expect anything from her," etc. Whatever insinuations may be made against the attorney or Mr. Carson by the contestant, we are unable to see the slightest suspicion that could attach to the doctor or the nurse. No one even attempted to question their honesty and standing in the community and no impeachment of their testimony was even attempted. It seems that such direct evidence stands out so strongly that nothing less than the most convincing circumstantial evidence should be permitted to overcome such testimony. No one could doubt that they were innocent of any knowledge of any wrongdoing. According to their description of what took place, the conclusion is irresistible that Mrs. Carson was able to and did keep in mind all things necessary to qualify her to make a will, and was, at the "very time and in the very act" free to act and capable of acting in the execution of her will.

[6] Contestant seemed to think Mrs. Carson should not have changed attorneys. It does not appear that Mrs. Carson had occasion to employ an attorney many times. It would be difficult to try to account for the reasons why people change or select their attorneys. It may be that Mrs. Carson, after Mr. Carson came back and they were reconciled, thought the daughter and Mr. Dunn had encouraged divorce proceedings too strongly, and then again she might have said some rather severe things about the husband while he was away, and to meet Mr. Dunn again with her husband, or otherwise, knowing she had returned to him, would embarrass her, and then again, as the daughter knew Mr. Dunn so well, Mrs. Carson might have been fearful that the daughter would find out too much about her business in the future, assuming she was angry with her. No attention was paid to a like situation in the Estate of Purcell, 164 Cal. 300, 128 P. 932, and in that case a different attorney had drawn a previous will.

After a careful consideration of the record, we feel constrained to say, in the language of the Supreme Court in the Estate of

Langford, 108 Cal. at page 621, 41 P. 701, 705, referring to the McDevitt Case:

"In that case the verdict was against the validity of the will, and the judgment and order denying a new trial were reversed; and it would be inconsistent with the decision of this court in that case to affirm the judgment in the case at bar. Numerous authorities upon the subject may be found in the notes to In re Hess, 31 Am. St. Rep. 665."

Since the McDevitt Case was decided, so many cases have been decided in this state setting aside verdicts of juries which have condemned wills on the ground of undue influence and to properly note and analyze all of them would fill a volume, but, if we have read them correctly, they seem to evince a firm, unvarying course to adhere to the principles laid down in the McDevitt Case. The instant case is largely a case of "general influence not brought to bear directly upon the testamentary act," and a case also supported by declarations of the testatrix introduced to show "state of mind." We may appropriately say with the court upon the question of general influence, in the early case of Woodward v. James, 3 Strob. (S. C.) 552, 51 Am. Dec. 649, supra, cited in many jurisdictions and by our Supreme Court in Re Kaufman, 117 Cal. 295, 49 P. 192, 59 Am. St. Rep. 179:

"These unanimous decisions of our own courts, one would think, ought to put an end to applications to set aside last wills and testaments, on account of the mere general influence of legatees, without which, any legacy is seldom given at all, or on account of a supposed perverseness, in the distribution of his property, by the testator, or on account of his supposed unnatural dislike to his near relations, and the like; the more especially when we find that foreign jurists and judges have very uniformly laid down the same rules," etc.

[7] Undue influence may be established by circumstantial evidence, but—

" 'it must, however, do more than raise a suspicion. It must amount to proof, and such evidence has the force of proof only when circumstances are proven which are inconsistent with the claim that the will was the spontaneous act of the alleged testator. I think there is nothing beyond suspicion shown here.' " Estate of Anderson, 185 Cal. at page 709, 198 P. 407, 411, quoting from Estate of McDevitt.

"There is no proof. Circumstances have been proven which accord with the theory of undue influence, *none of which are inconsistent with the hypothesis that the will was the free act of an intelligent mind.* This does not amount to proof, and many circumstances are shown which are wholly inconsistent with the hypothesis of undue influence, and the presumption of law, in the absence of all proof in a contest, is in favor of the will." (Italics ours.) In re Calkins, 112 Cal. 304, 44 P. 577, quoting from the Estate of McDevitt.

We also quote the following from notes in Re Hess, at pages 687 and 688:

"To invalidate a will on the ground of undue influence, there must be affirmative evidence of the facts from which such influence is to be inferred. It is not sufficient to show that the party benefited by the will had the motive or the opportunity to exert such influence; there must be evidence that he did exert it, and so control the actions of the testator, either by importunities which he could not resist, or by deception, fraud, or other improper means, that the instrument is not really the will of the testator. * * * The burden of proof being on those who attack a will on the ground of undue influence, it is not sufficient that they barely show that the circumstances of the will are consistent with the hypothesis of undue influence; for this would be but to create an equipoise in the testimony, and the onus being on the party attacking the will, he must go a step further, and show by any suitable evidence the inconsistency between circumstances of the execution of the will, and its being executed without the interposition of undue influence" (citing many cases).

[8] The undue influence that must be proven to set aside a will, formally and solemnly executed, is clearly defined in the case of In re Kaufman, supra:

" 'Undue influence, however used, must, in order to avoid a will, destroy the free agency of the testator at the time and in the very act of the making of the testament. It must bear directly upon the testamentary act. * * * The fact, then, that a testator with such qualifications makes a foolish, unnatural, or unjust will, does not show that undue influence caused the will.' " Estate of Donovan, supra, at page 394, 73 P. 1082—citing many cases.

[9] From the evidence it would appear that Mrs. Carson was an unusually well-preserved woman for her age. She appeared to have no organic disease whatever. This is a rare condition for one of her age. No expert testimony was offered to prove that she was weak in any respect. Only a few acquaintances questioned her soundness and they, it seemed, had ceased to be friends after Mrs. Carson married, and their opinions could not be stronger than the facts upon which they were based:

"The opinion of a witness that a person is of unsound mind can be no stronger than or of superior evidentiary weight to the reasons upon which he bases his opinion." Estate of Campbell, 46 Cal. App. 621, 189 P. 812, 815, and see Waddington v. Busby, 45 N. J. Eq. 173, 14 Am. St. Rep. 706.

One of the witnesses in the instant case said:

"I do not know whether the woman was insane; I would say at times she was not real sound mind. She acted queer at times."

Another testified: "Well, not exactly sound," and a third said the decedent "was of unsound mind off and on for years." Against this testimony many witnesses testified that Mrs. Carson, while perhaps an un-

educated woman who had worked hard all her life, was quite a bright old lady; "a lovely old lady," as one of the witnesses said. The evidence was practically all this way. Besides, the doctor who was present when the will was executed declared her fully competent to execute the will. We think we may say the doctor was one of Sacramento's prominent and well-known physicians. His character and standing as a man and as a physician were not questioned at the trial. When Dr. Lindsay was sworn, the following occurred:

"Mr. Chester: Dr. Lindsay's qualifications will be admitted, I take it.

"Mr. Zagoren: As to what, as a doctor or a witness?

"The Court: In every respect.

"Mr. Zagoren: We admit both qualifications."

We enlarge upon this, because we must discuss later the question whether the jury had any right to refuse to follow the effect of his testimony as to the soundness of mind of testatrix at the very time of the execution of the will. No evidence was introduced to show the testatrix had ever lost anything by the mismanagement of her business affairs or otherwise. She must have managed well, else, no doubt, it would have been proven otherwise. She dealt with lawyers and doctors and real estate men, bankers and many other business men. She was very particular, for instance, that she did not lose the interest when the transfer of her money was made from the D. O. Mills Bank to another. Not one of these business men testified that she was not competent to transact her business, or that they observed any weakness in any respect in regard to her. The evidence also shows that up to the time she was taken down in her last illness she had her bedroom upstairs and walked up and down stairs daily, and up to the last did much of her cooking and housework. Of course, she may have had some of the usual nervousness due to old age. From all of this evidence, together with the strong testimony given by the subscribing witnesses and the nurse, it would appear that—

"The case bears no analogy to that of a testator who contributes nothing to his will but a series of nods and a cross or a signature traced by a guiding hand stronger than his own."

[10] It seems that a great many of the wills coming before the courts are not made until the hand of death is almost laid upon the maker, usually after the doctor gives the last warning, and this is usually withheld as long as there is hope, as the worry caused by the knowledge of the approach of death might have a depressing effect upon the patient. The courts must then take the conditions as they find them, and as the law permits wills to be made at such times, and as the conditions usually make it the last chance, a duty devolves upon the courts to give effect to every safeguard the law has provided to protect the will, if it appears to be the true will, and to see that it stands, though necessarily sometimes made in some degree of weakness. "To set aside a will * * * is a serious matter; and a verdict having that effect should be closely scrutinized by the trial judge. The upsetting of wills is a growing evil"—quoted with approval in Estate of Morey, 147 Cal. 505, 82 P. 57. The cases reveal varying degrees of strength of mind in the compass of a few days and if the will is executed on the day when the mind is strong enough to resist the undue influence, if any there be, the will must be sustained. Estate of Relph, 192 Cal. 451, 221 P. 361.

The following are some of the cases in which it was alleged undue influence was exerted upon a weak mind caused by old age or sickness or both and the reviewing court held the evidence of undue influence was insufficient: Estate of Higgins, 156 Cal. 257, 104 P. 6; Estate of Morey, 147 Cal. 495, 82 P. 57; Estate of Calef, 139 Cal. 673, 73 P. 539; Estate of Lavinburg, 161 Cal. 536, 119 P. 915; Estate of Gleason, 164 Cal. 756, 130 P. 872; Estate of Purcell, 164 Cal. 300, 128 P. 932; Estate of Relph, supra; Estate of Holloway (Cal. Sup.) 235 P. 1012; Estate of Bryson, 191 Cal. 521, 217 P. 525; Estate of Hanlon, 65 Cal. App. 592, 224 P. 772; Estate of Rickey, 64 Cal. App. 733, 222 P. 628; Estate of Perkins (Cal. Sup.) 235 P. 45; Estate of Clark, 170 Cal. 418, 149 P. 828; In re Kaufman, 117 Cal. 288, 49 P. 192, 59 Am. St. Rep. 179.

The following cases show activity in preparing the will by the beneficiary or close relative or agent: A comparison of the conduct of Mr. Carson with the conduct exhibited in the following cases where the will was upheld, will be useful: Estate of Morcel, 162 Cal. 188, 121 P. 733; Estate of Morey, supra; Estate of Calef, supra; Estate of Higgins, supra; Estate of Lavinburg, supra; Estate of Holloway, supra; Estate of Purcell, supra; Estate of Anderson, supra; Estate of Hickey, supra; In re Ricks' Estate, 160 Cal. 467, 117 P. 539; Estate of Relph, supra; Estate of Clark, supra; Estate of Latour, 140 Cal. 414, 73 P. 1070, 74 P. 441. We cite one outside case for the reason that it is so frequently cited by our courts. In re Hess, supra.

In many of the foregoing cases the person charged with the undue influence actually remained in the room while the will was being made, and in the Lavinburg Case, the one charged with the undue influence actually boasted of her general influence over the testator. In the same case the court, at page 543 of the decision, stating a reason why a certain daughter was probably not properly remembered in the will, say:

"And in this connection it is well to remember that the testator was not upon good terms with Mrs. Werthman when the will was drawn."

And in a similar quarrel between a mother and a daughter wherein the mother practically disinherited the daughter, the Supreme Court in the case of In re Kaufman, supra, say:

"Lizzie never afterward saw or communicated with her mother. * * * The greater part of the record is taken up with the circumstances of this quarrel between Lizzie and her mother, apparently either for the purpose of showing to the jury that the mother had no sufficient reason therein for disinheriting her daughter, or in order to allow the jury to conjecture that the mother's dislike of Lizzie may have been fostered by her other sisters. Whatever may have been the reason for its introduction, it was immaterial and irrelevant to either of the issues submitted to the jury."

The following are some of the cases of undue influence in which powers of attorney and other authority were given, but in which it was held that this in itself does not create a presumption of undue influence. This condition will be found in the following cases, wherein the will was upheld by the reviewing court: Estate of Lavinburg, supra; Estate of Morcel, supra; Estate of Purcell, supra; Estate of Ricks, supra; Estate of Bryson, supra; Estate of Hanlon, supra. The following are some of the cases in which undue influence was denied to be sufficient where the second wife or husband were charged with undue influence, and where jealousy and bad feeling resulted in quarrels, etc.: Estate of Morcel, supra; Estate of Rickey, supra; Estate of Langford, supra; Estate of Donovan, supra.

[11] The instances will be found rare where our Supreme Court has permitted a will to be upset solely upon the ground of undue influence where the charges have been made against the husband or wife. No presumption is permitted to be indulged against this relation in this state, and it is not permitted in most other jurisdictions. Our Supreme Court, in the Estate of Donovan, supra, at page 395, 73 P. 1082, very clearly adopted this view:

"There is no legal presumption against the validity of any provision which a husband may make in the wife's favor, for she may justly influence the making of her husband's will for her own benefit or that of others so long as she does not act fraudulently, or extort benefits from her husband when he is not in condition to exercise his faculties as a free agent."

The Langford Case, supra, is full of expressions of like purport, and has been approved in later cases. Mr. Freeman, in his notes in Re Hess, supra, at page 679, places this right above that of the child:

"While the right of children may not stand on the same high footing as that of a wife to be heard respecting a will, still there is no doubt that they have the right to influence their parent by fair argument, or even by entreaty, to make disposition of his property in their favor. * * * So long as no fraud is practiced upon the testator, and no advantage taken of his weakness and his inability to resist, his bounty may be sought by every appeal to his intelligence or his emotions, which may lawfully influence his judgment or his affections. He may be flattered, persuaded, or entreated, * * * the importunity may be such as no delicate mind could be guilty of, * * * and yet if he yield intelligently, and from conviction, the influence thus operating is not undue, * * * 'solicitations, however importunate, cannot of themselves constitute undue influence, for, though these may have a constraining effect, they do not destroy the testator's power to freely dispose of his estate'" (citing many cases).

See, also, 28 R. C. L. § 94, and notes.

Nearly all of the cases wherein the courts have approved the setting aside of the will on the ground of undue influence, the circumstances are shown, not by inference, but by positive proof that the person charged with exerting the undue influence was active in procuring the execution of the will, or was guilty of trying to keep relatives away from the testator, or both, as in the Estate of Tibbetts, 137 Cal. 123, 69 P. 978; Estate of Kendrick, 130 Cal. 360, 62 P. 605; Estate of Snowball, 157 Cal. 301, 107 P. 598; Estate of Olson, 19 Cal. App. 379, 126 P. 171. In Estate of Ramey, 62 Cal. App. 413, 217 P. 135, the evidence of Mrs. Wilcoxson would support a finding that the person charged with the undue influence was present when the will was discussed and executed and there is other evidence that when executed the will was immediately given by the testatrix into the keeping of the person charged with the undue influence. In all of these cases the activities in having the will executed by the person charged are disgustingly prominent and they are not merely suspected, but sufficient circumstances are positively proven upon which the jury could act, and in the Estates of Kendrick and Ramey, a very bad condition of mind and body were proven. In the Tibbetts Case, one of the cases respondent urges very strongly upon us for consideration, the Supreme Court, in its decision, said, "The case is undoubtedly a very close one," and Justice Temple, who wrote the opinion in the McDevitt Case, and Justice Harrison, who wrote the opinions in the Kaufman and Calkins Cases, dissented from the judgment. In the Estate of Kendrick, the court say:

"Upon the question of the sufficiency of this evidence to support the verdict that the will was procured by undue influence, we confess a feeling of some doubt. The question is a close one."

In Estate of Ramey, the court, referring to the question of undue influence, which it had just been considering, said:

"The other question seems less difficult of solution." (Meaning the question of unsoundness of mind.)

In Estate of Olson, the evidence seemed to have been so strong in proof of the undue influence that the appellant did not take the evidence before the reviewing court, but relied upon an effort to attack the pleadings. In that case the design of the person charged with the undue influence was proven by his own statements and it was clearly proven that he went with the testatrix and was present during the preparation of the will and immediately left with her after its preparation. This point was commented upon by the court, citing Estate of Snowball, supra, and saying, at page 388 (126 P. 175):

"A similar circumstance was given significance where the favored daughter of the testatrix went to the office of the lawyer with the testatrix, who then made the will 'while the daughter remained in another room.'"

The charges in the Olson Case are particularly revolting and seem to have been fully proven.

The judgment should be reversed, and it is so ordered.

We concur: FINCH, P. J.; PLUMMER, J.

---

73 Cal. App. 748

GREGG v. McDONALD. (Civ. 4213.)

(District Court of Appeal, Second District, Division 2, California. July 27, 1925.)

1. Partnership ⟸21—Contract for purchase of pool hall business held to impose mutual obligations.

Under contract for employment of plaintiff as manager of a pool hall, providing that agreement should constitute a contract for purchase by plaintiff of a one-third interest in the business, *held*, that parties were mutually obligated—one to buy and the other to sell.

2. Contracts ⟸143—Obligations of party may be inferred from undertakings of other party.

Obligations of party need not be expressly stated in the contract, but may be inferred from undertakings of other party.

3. Master and servant ⟸36—Discharged employee held not required to tender performance of contract.

In suit for breach of contract to employ plaintiff as manager of a pool hall business, and to allow him to purchase an interest therein, plaintiff *held* not required to allege or prove that he had paid or tendered to defendant agreed purchase price for an interest in the business, in view of Civ. Code, §§ 1440, 1784, after his discharge by defendant, and after he was notified that defendant would not perform his part of the contract, since such discharge and notice constituted a breach of the entire contract, and plaintiff's cause of action arose immediately without reference to any tender of payment.

4. Master and servant ⟸36—Plaintiff not required after discharge to offer to go on with employment.

In suit for breach of contract to employ plaintiff as manager of defendant's pool hall business, plaintiff was not required after his discharge to present himself to defendant and to offer to go on with his employment; it being sufficient that he was ready to continue in defendant's employ as manager of the business at time of his discharge.

5. Master and servant ⟸3(2)—Contract held to be for employment as manager.

Contract for employment of plaintiff as manager of defendant's pool hall business, providing that plaintiff should be employed in conducting and managing of such business, and that he should give all his time and attention thereto, *held* to manifest an intention in view of practical construction by parties, that both parties understood that plaintiff was to be employed as manager of the business and not in some other rôle.

6. Master and servant ⟸8(1)—Contract held to imply right to continue employment during full term, unless employee should elect to purchase interest.

Contract for employment of plaintiff as manager of defendant's pool hall business, giving him all of 5 years, if he chose to take it, within which to make his payment for a one-third interest in the business, *held* to imply that plaintiff should have the right to continue in defendant's employ during full term of 5 years, unless he should elect sooner to pay purchase price for interest which he had agreed to buy.

7. Master and servant ⟸41(1, 6)—Damages for wrongful discharge prima facie wages, and employer must rebut presumption.

Measure of recovery by a wrongfully discharged employee is prima facie agreed wage for unexpired part of the term, and burden is on employer to rebut this presumption by proof that damages were actually less.

8. Master and servant ⟸42(2)—"Other employment" after discharge defined.

The "other employment" that a discharged employee is bound to seek in order to reduce employer's damages is employment of a character substantially similar to that of which he has been deprived.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Other.]

9. Master and servant ⟸41(1)—Damages for breach of contract held agreed wage for unexpired term.

In suit for damages for breach of contract of employment, measure of plaintiff's damages was agreed wage for unexpired part of term, where there was no evidence that he was actually engaged in profitable employment at any

time during balance of the term subsequent to his discharge, or that he had been offered and declined other similar employment, or that he could have procured such employment by reasonable diligence.

10. Appeal and error ⊂=1066—Trial ⊂=252(1)—Instructions based on legitimate evidence only should be given; when irrelevant instruction constitutes reversible error stated.

Such instructions only should be given as are based on legitimate evidence in the case, but giving of an irrelevant instruction, if it is unobjectionable as an abstract proposition of law, is not reversible error, if it is not calculated to mislead jury, but, if calculated to mislead the jury and affect their conclusion upon the issue submitted to them, it is prejudicial and reversible error.

11. Trial ⊂=252(20)—Instruction on measure of damages for breach of agreement held misleading.

Instruction that, if defendant by breach of his agreement deprived plaintiff of an opportunity to acquire a one-third interest in defendant's business, it might be considered as an element of damages, *held* calculated to mislead jurors and to affect their conclusion on amount of damages awarded, where there was no showing that any profits ever had been, or ever would be, earned in the business.

12. Appeal and error ⊂=930(2)—Reviewing tribunal cannot assume that jury willfully disregarded instructions given by court.

Reviewing tribunal cannot assume that jury willfully disregarded their sworn duty to consider all instructions given them by court.

Craig, J., dissenting.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by O. M. Gregg against T. J. McDonald. Judgment for plaintiff, and defendant appeals. Reversed.

George J. Denis and George W. McDill, both of Los Angeles, for appellant.

A. J. Bledsoe, of Los Angeles, for respondent.

FINLAYSON, P. J. This is an action for damages and also for accrued wages sought to be recovered by reason of an alleged breach of contract. The action was tried before a jury, a verdict for plaintiff in the sum of $5,000 was returned, and judgment entered accordingly. From that judgment the defendant appeals.

On July 30, 1920, at the city of Los Angeles, defendant as the party of the first part, and plaintiff, as the party of the second part, executed a written contract as follows:

"This agreement made this 30th day of July, 1920, by and between T. J. McDonald, party of the first part, and O. M. Gregg, party of the second part, witnesseth: Whereas, said first party is about to engage in the bowling alley and pool room business in a building to be erected for said first party for said purpose at 828 South Olive street, in the city of Los Angeles, and it is desired that second party shall be employed by said first party in the conducting and management of said business with the view also to his buying an interest in said business and ultimately becoming a partner therein: Now, therefore, it is hereby agreed that if said building is built, and if said first party shall secure a lease of same and shall establish said business so contemplated as aforesaid, said second party shall enter into the employ of said first party in said business and that he shall purchase a one-third interest in said business within 5 years from date hereof, at the actual cost of installing and equipping said business, to wit, at a purchase price of one-third of the actual cost of installing bowling alleys, pool tables, racks, and other equipment and furniture used in said business, and the other expenses of installing said business; it being contemplated that said first party shall receive from said second party for said one-third interest a total sum sufficient to cover one-third of the total amount invested by said first party in said business. It is agreed that said second party shall give all of his time and attention to the conduct of said business and shall receive a salary of one hundred seventy-five dollars ($175.00) per month and shall further be allowed 3 per cent. of the net profits of said business, computed monthly if possible, which 3 per cent. shall not be paid to said second party, but shall be turned over to said first party when ascertained and shall be credited by him upon the purchase price of said one-third interest in said business. It is understood and agreed that said business shall be carried on in the name of said first party and that this agreement shall not be deemed to constitute a partnership between the parties hereto but merely as a contract covering the conditions of employment of said second party by said first party and for the purchase by second party from said first party of said one-third interest in said business.

"In witness whereof the parties have hereunto set their hands the day and year first above written:

"T. J. McDonald,
"Ona M. Gregg."

It will be noticed that the contract is of a dual character—that it bears two aspects: In one aspect it is a contract of employment; in the other it is a contract to purchase an interest in the business. These two features are so intimately blended and related to each other that the breach of one necessarily involves a breach of the other, though the measure of damages for a breach of one is not the same as that which is applicable to a breach of the other.

About September 1, 1920, plaintiff entered upon the performance of his duties as manager of the pool room business under the terms of his contract. By a supplemental agreement in writing, bearing date January 17, 1921, the contract of July 30, 1920, was modified in certain particulars. By this sup-

plemental contract the parties agreed that plaintiff's salary should be $150 per month instead of $175, as provided for in the original contract, and that he should be credited with 4 per cent. of the net profits of the business instead of 3 per cent. as originally agreed.

The complaint is in two counts: One for damages for the alleged breach of the contract by reason of the wrongful discharge of plaintiff; and the other for accrued wages due under the contract and remaining unpaid. In the first count plaintiff alleged that on March 16, 1921, he was wrongfully discharged by defendant from the latter's employ; that ever since his discharge defendant has refused to ascertain his 4 per cent. of the net profits or to give him credit therefor on the purchase price of the one-third interest in the business; that at all times since March 1, 1921, the business has been operating at a profit; that under plaintiff's management the business would have earned a profit of $100,000 at the end of the term of 5 years, and that his 4 per cent. thereof would amount to $4,000; that the cost of installing the bowling alleys, pool tables, racks, and other equipment and furniture was $50,000; that during the 5 years for which he was to be employed the value of the equipment and business would have increased, and that it would have amounted to $100,000 at the end of the term; that the lease of the building in which the business is conducted runs for a term of 15 years from August, 1920, and is constantly increasing in value; that by reason of the premises he has been damaged in the sum of $20,000. In the second count plaintiff alleges the contract of employment, his discharge and that there is due him and unpaid the sum of $975 for salary earned prior to his discharge. Issue having been joined upon many of the material allegations of the complaint, the cause was tried before the jury, resulting in a verdict and judgment for plaintiff, as already stated.

Since the judgment must be reversed and a new trial ordered on account of the prejudicial error later to be considered, we shall consider such of appellant's points as are likely to arise on a retrial.

[1, 2] We do not agree with appellant that the contract gave him only an optional right to sell the one-third interest to respondent. We think that under the terms of the contract the parties were mutually obligated—the one to buy and the other to sell. The instrument contains these significant and pregnant clauses:

"* * * It is desired that second party [respondent] shall be employed * * * with the view also to his buying an interest in said business and ultimately becoming a partner therein;" "* * * it is agreed * * * that said second party * * * shall purchase a one-third interest;" "* * * it is * * * agreed * * * that this agreement shall * * * constitute * * * merely * * * a contract covering the conditions of employment * * * and for the purchase by said second party from said first party of said one-third interest in said business."

There can be little doubt that when the parties expressly stated in their writing that their agreement should constitute a "contract * * * for the purchase by said second party * * * of said one-third interest," they understood that appellant was just as much obligated to sell as respondent was to buy. It is uniformly held that the obligation of a party need not be expressly stated in the contract, but may be inferred from the undertakings of the other party. Thus it has been held that where one party agrees to buy from the other, and nothing is expressly said as to the obligation of the latter to sell, such obligation to sell may be implied. Thomas-Huycke-Martin Co. v. Gray, 94 Ark. 9, 125 S. W. 659, 140 Am. St. Rep. 93.

[3] It was not necessary for respondent to allege or prove that he had paid or tendered to appellant the agreed purchase price for the one-third interest. This is not the case of a breach of contract by the seller before the arrival of a fixed time for performance by him. It was not agreed that appellant's obligation to sell should accrue at the end of the 5 years. The language of the agreement is that respondent "shall purchase a one-third interest in said business within 5 years from date hereof." This left indefinite the time for payment by respondent, and it left equally indefinite the time for the transfer of the one-third interest by appellant. The law implies that payment was to be made upon the transfer of the one-third interest to respondent. Civ. Code, § 1784; Blackwood v. Cutting Packing Co., 76 Cal. 215, 18 P. 248, 9 Am. St. Rep. 199. Respondent could make payment of the full amount of the purchase price at any time within the 5 years, and thereupon he would become entitled to a transfer of the one-third interest to him. In such cases, if the seller repudiates his contract and gives the buyer notice that he will not carry it out, and does not retract his repudiation before the action is commenced, the buyer, not being in default, is not required to tender performance on his part before suing for breach of the contract. Civ. Code, § 1440; Stum v. Hadrich, 7 Cal. App. 241, 94 P. 82. Not only was respondent not required to tender performance after his discharge and after he was notified by appellant that the latter would not perform his part of the contract, but such discharge and notice constituted a breach of the entire contract, and respondent's cause of action arose immediately, without reference to any tender of payment. Stum v. Hadrich, supra.

[4] Nor was it incumbent upon respondent, after his discharge, to present himself to

appellant and offer to go on with his employment. It is enough that he was ready and willing to continue in appellant's employ, as manager of the business, at the time of his discharge. Howard v. Daly, 61 N. Y. 362, 19 Am. Rep. 285; Stumer v. Wilson, 82 Ill. App. 384. The case of Winsor v. Silica Brick Co., 31 Cal. App. 85, 159 P. 877, cited by appellant is not in point. In that case the letter to the employee announcing his release from the contract did not involve a clear and unequivocal discharge. Here appellant incontinently discharged respondent and refused to permit him to continue in his employ as manager of the business. An offer by the employee to proceed with the performance of his contract of employment after his employer has unconditionally and peremptorily discharged him and has refused to permit him to continue to perform the duties for which he was employed would, as was said in Winsor v. Silica Brick Co., supra, be "a useless and futile act." Such dismissal is of itself a sufficient prevention of performance of the contract to entitle the employee to bring his action for its breach.

[5] Respondent was employed as manager of the business, and not in any other capacity. His discharge from that position was, therefore, a wrongful discharge from his employment. The written contract not only contains the recital that "it is desired" that respondent shall be employed "in the conducting and management of said business," but it is expressly agreed that he "shall give all of his time and attention to the conduct of said business," not to the conduct of a minor department of the business. The whole tenor of the contract leads irresistibly to the conclusion that both parties understood that respondent was to be employed as manager of the business, and not in some other rôle. Indeed, the parties themselves put this construction upon their writing. This is indicated by the fact that respondent took charge of the business as its manager with appellant's acquiescence, and continued in that capacity until he was wrongfully discharged some 6½ months later.

[6] Appellant had not the right to discharge respondent before the expiration of the 5 years mentioned in the contract. By the terms of their agreement respondent was given all of the 5 years, if he chose to take it, within which to make his payment for the one-third interest; that is to say, it was optional with him to pay the whole of the purchase price for the one-third interest before or at the end of the 5 years. If he chose to wait until the end of that period before making full payment, he would be entitled to remain in appellant's employ as manager of the business for the full term mentioned in their agreement. This is the necessary result of that provision of the contract, which contemplates that a part at least of the purchase price shall be deducted from respondent's salary; that is to say, in addition to the $150 per month, which amount he was to retain, respondent was to receive for his services a further monthly sum equal to 4 per cent. of the net profits of the business, if any there were. This percentage of the profits, computed monthly if possible, was to be applied by appellant upon the price to be paid by respondent for the one-third interest. Since respondent was to have all of the 5 years, if he wanted that length of time, within which to pay for the one-third interest, it follows that the contract, considered in its entirety, clearly implies that he should have the right to continue in appellant's employ during the full term of 5 years, earning the 4 per cent. to be applied upon his contract of purchase, unless he should elect sooner to pay the purchase price for the interest which he had agreed to buy.

[7-9] It was shown that respondent had been earning $100 per month immediately prior to his entry into appellant's service. Wherefore, it is suggested that his earning capacity equals that amount, and that, therefore, the damages sustained by him as a discharged employee could not exceed $50 per month for the unexpired balance of the 5-year term. But there was no evidence that respondent was actually engaged in profitable employment at any time during the balance of the term subsequent to his discharge, or that he had been offered and had declined other employment of a character substantially similar to that of which he had been deprived, or that he could have obtained such employment by the exercise of reasonable diligence. The measure of recovery by a wrongfully discharged employee is generally and primarily—or "prima facie," as many cases put it—the agreed wage for the unexpired part of the term; and the burden is upon the employer to rebut this presumption by proof that the damages sustained were actually less. If, for example, the employer contends, in mitigation of damages, that the employee was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected, or that by the exercise of reasonable diligence he could have found such employment, the burden is upon him to show it. 8 Cal. Jur. 896; 18 R. C. L. 523. "The 'other employment' that the discharged employee is bound to seek is employment of a character substantially similar to that of which he has been deprived; he need not enter upon service of a more menial kind." 18 R. C. L. p. 529.

[10] The trial court gave an instruction which was not warranted by the evidence. We agree with appellant that it was calculated to mislead the jurors and to affect their conclusion on the amount of damages to be awarded by them. We are satisfied, therefore, that the giving of it was prejudicial error necessitating a reversal of the judg-

ment. The rule deducible from the authorities is this: Such instructions only should be given as are based upon legitimate evidence in the case. If an irrelevant instruction be given, and if it is unobjectionable as an abstract proposition of law, the giving of it is a mere technical, but not a reversible, error, if it is not calculated to mislead the jury. If, however, it is calculated to mislead the jury and to affect their conclusion upon the issue submitted to them, it is prejudicial and reversible error. Coughlin v. People, 18 Ill. 266, 68 Am. Dec. 541; Mendelsohn v. Anaheim Lighter Co., 40 Cal. 657; Perkins v. Eckert, 55 Cal. 400; People v. Roe, 189 Cal. 559, 209 P. 560.

[11, 12] The instruction in question (we italicize the parts of which complaint is made) reads—

"If you believe from the evidence, ladies and gentlemen of the jury, that the contract alleged in the complaint was made by the plaintiff and defendant, and that plaintiff entered upon the discharge of the duties of manager of defendant's business under the terms of the contract, and that defendant thereafter discharged plaintiff without cause, and has ever since refused to allow plaintiff to perform the employment which he contracted to perform, then I instruct you that defendant is liable in damages for any loss suffered by the plaintiff as the natural result of such breach of contract, and which was within the reasonable contemplation of plaintiff and defendant in entering into the contract. *If you find from the evidence that the defendant by breach of his agreement deprived the plaintiff of all opportunity to acquire a one-third interest in defendant's business described in the complaint, this is an element of damage to be considered by you in arriving at your verdict.* Also, you may consider whether the evidence shows that plaintiff, at the instance of defendant, and for the purpose of enabling plaintiff to enter upon the duties specified in the contract in question, did leave and surrender an established business, or avocation, and thus sustained damage to himself. With reference to the salary of the plaintiff as manager, specified in the contract alleged in the complaint, I instruct you, if you believe from the evidence that the contract alleged in the complaint was entered into between plaintiff and defendant, and that thereafter plaintiff entered upon the duties of manager of defendant's business in pursuance of the terms of said contract, and that defendant in the month of May, 1921, discharged plaintiff from the said employment as manager, without cause, and in violation of the terms of said contract, the plaintiff is entitled, *as a part of his damages*, to the entire salary provided by the contract for the full 5-year term, commencing with the date of his employment. From the amount of his salary for the full term, if the jury finds for the plaintiff, the jury must deduct any sum which plaintiff has already been paid thereon by defendant."

There was no evidence showing, or tending to show, that any profits ever had been or ever would be earned in the business. There was no evidence showing, or tending to show, that the one-third interest which appellant was to transfer to respondent had, or ever would have, any value whatever. Indeed, for aught that appears to the contrary, that interest if purchased by respondent, may have proved to be a liability instead of an asset.

If the jury had returned a verdict on the first count for an amount exactly equal to the stipulated salary for the unexpired term of employment, less the amount already paid by appellant, it is possible that we then could have said that the irrelevant part of the instruction had not affected the result. Had that been the precise amount of the verdict, it may be that we could have said that the jurors had ignored the part of the charge advising them to consider as "an element of damage" respondent's opportunity to acquire the one-third interest. But, be that as it may, the jury returned a verdict for an amount which is less than respondent's agreed salary for the balance of the term after deducting the previous payments. We can conceive of no explanation to account for the amount arrived at by the jurors, save upon the theory that they possibly took notice of local business conditions and concluded therefrom that respondent, by the exercise of reasonable diligence, could have found other similar employment long before the expiration of the balance of the 5-year term, which still had more than 4 years to run. At any rate, having returned a verdict for a sum considerably less than the amount of the agreed wage for the balance of the term minus the previous payments, we have no means of knowing how much the jurors allowed respondent for loss of the stipulated amount of salary and how much they may have undertaken to allow him for the loss of his opportunity to purchase the one-third interest in the business. We are bound to assume that they allowed him some amount for the loss of his opportunity to purchase an interest in the business, notwithstanding the utter absence of evidence to show that it was of any value, for not only were they distinctly told that loss of opportunity to purchase the interest "is an element of damage," but they were also told that it is an element of damage "to be considered by you in arriving at your verdict." And later on in the instruction they were told that, if respondent was wrongfully discharged, he was entitled to the entire salary for the full five years, less previous payments, "as a part of his damages." This language necessarily must have created the inference that respondent was entitled to substantial damages for the loss of his opportunity to purchase the one-third interest as well as damages suffered by him as a discharged employee. There is no escaping the conclusion that the part of the instruction of which complaint is made, though not based upon any evidence in

the case, necessarily must have augmented the verdict to some extent if the jurors considered it, as they were told they must. We cannot assume that they willfully disregarded their sworn duty to consider all instructions given them by the court. When it is clear—as it seems to us in the instant case—that the instruction was calculated to mislead the jurors, and that in all likelihood it affected their conclusion as to the amount of the verdict, prejudicially to the appellant, the giving of it "constitutes error equally as grave as would be the giving of instructions fundamentally wrong." People v. Roe, supra.

The judgment is reversed.

I concur: WORKS, J.

CRAIG, J. I dissent. To my mind the giving of the instruction which my associates consider of a prejudicially erroneous character is not a sufficient ground for reversal. It is doubtful whether or not the instruction in question is a correct statement of the law, but if it is conceded, without admitting the legal correctness of the concession, that the instruction was erroneous, there is nothing to indicate that the error prejudiced the appellant, and therefore the judgment should be sustained.

The verdict is general in its character. Evidence contained in the record conclusively supports a recovery for the plaintiff and respondent, based upon loss of former employment, as well as loss of salary under the contract. No evidence whatever was introduced to sustain the allegation of the complaint referred to by the instruction in question and having to do with the loss of opportunity to purchase an interest in the business. This in itself furnishes strong reason to believe that the jury based its verdict upon the former rather than the latter ground. Aside from this indication, there is nothing upon which even an intelligent guess might be hazarded to say for which element of damages pleaded in the complaint the award was made. Under these circumstances a conclusion that the appellant was prejudiced must be predicated upon a presumption that the jury acted so unjustly as to return a substantial verdict against the defendant without the slightest proof that as to the ground upon which it was based he had done more than commit a technical wrong, for which the plaintiff had suffered no loss. Further, it would be necessary for us to presume that the jury disregarded the court's instructions upon other phases of the case in which damages in an amount greater than the sum allowed were clearly proven. I apprehend that it is not the province or the practice of appellate courts to indulge in these presumptions, which at once reflect upon the integrity of juries and impugn their intelligence. Rather, I think the law as well as experience and reason require that contrary presumptions be recognized, and in the absence of proof be given the weight to which they are usually entitled. In the instant case we should therefore presume that the jury took into consideraton the only grounds supported by any evidence upon which the plaintiff was entitled to recover, and that the jury based its verdict upon the only grounds for which a verdict could reasonably have been rendered for the plaintiff.

This procedure is supported by numerous decisions from every jurisdiction, so far as I have been able to ascertain, where the issue here involved has been passed upon. The following are a few of the cases which might be cited: Werner v. Southern Pacific Co., 44 Cal. App. 76, 185 P. 1016; Flinn v. Crooks, 2 Cal. App. 335, 83 P. 812; Blizzard v. Applegate, 77 Ind. 516; Bourland v. Baker, 141 Ark. 280, 216 S. W. 707, 20 A. L. R. 525; Valente v. Porto, 98 Conn. 653, 119 A. 888.

In Flinn v. Crooks, supra, the complaint consisted of two counts: The first one for the reasonable value of an attorney's services; and the second was based upon an alleged express contract. No evidence was introduced in support of the second count, but a motion for nonsuit as to that count was erroneously denied. A general verdict for the plaintiff was returned. It was held that as there was no evidence introduced in support of the second count, and the evidence did justify a verdict upon the first count, it would be presumed for the sake of upholding the verdict and the judgment that they were based upon the first count.

Sanders v. Reister, 1 Dak. 151, 46 N. W. 685, involved an instruction that the jury consider inter alia the pecuniary loss, if any proven. Of this there was no evidence. It was said:

"The record does not disclose that there was any evidence introduced even tending to prove pecuniary loss, and we are not to presume the jury found what was not in the evidence."

Werner v. Southern Pacific Co., supra, applied the same rule to an instruction that the jury could find for the plaintiff if it was negligence for the railroad company to make a running switch; the running switch having been directed by plaintiff's decedent. It was there said:

"There might be sufficient ground for appellant's exception to the verdict under the instructions covered by exception No. 31 *if there was any evidence before the jury* tending to show that there was negligence in attempting the running switch on this occasion. * * * Under this state of the evidence it cannot be assumed that the jury predicated its verdict upon negligence in resorting to this mode of switching cars." (Italics ours.)

In Blizzard v. Applegate, 77 Ind. 516, suit was brought upon two counts: The first on a promissory note, and the second on an ac-

count for services as an attorney and for moneys expended. The Supreme Court of Indiana, by an itemized statement set out in its opinion, illustrated how the jury could have found its $600 verdict, saying:

"The appellant assumes that the jury did not allow the appellee anything on the note, and earnestly insists that the evidence does not sustain the verdict on the second paragraph. The verdict was general. We are therefore unable to determine whether or not the jury included the amount apparently due upon the note in the verdict. But there was evidence upon which they could have found for the plaintiff upon the issues under the first paragraph of the complaint, and, if necessary to sustain the verdict, we must presume that they did so; the record showing nothing to the contrary."

In Bourland v. Baker, supra, it was said:

"The instruction is assailed because, according to appellant's interpretation thereof, it submitted all the allegations of negligence set up in the complaint to the jury for consideration, whether supported by evidence or not. It is true evidence was not introduced in support of every allegation of negligence in the complaint. The trend of the evidence, however, limited the issues to whether the injury resulted from fast driving, failure to give a signal of warning, failure to keep a proper lookout, or whether due to appellee's own negligence; and, in the absence of specific objections to the general terms in which the allegations of negligence were submitted, it will be presumed that the jury considered *only such grounds of negligence as were supported by the evidence.*" (Italics supplied.)

But we need not rely upon the decisions of courts of this and other jurisdictions. In this state we have express legislative authority on the matter which appears to me to compel the affirmance of the judgment appealed from. Section 475 of the Code of Civil Procedure provides that:

"No judgment, decision, or decree shall be reversed or affected by reason of any error, ruling, instruction, or defect, unless it shall appear from the record that such error, ruling, instruction, or defect was prejudicial, and also that by reason of such error, ruling, instruction, or defect, the said party complaining or appealing sustained and suffered substantial injury, and that a different result would have been probable if such error, ruling, instruction, or defect had not occurred or existed. There shall be no presumption that error is prejudicial, or that injury was done if error is shown."

To the same effect is section 4½ of article 6 of our Constitution.

It must be remembered that the verdict rendered was a general one. There is not the slightest suggestion of evidence in the record on appeal which would indicate that the jury awarded their verdict upon the cause of action for loss of opportunity to purchase an interest in the business. Nor is there any evidence to show that respondent was damaged one cent by reason of being deprived of his opportunity to purchase the one-third interest in the business. Under the authorities above cited, to justify a reversal appellant must not only show that an erroneous instruction has been given, but that the error committed was prejudicial, that by reason of such instruction the party appealing sustained and suffered substantial injury, and also that a different result would have been probable if such instruction had not been given. In the face of the fact that the verdict rendered was fully warranted by evidence sustaining the allegations of loss of other employment and of salary, and that there was none to support the claim of substantial damage by reason of appellant having been prevented from securing an interest in the business, can it be said that if error had not been committed a different verdict would have been rendered? I think not. And, lest an appellate court might consider, as was formerly done, that in the absence of proof either way, prejudice and damage is to be presumed from error, the Legislature in enacting this section of the Code has closed the door against entertaining such argument or applying that presumption.

It has been uniformly held that, if a judgment or order is right upon any theory of law applicable to the case, it must be sustained regardless of the consideration which may have moved the trial court to its conclusion. The ruling may have been correct, but the reasoning or instruction of the trial court is erroneous. An appellate court cannot know the minds of the jury nor adjudge that they were guilty of perpetrating an injustice without evidence or reason therefor, merely because under an instruction given by the court it may have been possible for them to do so. In cases similar to that before us, where the jury has rendered a general verdict, and there is satisfactory evidence to establish other elements of damage alleged in the complaint, it has been held that it will be presumed that the jury rendered its verdict in favor of the plaintiff for the injuries which the evidence sustained, and not to compensate for that which was alleged but not proven.

From these cases, as well as the Code and Constitution, the conclusion is inevitable that, if there was error, it was not of such a character as to require or allow a reversal.

73 Cal. App. 765

WELCH et ux. v. STRATTON. (Civ. 4815.)

(District Court of Appeal, Second District, Division 2, California. July 27, 1925.)

1. Appeal and error ⊂=765—Time for filing points and authorities cannot be extended except by order based on stipulation or affidavit.

Under Code Civ. Proc. § 283, providing that attorney may bind his client by agreement filed with clerk or entered in minutes of court, and not otherwise, and Supreme Court rule 2, subd. 5, time for filing points and authorities cannot be extended except by order based on either stipulation or affidavit.

2. Stipulations ⊂=6—Court will not determine whether oral stipulation, denied by party against whom it is invoked, was made.

If party against whom an oral stipulation is invoked denies it was made, court will not hear parties for purpose of determining dispute.

3. Appeal and error ⊂=765 — Diligence warranting extension of time for filing points and authorities held not shown.

Diligence justifying court in permitting filing statement of points and authorities after expiration of time therefor *held* not established, nor was fact that appellee's counsel made no response to oral statements at different times that appellants' brief would soon be ready effective as extension of time for filing.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by James H. Welch and Stella Stone Welch, his wife, against B. C. Stratton. On motion to dismiss appeal of plaintiffs from judgment for defendant. Appeal dismissed.

Henry O. Wackerbarth, of Los Angeles, for appellants.

Lucius M. Fall and Henry M. Willis, both of Los Angeles, for respondent.

FINLAYSON, P. J. This is a motion to dismiss the appeal for failure to file appellants' points and authorities within the time provided by the rules.

The transcript was filed August 16, 1924. On September 15, 1924, the parties stipulated in writing that appellants might have 40 days, in addition to the time allowed by the rules, within which to serve and file their opening brief. The stipulation was filed, and an order was made, extending the time accordingly. On October 25, 1924, the parties stipulated in writing to extend appellants' time 40 additional days. In accordance with this stipulation the court entered its order extending the time. Under these stipulations and orders appellants' time to file their points and authorities expired December 4, 1924. On March 23, 1925, respondent served and filed his notice of motion to dismiss the appeal. No points and authorities on behalf of appellants were on file when the notice was given.

Appellants have filed an affidavit of their attorney, in which he states that shortly before the expiration of the time accorded by the last written stipulation, i. e., shortly prior to December 4, 1924, he telephoned to one of respondent's counsel, and that the latter orally agreed during the telephonic conversation to give affiant additional time to file appellants' opening brief; that no definite time for filing the points and authorities was mentioned during the conversation; that affiant had two subsequent conversations with one of respondent's counsel, in each of which affiant stated that he would have appellants' opening brief printed and filed in the near future; that respondent's counsel offered no objection to these statements; that on March 9, 1925, affiant again met the same counsel for respondent, and told him that the brief had been prepared, and that it would be sent to the printer; that affiant delayed the printing of such brief until he was served with respondent's notice of motion to dismiss the appeal, when he immediately sent the brief to the printer, and that thereafter it was printed and was served and filed (without authority) April 2, 1925—ten days after respondent had served and filed his notice of motion to dismiss. The affidavit also sets forth that by reason of the aforementioned conversations with respondent's counsel affiant believed that respondent was in no hurry about the filing of appellants' opening brief.

A counter affidavit by the attorney for respondent, who is referred to in the affidavit of appellants' counsel, has been filed. In this counter affidavit the affiant in effect denies that he orally or at all agreed to extend the time beyond that accorded by the last written stipulation. The affidavit also sets forth, in substance, that affiant from time to time asked appellants' counsel what the latter's intentions were respecting the filing of a brief on behalf of his clients, and that, receiving no satisfactory reply to these requests for information, and believing that appellants had abandoned their appeal, he finally served and filed his notice of motion to dismiss the appeal.

[1] The rules prescribed by the Supreme Court for the government of this court provide:

"The time limited for filing points and authorities shall not be extended except by order of the court upon stipulation of the parties, or on affidavit showing good cause therefor." Rule 2, subd. 5.

Section 283 of the Code of Civil Procedure provides:

"An attorney and counselor shall have authority * * * to bind his client in any of the steps of an action or proceeding by his agree-

ment filed with the clerk, or entered upon the minutes of the court, *and not otherwise.*" (Italics ours.)

[2] No order of court was ever made extending appellants' time to file points and authorities after December 4, 1924; nor did appellants' counsel make any attempt to secure such an order. Under the rules the time could be extended only upon an order therefor based upon either a stipulation or an affidavit. Not only was there no order extending time, but no written stipulation or affidavit was made or filed. "Verbal stipulations with reference to proceedings in pending actions," says the court in McLaughlin v. Clausen, 116 Cal. 490, 48 P. 487, "cannot be regarded except so far as they are admitted by the parties against whom they are sought to be enforced, or have been wholly or in part executed. Reese v. Mahoney, 21 Cal. 306; Smith v. Whittier, 95 Cal. 279 [30 P. 529]. And if a party against whom a verbal stipulation is invoked denies that such a stipulation was made, the court will not hear the parties for the purpose of settling the dispute. Johnson v. Sweeney, 95 Cal. 304 [30 P. 540]."

[3] Aside from the fact that no order was made extending the time after December 4, 1924, and that no written stipulation therefor was ever entered into, appellants, upon their own showing, have failed to disclose reasonable diligence to comply with the rules of court. If, notwithstanding the denials contained in the counter affidavit, it be assumed that an extension of time was orally agreed to by one of respondent's counsel shortly before December 4, 1924, it did not extend the time more than 30 days at the most. As we have stated, no definite time was mentioned in the alleged oral stipulation. Therefore the extension, if any was agreed to by respondent's counsel, was for a reasonable time only. Under the rules 30 days is regarded as a reasonable period within which to file the points and authorities. January 3, 1925, then, marked the limit of time for serving appellants' points and authorities under the oral stipulation—assuming that one was entered into as claimed by them. But appellants did not attempt to file their points and authorities until the lapse of approximately three months after the expiration of the utmost period of time which they possibly could claim under the oral stipulation. The fact that respondent's counsel, when spoken to by appellants' counsel upon two or three occasions subsequent to December 4, 1924, said nothing in response to the latter's statements that the brief would soon be ready for filing, was not effective to extend the time beyond January 3, 1925.

According to the affidavit of appellants' counsel, his clients' brief was ready for the printer at least as early as March 9, 1925. He states in his affidavit that on that day he told respondent's counsel that the brief had been prepared and that it would be sent to the printer. And yet no attempt was made to print it until after respondent had served his notice of motion to dismiss the appeal—an unexplained delay of at least two weeks in merely sending copy to the printer. No showing is made which even tends to excuse appellants' long-continued default, and it is respondent's right to have his motion granted.

The appeal is dismissed.

We concur: WORKS, J.; CRAIG, J.

---

73 Cal. App. 744

COOKE v. SUPERIOR COURT OF CITY AND COUNTY OF SAN FRANCISCO et al. (Civ. 5365.)

(District Court of Appeal, First District, Division 1, California. July 27, 1925. Rehearing Denied Aug. 26, 1925. Hearing Denied by Supreme Court Sept. 24, 1925.)

1. Prohibition ⟸10(2) — Plea of immunity from service of process of state courts does not deprive superior court of jurisdiction.

A father brought habeas corpus for custody of minor child while mother and child were at liberty on bail pending determination of immigration proceedings, and mother prayed writ of prohibition against prosecution of habeas corpus proceeding, on ground that she was immune from service of process of state court. *Held*, that since plea of immunity did not deprive superior court of jurisdiction, but merely furnished ground for abatement if not waived, prohibition would not lie.

2. Prohibition ⟸10(1)—Superior court will not be prohibited from determining issue within its jurisdiction.

Writ of prohibition will not be granted to prohibit superior court from determining an issue legally within its power to determine, and properly brought before it.

Application of Hilda Betty Cooke for writ of prohibition to be directed to the Superior Court of the City and County of San Francisco and Hon. J. J. Trabucco, Judge thereof, to restrain further hearing of habeas corpus proceeding. Writ denied.

Knight, Boland, Hutchinson & Christin and Archibald M. Johnson, all of San Francisco, for petitioner.

Annette A. Adams, Charles N. Douglas, and Joseph A. McCaffrey, all of San Francisco, for respondents.

KNIGHT, J. Prohibition. Petitioner seeks to prohibit the superior court of the state of California in and for the city and county of San Francisco, department 12 thereof, and the Honorable J. J. Trabucco, judge presiding,

from further hearing or determining a proceeding in habeas corpus now pending before said superior court, involving the custody of Shirley Cooke, a minor child of the age of 5½ years.

The facts are as follows: James H. Cooke and Hilda Betty Cooke are husband and wife and are the parents of said Shirley Cooke, all of whom are subjects of Great Britain, and, until recently, resided in the province of Ontario, Canada.

It is in substance alleged by the father of said child, in his petition for the writ of habeas corpus, that under Canadian law he has been declared the custodian of said child, and that during the month of January, 1925, the mother kidnapped said child, in said province of Ontario, Canada, and unlawfully brought her to the United States.

In the return to said writ of habeas corpus filed by the mother of said child, it is, in effect, alleged that on June 7, 1925, at the instance of the father, in the city of Reno, state of Nevada, she and the child were arrested pursuant to a federal warrant issued by the immigration service of the department of labor of the United States government; that after certain proceedings were had in the state of Nevada (the purpose and effect of which are unimportant here), and in order to expedite the matter of the hearing of said immigration proceedings, she surrendered herself and child into the custody of the immigration officials of San Francisco, where said immigration proceedings were made returnable and were required to be heard and determined. Later she and the child were released on bail, and, while at liberty on bail awaiting the hearing and determination of said immigration proceedings, this writ of habeas corpus was applied for and issued, upon the petition of the father, who seeks thereby to regain the custody of said child. All of these facts and circumstances are in detail set forth in said return, and upon these facts thus alleged, and the evidence adduced in support thereof, the mother of the child claims that she and the child were immune from the service upon them of process issued out of the state courts. Fox v. Hale & Norcross, 108 Cal. 369, 41 P. 308; Hammons v. Superior Court, 63 Cal. App. 700, 219 P. 1037: Filer v. McCornick (D. C.) 260 F. 309; Central Ry. Co. v. Jackson (D. C.) 238 F. 625; Stratton v. Hughes (D. C.) 211 F. 557.

[1] The sole question presented by this proceeding in prohibition, however, is one purely of jurisdiction; that is, whether or not, on account of said claim of immunity having been made in said habeas corpus proceeding, and (we will assume) having been established by evidence, said superior court is now proceeding without or in excess of jurisdiction. Our conclusion is that the question must be answered in the negative. It has been uniformly held in apparently all of the jurisdictions wherein this question has arisen that, if such immunity be seasonably and properly asserted, it serves as sufficient grounds for abatement of the proceeding, or upon which the service of the process may be set aside (Thornton v. American Writing Machine Co., 83 Ga. 288, 9 S. E. 679, 20 Am. St. Rep, 320), but that the proceeding out of which the alleged illegal process was issued is not void, nor is the service itself of the process a nullity, but that such immunity is only a privilege which may or may not be claimed, and that under certain circumstances is held to be waived (Smith v. Jones, 76 Me. 138, 49 Am. Rep. 598; Wood v. Kinsman, 5 Vt. 588; Petrie v. Fitzgerald, 1 Daly [N. Y.] 401; Cooper v. Wyman, 122 N. C. 784, 29 S. E. 947, 65 Am. St. Rep. 731; Massey v. Colville, 45 N. J. Law, 119, 46 Am. Rep. 754; In re Hall [D. C.] 296 F. 780, 782; Thornton v. Am. Writing Mach. Co., 83 Ga. 288, 9 S. E. 679, 20 Am. St. Rep. 320; McCullough v. McCullough, 203 Mich. 288, 168 N. W. 929; Tiedemann v. Tiedemann [Sup.] 156 N. Y. S. 109; Austin, etc., Road Co. v. Owen, 41 S. D. 110, 168 N. W. 860; Sebring v. Stryker, 10 Misc. Rep. 289, 30 N. Y. S. 1053).

[2] There can be no doubt but that the superior court, upon the filing of the father's petition in habeas corpus, the legal sufficiency of which petition is not questioned, was clothed with full and complete power to hear and determine the proceeding initiated by it—indeed it was its duty to do so; and it is manifest from the rule established by the numerous authorities hereinabove cited that the mere assertion of a claim of immunity did not ipso facto stay the proceeding or divest said court of jurisdiction, but, being in its nature a plea in abatement, said claim of immunity simply raised before said superior court an issue of fact as to the matters therein pleaded, and which, if established, would doubtless operate to abate the proceeding. But jurisdiction to hear and determine that issue was necessarily retained by the tribunal to which the plea was addressed and before which the issue was pending. It follows that prohibition does not lie to prevent that tribunal from exercising, in that respect, its lawful jurisdiction. Moreover, the petition in the instant proceeding does not allege that the court before which said issue is pending has even indicated that it is going to decide said issue adversely to the mother's claim; the allegation of the petition in this respect being:

"That said superior court intends *to proceed further* with said habeas corpus proceeding; that, unless this honorable court arrests said proceeding of said superior court, the petitioner and her said child and said Anna Bowman (the grandmother of said child) will be irreparably injured." (Italics ours.)

However, it appears that petitioner having urged upon said superior court a plea, founded upon allegations of fact, which, if true, would, it is claimed, operate to abate the pro-

ceeding filed against her, now seeks by this proceeding to prohibit said court from giving its decision upon the very issue of fact thus presented for decision. The inconsistency of petitioner's position seems self-evident. Even though it were alleged that said superior court had declared its intention of deciding adversely upon that issue and that such decision, if so rendered, would be in contravention of the law, it would not furnish grounds for interference on prohibition, for the reason that said superior court would still be acting entirely within its jurisdiction in determining an issue legally within its power to determine, and which had been properly brought before it. Prohibition is not available to restrain a subordinate court from deciding erroneously. Van Hoosear v. Railroad Com., 189 Cal. 228, 207 P. 903; High on Extraordinary Remedies, p. 772. It lies only when such tribunal is entertaining a proceeding of which it has no jurisdiction, or where it is assuming to exercise an unauthorized power in a cause or proceeding of which it has jurisdiction. 21 Cal. Jur. 584; Day v. Superior Court, 61 Cal. 489; Coker v. Superior Court, 58 Cal. 177.

The writ is denied.

We concur: TYLER, P. J.; CASHIN, J.

---

74 Cal. App. 101

DIXON v. DIXON. (Civ. 4215.)

(District Court of Appeal, Second District, Division 2, California. July 30, 1925.)

1. Divorce ⟸51—Condoned divorce cause may be revived.

Where in a divorce action neither party obtained a decree, but wife was granted alimony, a subsequent living together of the parties, if a condonation, was revoked by later acts constituting a like cause for divorce, under Civ. Code, § 121, and order in first action remained in force.

2. Divorce ⟸231, 245(1)—Alimony may be awarded, though wife does not prevail; alimony may be modified as conditions warrant under statute.

Under Civ. Code, § 136, court may order payment of alimony, though wife does not prevail in suit, and such order may be modified and enforced as conditions warrant.

3. Divorce ⟸82—Prior divorce action still pending bar to second action, where relief asked may be obtained in first action.

Divorce action, denying parties' divorce, but granting wife alimony, which is still pending, is a bar to a second action for same relief, under rule that a prior suit bars a second suit, where relief sought is obtainable in first action.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Suit for divorce by Maude S. Dixon against John T. Dixon. From a judgment allowing the plaintiff temporary alimony and attorney fees, defendant appeals. Reversed.

Hocker & Austin, of Los Angeles, for appellant.

Lawrence L. Larrabee, of Los Angeles, for respondent.

CRAIG, J. The parties to this proceeding intermarried in October, 1913, and still are husband and wife. They separated on or about June 23, 1918, and on August 14, 1919, the husband commenced an action for divorce, wherein the wife filed an answer and cross-complaint, praying a decree dissolving the bonds of matrimony, and for attorneys' fees and costs. The cause was tried, and an interlocutory decree of divorce was denied either party, but a minute order was made that the husband pay to the defendant and cross-complainant "alimony $40 a month until further order of court." Such order was never entered in the form of a judgment, but the parties continued living apart, and monthly payments were made as directed, to and including December, 1921. Some time after the trial Dixon commenced persuasive methods in an attempt to induce his wife to return to him, as a result of which, upon consideration of his entreaties, she finally consented, and on or about January 13, 1922, she rejoined him. The parties lived together until April 4, 1922, when they again separated, but payments of said allowance were not resumed, though the original order remains upon the minutes of the court.

On June 8, 1922, the respondent commenced this action against appellant, charging that he had treated her with extreme cruelty during her second attempt to live with him, and praying judgment for separate maintenance, and for moneys to defray alleged necessary medical expenses, and for attorneys' fees and costs herein. Appellant answered, denying the allegations of her complaint, and affirmatively alleging the pendency of the divorce action and the order for alimony to be a bar to the subsequent suit. Order to show cause was issued, in response to which each of the parties appeared and testified, and appellant introduced the pleadings and orders of the first suit. Thereupon the trial court ordered that "the plea in abatement not proven, and disallows the same," and directed that the defendant pay to the plaintiff pending trial the sum of $15 weekly, besides attorneys' fees and costs.

The defendant appeals "from the judgment and order allowing alimony and attorneys' fees," contending that the decision and order of the lower court in the second suit are contrary to law and not supported by sufficient evidence. The gist of appellant's argument is that no findings or judgment were filed in

the original action, and that the same is therefore still pending; that the cross-complaint stating grounds for divorce was sufficient to support a judgment for alimony or maintenance, with or without divorce. It is asserted that the right to separate maintenance arises from the divorce statutes, and that had said minute order been, in fact, followed by the entry of judgment thereon, it would now constitute a complete bar to this action.

None of the evidence, other than the pleadings and orders above mentioned, are brought up on this appeal, and we are therefore not apprised of the grounds upon which the decree of divorce was denied to either party.

[1] There may be room for argument, and some doubt, as to whether the respondent's cause of action, if she had one as alleged in her cross-complaint in the divorce case, was condoned by the parties living together as husband and wife subsequently thereto. If it be assumed that such a condonation took place, it was revoked according to the allegations of respondent's complaint in the instant action by the appellant having committed acts constituting a like cause for divorce. Civil Code, § 121. Hence, it cannot be said that the order entered in the divorce action became unenforceable through condonation.

[2] On the other hand, it is quite reasonable to conclude that the wife did not establish a cause of action in support of the allegations of her cross-complaint in the first case. The court denied a decree of divorce to each of the parties. If this denial was due to the fact that her proof failed to show the defendant guilty of such acts alleged in her cross-complaint as would give her a right to a divorce, of course there was no misconduct to condone. Under section 136 of the Civil Code the court was authorized to make an order allowing the wife alimony, even though she did not establish her right to a divorce; but in that event she might at any time have appeared and secured such modification of the order allowing her alimony as the facts would warrant. There can be no doubt that the respondent had a full and complete remedy in her right to appear at any time in the divorce action and ask for such additional alimony as new conditions arising subsequently to the trial might warrant, or to enforce payment of the alimony which had been directed to be paid.

[3] The plea of a prior suit pending to abate a second action is limited to cases where the relief sought in the second action is obtainable in the first. If the allegations of the complaint in the instant case are true, the only relief to which respondent here would be entitled is that of an order for alimony, and this relief, as we have shown, she had already secured in the former action. If this suit could be maintained, in the case where a husband had been guilty of cruel treatment of his wife for years, she might divide the time up into a number of periods and bring a separate action for maintenance based upon his cruelty during each one. These and other considerations justify the rule which prohibits the bringing of a second action when a prior suit is pendng entitling the party suing to the same relief. We think that this defense advanced by the appellant is a bar to the instant suit.

The judgment appealed from is reversed.

We concur; FINLAYSON, P. J.; WORKS, J.

197 Cal. 28

In re JOHNSTON'S ESTATE. (L. A. 8395.)

(Supreme Court of California. Sept. 11, 1925. Rehearing Denied Oct. 8, 1925.)

1. Wills ⟸13(4)—Husband's consent to wife's will held not a consent to codicil substantially changing disposition of her property and reserving no benefit to him.

Consent by husband to will of wife, bequeathing part of her estate for charitable purposes, *held* given to particular will which reserved a benefit to him, and not to be a waiver of Civ. Code, § 1313, as to any different disposition of his wife's property, nor a consent to a codicil which substantially changed disposition of property and reserved no benefit to him.

2. Asylums ⟸2—Legislature may empower counties to establish county hospitals, etc., but legislative control of county asylum does not make it state institution.

Legislature may, in absence of constitutional restriction, empower counties to establish hospitals, dispensaries, etc., and to prescribe regulations for government thereof, but legislative control of a county asylum does not make it a state institution.

3. Wills ⟸13(2)—Bequest to county hospital held not bequest "to the state or any state institution, or for the use or benefit of the state, or any state institution."

Wife's bequest to county hospital *held* not a bequest "to the state or to any state institution, or for the use or benefit of the state, or any state institution," within exception to Civ. Code, § 1313, so as to obviate necessity of husband's consent thereto; Pol. Code, § 2145, enumerating various state hospitals, not mentioning county hospitals.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, State Institution.]

In Bank.

Appeal from Superior Court, San Diego County; W. P. Cary, Judge.

In the matter of the estate of Susan Mary Gowan Johnston, also known as Susan M. Johnston, deceased. From a decree directing distribution, the people of the state of California and another appeal. Affirmed.

See, also, 64 Cal. App. 197, 221 P. 382.

C. C. Kempley and Albert J. Lee, both of San Diego, for appellants.

Haines & Haines, of San Diego, for Executor Southern Trust & Commerce Bank.

Hamilton & Lindley, of San Diego, for respondent Edwin Reed.

LAWLOR, Acting C. J. The decedent above named died testate on November 1, 1922, at La Mesa, in the county of San Diego, being a resident of and leaving estate in said county. The will of said decedent was admitted to probate in the superior court of the county of San Diego on December 18, 1922, and the Southern Trust & Commerce Bank, named therein as such, was duly appointed executor of said will. Christopher J. Johnston, the husband of the decedent, survived her, but has, since her death, been adjudged incompetent; one Lincoln McMillan being the legally appointed guardian of his person and estate. By her will the decedent disposed of all her estate to the Southern Trust & Commerce Bank of San Diego in trust for the benefit of her husband. After specifying the trust upon which the trustee named was to hold the estate the will proceeded as follows:

"Item 4: After the decease of my husband, if he survive me, or if he should not survive me, and the said trust for him does not take effect, I direct my said trustee to dispose of the said trust estate and close this trust as follows: [Then follow numerous specific legacies to be paid by the trustee.] (f) The remainder and residue of the said trust estate, after payment of all expenses of closing the trust, I direct, my said trustee to pay over to the Fredericka Home for the Aged, at Chula Vista, California, a corporation organized under the laws of said state, to be used by it to create an endowment fund for said home to be known as the 'Gowan-Johnston Endowment Fund,' the principal of which shall be maintained intact, and the income from which shall be devoted to the support and general purposes and needs of said home. * * *"

Following the attestation clause of the will the husband of the decedent signed on the same day the will was executed the following statement:

"I, the undersigned Christopher J. Johnston, having been made fully acquainted with the above and foregoing will of my wife Susan Mary Gowan Johnston, and being fully advised, do hereby consent to the same and the whole thereof."

At a later date, to wit, June 26, 1922, a codicil in these terms was added to the will by the decedent:

"I, Susan Mary Gowan Johnston hereby revoke and cancel the bequest to the Fredericka Home for the Aged as written herein, and all relating to it. — * * * And I further name and appoint the San Diego County Hospital as residuary legatee under this codicil of June 26, 1922—And direct that the funds obtained from the residue of my estate be used for the purpose of a special ward or building for the necessary care and treatment of patients who prefer to pay for hospital services rather than accept charity, the fees to be moderate and within the means of working people to pay, while the care and treatment of such patients to be of the best."

A petition for final distribution was seasonably filed. Objections on behalf of the county of San Diego to the distribution of the estate as prayed for in the petition were filed by the district attorney of that county. The court, on July 11, 1924, made its decree in accordance with the petition. After providing for the trust created by the will and setting forth directions to guide the trustee in the conduct thereof, the decree of distribution declared, in part:

"6. It is further ordered, adjudged and decreed, and this does order, adjudge and decree that if and to the extent that the effect of the codicil to the will of said Susan Mary Gowan Johnston, also known as Susan M. Johnston, deceased, set out in the finding numbered 6 of the said findings of fact and conclusions of law heretofore filed herein, results in a devise and bequest, or devise or bequest, to charities or in trust for charitable uses, which collectively exceed one-third of the net distributable estate of the testatrix, such disposition to charitable purposes in excess of one-third of the distributable estate of said testatrix is null and void and a violation of section 1313 of the Civil Code of California, and that to that extent an intestacy has resulted and that the provisions in said codicil contained in favor of the San Diego County Hospital as residuary legatee of said decedent do not in law constitute a bequest or devise to the state or any state institution or for the use or benefit of the state or any state institution within the exception from the restrictions of said section 1313 of the Civil Code of California."

It is then provided in the decree the method to be employed by the trustee to determine whether or not the residuary bequest to the San Diego County Hospital does in fact constitute a disposition in excess of one-third the value of the distributable estate and then declares that "as to the amount of such excess an intestacy shall be deemed to exist and such excess shall be deemed to belong to the heirs at law of said Susan Mary Gowan Johnston, deceased, and be disbursed and paid by said trustee in the following manner:" (The part thereof to be distributed to each heir of decedent then being set forth.)

Thereafter the people of the state of California and the county of San Diego filed this appeal "from that part of the decree of distribution entered herein on the 18th day of

July, 1924, which adjudges and decrees that the County Hospital of the county of San Diego is not a state institution and that the legacy bequeathed to said institution by the codicil to the will of said decedent fails in so far as said legacy exceeds one-third of the distributable estate of said decedent, being that portion of the decree contained in paragraphs six and seven thereof."

Section 1313, Civil Code, provides:

"No estate, real or personal, shall be bequeathed or devised to any charitable or benevolent society or corporation, or to any person or persons in trust for charitable uses, except the same be done by will duly executed at least thirty days before the decease of the testator; and if so made at least thirty days prior to such death, such devise or legacy and each of them shall be valid; provided, that no such devise or bequest shall collectively exceed one-third of the estate of the testator, leaving legal heirs, and in such case a pro rata deduction from such devises or bequests shall be made so as to reduce the aggregate thereof to one-third of such estate; and all dispositions of property made contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law; and provided, further, that bequests and devises to the state, or to any state institution, or for the use or benefit of the state or any state institution, or to any educational institution which is exempt from taxation under section one *a* of article thirteen of the constitution of the state of California, or for the use or benefit of any such educational institution, are excepted from the restrictions of this section; provided, however, that nothing in this section contained shall apply to bequests or devises made by will executed at least six months prior to the death of a testator who leaves no parent, husband, wife, child or grandchild, or when all of such heirs shall have by writing, executed at least six months prior to his death, waived the restriction contained herein."

Appellants state that—

"By this appeal two questions are presented for decision:

"(1) The husband having waived the restrictions imposed by section 1313 of the Civil Code, at the time of the execution of the original will, was it necessary to the validity of the change of charitable beneficiary, as made by the codicil, that he again waive said restrictions?

"(2) Was the bequest contained in the codicil, one to a state institution or for the use or benefit of the state?"

Under the first contention it is urged by the appellants that—

"The written consent of Mr. Johnston to the original will, containing a residuary bequest to a corporation for charitable uses, was a consent to bequeath the residue of the estate in trust for charitable purposes and a waiver of the restrictions imposed by section 1313 of the Civil Code. * * *

"The waiver was written on the will itself just below the attestation of the witnesses to the will and was general in terms. You cannot read into the waiver any condition or limitation. The only logical construction of the waiver is that the husband consented to the making of a will whereby more than one-third of the estate would become a trust fund for charitable uses. This consent, having been given more than six months prior to the death of the testator [testatrix?] was sufficient to validate any bequest contained in the will and any thereafter provided for."

[1] In our opinion a reading of the consent or so-called "waiver" makes clear that the contention is without merit. It signifies merely a consent to the will as then written, and in no reasonable sense can it be held to constitute a general waiver of the rights and benefits secured to heirs by the provisions of section 1313, Civil Code. As stated by the respondent:

"Taking into consideration the language used in the consent in question, the construction placed on section 1313 by the courts, and upon similar statutes in other states, the only logical conclusion to be reached is that the consent given by Mr. Johnston to the will of his wife was given to the particular will which reserved a benefit to Mr. Johnston, and that consent cannot be construed as a waiver of the provisions of C. C. 1313 as to any different disposition of his wife's property, nor as a consent to the codicil here, which substantially changed the disposition of the property and reserved no benefit to Mr. Johnston."

We quote from appellants' brief touching their second contention:

"The bequest to the county hospital * * * was a valid bequest for the reason that the county hospital is a state institution and the trust created was for the benefit of the state, and for the further reason that the Legislature has authorized counties to accept bequests and hold and use the same for the purposes prescribed by the terms of the bequest."

Hereunder, it is urged that one of the primary duties of a state is to care for the indigent sick, and that the Legislature has, by the various county government acts and other measures, authorized, if not compelled, the several counties to assume their proper share of this public duty. Again quoting from appellants' brief:

"It thus appears that the state has continuously undertaken to provide for the care of the indigent sick of the state. At times it has done so by delegating to the counties the duty of providing hospitals and caring for the poor without supervision by any other state agency, but since 1903 this delegated duty has also been supervised and controlled by a state agency and by the Governor of the state. The power to build county hospitals and almshouses cannot now be exercised by the board of supervisors without the sanction of the state board of charities.

"Legislative control over institutions for the care of indigent sick as expressed by the provisions of the above-mentioned enactments fixes the character of such institutions as state institutions maintained for the purpose of carrying on the work of the state. * * *"

[2] In 5 McQuillan on Municipal Corporations, § 2458, the rule is thus stated:

"The Legislature may, in the absence of constitutional restriction, empower municipalities to establish municipal hospitals, dispensaries, asylums, poor houses and other charitable institutions to care for the sick, dependent, neglected, destitute, insane or poor, and to prescribe regulations for the government thereof, and such power is usually conferred. * * * The fact that a municipal asylum is subject to legislative control does not make it a state institution."

No reason suggests itself why a different principle should be applied to similar county institutions.

The case of Chalfant v. State, 37 Ohio St. 60, 61, involved the question whether or not Longview Asylum, founded by Hamilton county under acts of the General Assembly, was a state institution within the meaning of an article of the Ohio state Constitution, which required the trustees of such institutions to be appointed by the governor. The court declared, in part:

"The constitutional provision evidently refers to institutions belonging to and owned by the state, and not to such as might belong to particular municipalities or counties, though established under the legislative authority of the state. * * *

"The grounds upon which it is claimed to be a state institution are that the state has contributed to its support; that it is governed by the laws of the state; and, moreover, that it is made the duty of the state by the Constitution, to foster and support institutions for the benefit of the insane, blind, deaf, and dumb.

"While it is true this duty is imposed on the state, yet, it is left to the wisdom of the general assembly to determine the character of the institutions through which the benefit is to be conferred.

"There is no constitutional inhibition against authorizing a county, or the municipalities of the state establishing such institutions. All institutions for these purposes are not required to be state institutions; but when state institutions are created for the purpose, the Constitution requires the trustees to be appointed in the mode therein provided.

"The provision has no application to institutions for these purposes founded by individuals, or particular localities, under authority granted for the purpose. Nor do such institutions become state institutions from the fact that they are subject to legislative government and control. All institutions and corporations created for public purposes are subject to be thus governed.

"Nor is the character of the institution affected by the fact that the Legislature has contributed to its support. The institution was created to administer in a particular county a public charity, which the state is enjoined to foster, and there is no inhibition against the general assembly giving it such aid as it may deem just."

This definition of "state institution" seems to have been approved in Estate of Houk, 186 Cal. 643, 646, 200 P. 417, 418, wherein, in passing upon the question whether or not a bequest to a municipality for the construction and maintenance of a pleasure pier was a charitable bequest within the meaning of section 1313, the court declared:

"In Chalfant v. State, 37 Ohio St. 60, state institutions are defined as institutions belonging to and owned by the state and not such as might belong to particular municipalities."

Moreover, it is significant to note that section 2145 of the Political Code enumerates the various state hospitals. Obviously, if county hospitals were intended to be state institutions, they would appear or be referred to in this section of the Political Code.

Nor do we think the residuary bequest in the instant case to the County Hospital of San Diego county comes within the exception contained in the phrase "for the use or benefit of the state or any state institution" found in section 1313, for, as said in Estate of Houk, supra:

"It cannot be disputed that anything in the way of municipal improvement which benefits the municipality benefits the state as a whole. This would be the case were the beneficiary of that aid a private hospital, or charity of any kind which helped to carry the public burden, but that is obviously not what is meant by this provision of section 1313. When it is read with its context it will be apparent that the words 'state' and 'state institution' are to be read in the clause referred to precisely in the sense used in the preceding clause as referring to bequests directly to the state or in trust for the benefit of the state; directly to, or in trust for the benefit of, any state institution."

Furthermore, as suggested in Estate of Houk, supra, if the Legislature had intended to include municipal or county institutions within the exceptions to the provisions of section 1313, Civil Code, it would have expressly so provided.

[3] As indicated, we conclude that the bequest here to the County Hospital of San Diego county is not a bequest "to the state, or to any state institution, or for the use or benefit of the state or any state institution," so as to come within the exception to the provisions of section 1313 of the Civil Code.

The decree of distribution is affirmed.

We concur: WASTE, J.; SEAWELL, J.; SHENK, J.; RICHARDS, J.; LENNON, J.; HOUSER, Justice pro tem.

197 Cal. 43

JOHNSON v. SCHIMPF. (Sac. 3627.)

(Supreme Court of California. Sept. 11, 1925.)

1. Vendor and purchaser ⟹351(1)—Allegations of complaint for breach of contract to convey held to limit recovery under statute for damages for vendor's bad faith.

In action for breach of contract to convey land, where there were no allegations in complaint showing payment or part payment of purchase price, nor expenditures incurred in examination of title, plaintiff's recovery under Civ. Code, § 3306, is limited to damages under clause providing that, in case of bad faith, damages were to be the difference between price agreed to be paid and value of the estate agreed to be conveyed at time of the breach and expenses incurred in preparing to enter the land,

2. Vendor and purchaser ⟹349—Allegations in complaint for breach of contract held to clearly and indubitably indicate bad faith of vendor.

In action for breach of contract to convey realty, where complaint set out facts showing material representations by defendant to plaintiff, and reliance thereon by plaintiff in expending money, *held* that the complaint clearly and indubitably indicated bad faith of vendor.

3. Pleading ⟹9—Bad faith of defaulting vendor in contract to convey realty need not be specifically alleged under statute.

Bad faith of defaulting vendor in contract to convey real property need not be specifically alleged in order to make cause of action under last provision of Civ. Code, § 3306; it being sufficient if ultimate facts are pleaded from which bad faith may be deduced.

4. Vendor and purchaser ⟹349—Cause of action for failure to convey realty held stated within provisions of statute.

In action for damages for breach of contract to convey realty, *held* that a cause of action was stated by the complaint within the provisions of Civ. Code, § 3306.

5. Evidence ⟹460(3)—Vendor and purchaser ⟹22—Less strictness in description of property demanded in contract for sale than in deed of conveyance, and parol evidence admissible to identify property.

Less strictness in the description of property is demanded in contract than in deed of conveyance, and, in the construction of executory contracts for sale of realty, courts are liberal in their construction to give effect to intent of parties, and extrinsic and parol evidence may be resorted to as a means of ascertaining and identifying property in question.

6. Evidence ⟹460(3)—Land in contract for sale held sufficiently identified by occupancy, and parol evidence admissible to aid description.

In action for breach of contract to convey realty, *held* that the description sufficiently identified the property in controversy by occupancy, and parol evidence could be introduced in aid thereof.

7. Estoppel ⟹83(1)—One intentionally inducing another to believe certain facts to his prejudice estopped to deny same.

It is elementary that, where one by his acts, representations, or admissions intentionally induces another to believe certain facts to exist, and latter without fault, in reliance thereon, will be materially prejudiced if the former is permitted to deny such facts, the one making the representations is estopped from denying same.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Estoppel.]

8. Estoppel ⟹83(2)—Owner of property, clothing another with ostensible authority to dispose of same, leading third parties to act in reliance thereon, is precluded thereafter from setting up ownership.

Where the owner of property clothes another with ostensible authority to dispose of same, and innocent third parties are thereby led or induced to act on such representations, the real owner is precluded thereafter from setting up his ownership to their detriment.

9. Estoppel ⟹107—If allegations of complaint are tantamount to allegations of estoppel, it is well pleaded.

It is a general rule of pleading that, if the allegations of a complaint are tantamount to an allegation of estoppel, it is well pleaded, though there be no specific allegations of estoppel.

10. Estoppel ⟹107—Complaint in action for breach of contract of sale of realty held to state sufficient facts upon which estoppel may be predicated.

In action for breach of contract for the sale of realty, *held* that the complaint stated sufficient facts upon which an estoppel may be predicated, and to state cause of action against defendant.

In Bank.

Appeal from Superior Court, Yuba County; Eugene P. McDaniel, Judge.

Action by J. W. Johnson against Marie Schimpf. From a judgment for defendant, plaintiff appeals. Reversed.

Crofton & Wetmore, of Marysville, for appellant.

W. H. Carlin, of Marysville, for respondent.

LENNON, J. This action was brought to recover damages, alleged to have been sustained by plaintiff, because of the breach by the defendant of a contract to convey real property. The court below sustained a general demurrer to plaintiff's second amended complaint without leave to amend. Judgment was accordingly entered in favor of defendant. Plaintiff appeals from this judgment.

The pleaded facts in the case, substantially stated, are these: The defendant was the owner of certain real property upon which were situated certain designated buildings,

consisting of slaughter houses, sheds, and corrals, which constituted the appurtenances of a slaughter house business. One Venters was in possession of said buildings; he claimed to own the same, and represented to the plaintiff herein that he had the right to sell and dispose of them. Plaintiff desired to purchase these buildings, provided he could purchase the land upon which they stood. Defendant, knowing these facts, represented to plaintiff that said Venters had the right to sell the buildings and deliver possession to plaintiff. Defendant then entered into an agreement with plaintiff to sell the said real property upon which the buildings were situated at a stated price, when the plaintiff should acquire the said buildings from Venters. Relying upon this agreement with defendant, plaintiff, with the knowledge and consent of defendant, and believing defendant would convey the said land as agreed, purchased the said buildings and appurtenances from said Venters, paying $4,000 therefor, and took possession of said land and buildings with the knowledge and consent of defendant. Within four days subsequent thereto, when called upon by plaintiff to perform her agreement, defendant repudiated the same and refused to make the agreed conveyance of the land. Thereafter defendant set up her ownership of the buildings and demanded rent from plaintiff and threatened him with arrest if any attempt were made to remove the said buildings; whereupon plaintiff relinquished possession to defendant.

[1-3] The provisions of section 3306 of the Civil Code, after prescribing the ordinary measure of damages in an action to recover for breach of contract to convey realty, specifically declare that, in addition thereto, the measure of damages shall be: "In case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." For the purposes of this appeal, plaintiff may be considered as being in the analogous situation to one who had actually placed the improvements upon the land in reliance on the defendant's promise to make a conveyance. There are no allegations in the complaint showing payment or part payment of the purchase price of said land, nor of any expenditures incurred in examination of the title. Plaintiff's recovery is therefore limited by the concluding clause of section 3306 of the Civil Code. In order, therefore, to make out a cause of action, it was incumbent upon the plaintiff to allege bad faith in the defendant's refusal to convey the land in question. The complaint in the instant case sets out facts showing that the defendant had made certain material representations to plaintiff, believing that plaintiff would act on same; that plaintiff thereafter, in reliance on said representations, did act and expend money; that defendant, without just cause, repudiated her agreement and refused to make the promised conveyance. The alleged willful, unwarranted default of the defendant, without just cause, is a clear and indubitable indication of her bad faith. It is consonant with the general rules of pleading, to set out facts which of themselves necessarily imply bad faith. Osborne v. Clark, 60 Cal. 622; Anderson v. Bank, 140 Cal. 695, 74 P. 287.

This court, although never having had the occasion to pass upon the precise point presented here, has uniformly held that bad faith in a defaulting vendor, in a contract to convey real property, need not be specially alleged in order to make out a cause of action under the last provision of section 3306 of the Civil Code. If the ultimate facts are pleaded from which the bad faith of the vendor is a necessary deduction, the complaint will suffice to state a cause of action. Morgan v. Stearns, 40 Cal. 434; Clark v. Yocum, 116 Cal. 515, 48 P. 498; Shaw v. Union Escrow Co., 53 Cal. App. 66, 200 P. 25. Bad faith was implied from the pleaded facts in Morgan v. Stearns, supra, although the complaint did not expressly and specifically allege bad faith in the defaulting vendor. In Clark v. Yocum, supra, there was no express allegation of defendants' bad faith, and it was held that, inasmuch as the defendants had agreed to convey certain water rights and privileges to plaintiffs, who had paid the purchase price therefor, it was bad faith on the part of the defendants, within the meaning of section 3306, Civil Code, to refuse without just cause or excuse to perform their contract. In Shaw v. Union Escrow Co., supra, an attack was made upon the sufficiency of the pleading to raise the issue of bad faith. The court said:

"Appellant makes the further contention that the complaint in the action did not state facts sufficient to present the issue as to the bad faith of defendant. The complaint did allege the making of the contract, the breach thereof, the value of the property at the time of the breach and that the defendant 'without any just cause or just excuse' refused to make conveyance of the property."

The court also said:

"* * * It is not necessary, in order to establish bad faith within the meaning of section 3306 of the Civil Code, that the vendor be shown to have refused to go on with the transaction because of some gain which would accrue to him. It is sufficient if he refuses to convey, where through his own negligence he has put it out of his power to fulfill the obligations of his contract."

[4] The complaint in the instant case having alleged facts which necessarily compel the deduction of bad faith on the part of the defendant, it must be held that a cause of action was stated within the provisions of section 3306 of the Civil Code.

[5] Respondent by special demurrer challenges the sufficiency of the complaint on two additional grounds, namely, the inadequacy of the description of the land agreed to be conveyed, and the failure to allege by what right Venters sold and disposed of the said buildings and appurtenances situated upon the land. There is no merit in either of these objections. It is now the general and well-established rule that less strictness in the description of property is demanded in a contract than in a deed of conveyance. In the construction of executory contracts of sale of real estate, courts have been most liberal, and have sought, as far as consistent with established rules, to give effect to the intention of the parties in applying descriptions of property. The usual rigid construction given to deeds has not been adhered to in the character of contracts under consideration here. The description may be supplemented by extrinsic evidence showing its application to particular property to the exclusion of all other property. Parol evidence is ordinarily admissible to show what property the parties intended to convey, and it will be deemed that a contract adequately describes the property if it refers to something which is certain or provides a means of ascertaining and identifying the property which is the subject-matter of the contract. Preble v. Abrahams, 88 Cal. 245, 26 P. 99, 22 Am. St. Rep. 301; Marriner v. Dennison, 78 Cal. 202, 20 P. 386; Sparks v. Hess, 15 Cal. 186; Lange v. Waters, 156 Cal. 142, 103 P. 889, 19 Ann. Cas. 1207; Towle v. Carmelo L. & C. Co., 99 Cal. 397, 33 P. 1126; Carr v. Howell, 154 Cal. 372, 97 P. 885; Estate of Garnier, 147 Cal. 457, 82 P. 68; Calif. Pack. Corp. v. Grove, 51 Cal. App. 253, 196 P. 891.

[6] A scrutiny of the description of the land in the instant case shows that the property in controversy is sufficiently identified by occupancy, viz. that portion occupied and upon which is located the slaughter house, sheds, corrals, and appurtenances. This description could be made more certain, if need be, by the introduction of parol evidence to show what portion the parties intended to be embraced in the parcel to be conveyed.

[7, 8] It was immaterial under the pleaded facts of the complaint whether Venters was the owner of the buildings or whether he was simply given the right to sell them under some agreement with defendant as her agent or otherwise. The salient, outstanding fact, according to the allegations of the complaint, is that Venters claimed the right to sell them, and respondent, being aware of appellant's desire to purchase them and the lot upon which they were situated, and intending that appellant should rely upon such information, represented to him that Venters did have such right of sale. Appellant alleges he did rely upon these representations as being true. It is elementary that where one by his acts, representations, or admissions intentionally induces another to believe certain facts to exist, and the latter, without fault, acts in reliance thereon so that he is materially prejudiced if the former is permitted to deny the existence of such facts, the one making the representations is estopped from denying same. Where the owner of property permits another person to be clothed with ostensible ownership or as having full power of disposition, and innocent third parties are thereby led or induced to act in reliance on such representations, the real owner is precluded from setting up his ownership thereafter to their detriment.

[9, 10] Although there are no specific allegations of estoppel, the allegations of the complaint clearly indicate a cause of action based upon estoppel. It is a general rule of pleading that, if the allegations of a complaint are tantamount to an allegation of estoppel, it is well pleaded. Smiley v. Read, 163 Cal. 644, 126 P. 486; Carpy v. Dowdell, 115 Cal. 677, 47 P. 695; Beardsley v. Clem, 137 Cal. 328, 70 P. 175; Davis v. Davis, 26 Cal. 23, 85 Am. Dec. 157; Palvutzian v. Terkanian, 47 Cal. App. 47, 190 P. 503; Roger v. Struven, 44 Cal. App. 528, 186 P. 817; Mills v. Jackson, 19 Cal. App. 695, 127 P. 655. The plaintiff has alleged sufficient facts upon which estoppel may be predicated, and consequently the complaint sufficiently states a cause of action against the defendant upon the theory that having confirmed plaintiff in the belief that Venters was the owner of and had the right to sell the buildings, the defendant is precluded, if the allegations of the complaint be true—and they must be taken to be true for the purposes of demurrer—from denying that Venters had the right to sell the buildings. Respondent's other objections are nonsubstantial.

The judgment is reversed.

We concur: LAWLOR, Acting C. J.; SEAWELL, J.; WASTE, J.; RICHARDS, J.; HOUSER, Justice pro tem.; KNIGHT, Justice pro tem.

197 Cal. 36

In re BERNARD'S ESTATE.

DONAHUE et al. v. POCHIN et al.

(L. A. 8444.)

(Supreme Court of California. Sept. 11, 1925.)

1. Wills ⟸133—Signature in exordium clause only not sufficient signing to make document a will.

A signature in exordium clause of an alleged holographic will, abruptly terminating in middle of last page, indicating intention to do something additional, and containing no other signature, is not a sufficient signing to make document a will, but is regarded merely as descriptio personæ.

2. Wills ⟸133—Signature in exordium clause of holographic document held not executing signature, despite words "following four sheets included."

Signature in exordium clause of holographic document of four pages is not regarded as an executing signature for a will, despite opening words "the following four sheets included," since they do not warrant inference of intent to make an executing signature.

3. Wills ⟸132—Holographic document not a valid will, where place intended as a part of will was printed.

A holographic document, written on hotel stationery, containing printed words of place of writing, intended to be made an essential part of document, is invalid as not executed according to Civ. Code, § 1277, requiring such documents to be entirely written by hand of testator.

4. Wills ⟸386—Execution of will, question of fact for determination of trial court, sustained, unless unsupported by evidence.

The due execution of a will is a question of fact, and its determination by trial court will be sustained, unless unsupported by evidence.

In Bank.

Appeal from Superior Court, Los Angeles County; Frank R. Willis, Judge.

In the matter of the estate of Josephine Bernard, deceased. Petition by Jessie Bernard Donahue and others and Jane B. McKinley, as administratrix with will annexed of the estate of Josephine Bernard, deceased, for probate of last will and testament of Josephine Bernard, deceased, against Mary E. Pochin and others. From an order revoking the probate of a certain document holographic in form, the plaintiffs appeal. Affirmed.

Stewart & Stewart, of Los Angeles, for appellants.

Merriam, Rinehart & Merriam, of Pasadena, for respondents.

LENNON, J. This appeal is taken from an order revoking the probate of a certain document, holographic in form, theretofore admitted to probate as the last will and testament of Josephine Bernard, deceased. The order of the lower court revoking the probate of the alleged will rests upon two grounds: (1) That it was not signed by the decedent; (2) that it was not entirely written by the decedent as required by section 1277 of the Civil Code.

The document in question consists of four sheets of hotel stationery. The first page, as it appears in a photostatic copy incorporated in the record, is as follows:

"The following 4 sheets of paper included, Long Beach, California, Oct. 12, 1918.
"I, Josephine Bernard of the City and County of Denver, Colo. do hereby declare this to be my last will and testament."

This is followed by a number of dispositive clauses, and then the document terminates abruptly near the middle of the last page in the following language:

"To her husband Herbert Donahue ruby and diamond stick pin."

It is a conceded fact in the case that the document in question was in the handwriting of the decedent, save the words in the date line, "Long Beach, California," which were printed. The only question here presented is whether the document is entirely written and signed by the hand of the decedent.

[1] The rule governing what constitutes a sufficient signing of a holographic will is enunciated in Estate of Manchester, 174 Cal. 417, 163 P. 358, L. R. A. 1917D, 629, Ann. Cas. 1918B, 227, where the only signature in the document offered for probate was in the opening clause, and commenced in terms similar to those of the document in the instant case, and ended without any signature other than the one at the beginning. There was nothing on the face of the will to indicate that the testatrix intended to adopt the signature in the introduction as her signature in execution of the will. The court held:

"* * * A document in which the name of the person making it appears only in the beginning thereof, and by way of recital to designate that person as the maker * * * cannot be said to have been signed by the maker."

On this subject the court laid down the general rule in the following language:

"The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature must satisfactorily appear on the face of the document itself. If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, from an inspection of the whole document, its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference from the document it-

self that the signature was so placed with the intent that it should there serve as a token of execution. If such inference thus appears, the execution may be considered as proven by such signature."

This rule was approved in the Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778, and in Estate of Streeton, 183 Cal. 284, 191 P. 16. It was affirmed in Estate of Hurley, 178 Cal. 713, 174 P. 669. In Estate of McMahon, supra, the signature was in the exordium of the will, which was followed by a number of dispositive clauses, and concluded with the following:

"I do hereby publish and declare the foregoing, entirely written, dated and signed by my own hand, to be my last will and testament, this second day of January, 1912."

No signature followed nor was any to be found in any other part of the will except in the exordium. It was held, nevertheless, that this was a declaration of the intent of testatrix to adopt the name appearing in the exordium as her signature, and accordingly the validity of the will was upheld. In Estate of Streeton, supra, the court said, after reiterating the rule above stated in Estate of Manchester:

"The name of the testator appears in a blank space, disconnected from the rest of the written matter both as to location and meaning. Had the name appeared in the exordium, the logical inference from the context would probably have been that it was intended merely to identify the person making the will, and additional facts might have been necessary to raise the inference that it was also intended as a signature in execution of the will. Estate of Hurley, 178 Cal. 713, 174 P. 669; Estate of McMahon, 174 Cal. 423, 163 P. 669, L. R. A. 1917D, 778."

The same rule was applied in the Estate of Hurley, supra, as the test in determining whether an alleged will had been signed within the meaning of section 1277 of the Civil Code. In that case, in the document under consideration, as in the instant case, the name of the decedent appeared only in the introductory clause, and there, as here, the instrument closed abruptly without anything to indicate upon the face of the document that the signature in the exordium was adopted or intended to be adopted as the executing signature. Said the court in the case last cited:

"* * * The signature appears in the opening statement of the paper, but there is nothing in the document or in the closing paragraph to indicate that the testatrix intended to adopt that signature as the executing signature of the will. Indeed, the contrary may be inferred from the fact that the will terminates without even a punctuation mark, thereby indicating that the testatrix ceased writing before she had completed declaring her intention and that she did not regard the document as a completed will. But the contrary inference need not appear. In the absence of anything on the face of the will to raise the inference that the name in the exordium was intended as a signature in execution, the holographic document cannot be deemed a valid will."

[2] Marking and measuring the document in question by the above-stated "true rule," which has been so often reaffirmed and approved by this court, there is no escape from the conclusion, it seems to us, that there was no executing signature sufficient to give legal effect as a will to the document. There is no signature at the end of the document, where it is the common custom to place a signature intended for authenticating and indicating the completion of an instrument. The signature of the decedent appears only in the exordium, and there is nothing in any other part of the alleged will to indicate affirmatively or by necessary implication that the signature was intended to be or was adopted as the final executing signature in authentication of or in execution of the document as a completed testamentary act. The obvious and natural inference to be drawn from the position of the name of the decedent in the alleged will is that it was intended merely as descriptio personæ, and, in the absence of anything affirmatively appearing on the face of the will itself tending to show that such signature was intended to authenticate it, this conclusion is inevitable. This is so notwithstanding the fact that decedent wrote at the very beginning of the document the words and figure, "The following 4 sheets of paper included." These words indicate merely that decedent contemplated making the document her will, but they do not, standing alone, warrant the inference of an intent to adopt the signature in the exordium as her executing signature; nor are they so intimately connected with the context of the document, as was the situation in the estate of McMahon, supra, as to justify the inference that she intended such signature to be in authentication of the document as her will. The abrupt termination of the document near the middle of the last page is a strong indication of decedent's intent to do something more in order to make it a complete will. The last clause being, in all general respects, similar to the preceding dispositive clauses manifests that the writer did not intend to terminate the document finally and definitely at that particular point, but, rather, indicates that something additional was to be done, and necessarily compels the conclusion that decedent had no intention of adopting the name written in the opening clause of the will as the executing signature to her final testamentary act.

[3] In setting aside the order admitting the will to probate, the lower court did so upon the additional ground that it was not entirely written by the hand of the decedent. We are, then, upon this phase of the case,

called upon to determine whether the document was executed in compliance with the essential requirements of the law. A holographic document to be given legal effect as a will must be, among other things, "entirely written * * * by the hand of the testator himself. It is subject to no other form." Civ. Code, § 1277; Estate of Rand, 61 Cal. 468, 44 Am. Rep. 555; Estate of Billings, 64 Cal. 427, 1 P. 701; Estate of Plumel, 151 Cal. 77, 90 P. 192, 121 Am. St. Rep. 100; Estate of Francis, 191 Cal. 600, 217 P. 746; Estate of Thorn, 183 Cal. 512, 192 P. 19.

In Estate of Thorn, supra, the document admitted to probate was, in all of its essential portions, written in the handwriting of the decedent except the word "Cragthorn," which was inserted in two different places in the body of the document with a rubber stamp. This court held that the alleged will was not executed in accordance with the mandatory requirements of the statute, and was for that reason invalid. The court stated:

"If the words 'Cragthorn' stamped with a rubber stamp upon this document, or either of them, constitute a part of the attempted will, it seems obvious that the will is not 'entirely written by the hand of the testator himself,' and therefore does not measure up to the mandatory requirements of the statute."

That decision governs and controls in the determination of the validity of the document now before us. The instrument in the present case, it seems to us, does not fulfill the statutory requirements, in that it is not "entirely written * * * by the hand of the testator himself." Civ. Code, § 1277. It will be noted that the clause, "the following 4 sheets of paper included," written at the top of the first page, is written immediately above the date line, and the written word "included" is carefully adapted to the alignment of the printed words, "Long Beach, California," on the date line of the letterhead. The day, the month, and the year are written with exactitude on the same line with and directly following the printed name of the place where the alleged will was executed. The printed words are incorporated in and doubtless were intended to be made a part of the heading of the document. The care with which the date has been placed upon the precise line with the printed words indicate that the words immediately preceding the date must have been intended to be made a part of the document as the name of the place of the execution of the document. Moreover, this construction, based upon the relative position of the words, is supported by the juxtaposition of the written word "included" and the printed words "Long Beach, California," which are in a direct and immediate line thereto. It thus appears that decedent not only wished to make the date a part of the document, but to make, also, the printed portion, designating the place of the making of the document, an essential part of the document. Unless it can be said that the clause at the very top of the will, which reads: "The following 4 sheets of paper included," is a material part and parcel of the will, then there is nothing on the face of the document which in any wise indicates that the testator had executed a completed instrument; and, if we take that clause to be a material part of the will, then we are confronted with the fact that the printed words "Long Beach, California," are likewise a material part and parcel of the will, and therefore it cannot be said, in keeping with the rule enunciated in the Estate of Thorn, supra, that the will was entirely written by the hand of the testator. This being so, we perforce reach the conclusion that the alleged will was not executed in accordance with the requirements of the law.

[4] The due execution of a will is a question of fact, and its determination by the trial court must be sustained, unless that determination is unsupported by the evidence. Estate of Streeton, 183 Cal. 284, 191 P. 16; Ryder v. Bamberger, 172 Cal. 799, 158 P. 753; Rideout v. City of Los Angeles, 185 Cal. 434, 197 P. 74. The order appealed from is affirmed.

We concur: LAWLOR, Acting C. J.; WASTE, J.; RICHARDS, J.; SEAWELL, J.; SHENK, J.; HOUSER, Justice pro tem.

197 Cal. 20

In re TRICKETT'S ESTATE. (L. A. 8339.)

(Supreme Court of California. Sept. 11, 1925.)

1. Descent and distribution ⊜47(2) — That omission by testator of child or issue of deceased child from will was intentional must be established from will itself.

Under Civ. Code, § 1307, providing that, if testator omits to provide in will for children or issue of deceased children, unless it appears that such omission was intentional, such child or issue of such child has same rights as if he had died intestate, intention of testator to omit such children must be determined from will itself, and parol evidence must not be resorted to to show his intention.

2. Descent and distribution ⊜47(2)—To exclude testator's children or issue of deceased child from share in estate it must appear on face of will that omission therefrom was intentional, and words of will must show testator had such persons in mind and omitted them.

Under Civ. Code, § 1307, to exclude child of testator or issue of deceased child not mentioned in will from share in estate, it must

appear on face of will, not only that omission was intentional, but words of will must show that testator had persons omitted in mind and omitted them from provisions of will.

3. Descent and distribution ⟸47(2) — Will construed to permit only testator's wife and his children living at his death to share estate.

Where residuary clause of will provided for division among testator's four children at his death, and if any of them should die, then to be divided among the rest living, and not their heirs, or any other relatives or friends of testator, only testator's wife, provided for by prior clause and his childen living at his death shared estate, and children of his deceased children did not participate therein, regardless of Civ. Code, § 1307, providing that on omission of testator to provide in will for any of children or issue of deceased child, unless it appears that such omission was intentional, child or issue of such child takes share he would have taken if testator had died intestate.

4. Wills ⟸502—Testator, excluding from participation in estate any other relatives than those designated, held to have used words "relatives" in legal sense.

Where testator, after making certain devises, in residuary devise, left property to his four children to be divided among them, if living at his death, and if any of them should die, to be divided between the rest living, and not their heirs or any other relatives of testator, he must be deemed to have used word "relatives" in its legal sense, which should be construed, unless contrary intention appears, as meaning those next of kin, who in case of intestacy would take under statutes of distribution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Relation—Relative.]

5. Wills ⟸502—Word "relatives" or "relations" in devise or bequest means, unless contrary intention appears, those next of kin who, in case of intestacy, would take under statutes of distribution.

Word "relative" is ordinarily defined to mean one that is connected by blood, affinity, relation, and word "relatives" or "relations," when used in a devise or bequest, should be construed, unless a contrary intention appears, as meaning those next of kin who, in cases of intestacy, would take under statutes of distribution.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

In the matter of the estate of A. G. Trickett, deceased. From a decree of distribution, Jessie Neva O'Dell and others appeal. Affirmed.

Benjamin P. Oakford, of Los Angeles, and Harry G. Kyle, of Kansas City, Mo., for appellants.

A. B. Taylor, of Whittier (Arthur G. Wray, of Whittier, of counsel), for respondent.

LENNON, J. A. G. Trickett died testate March 11, 1923, a resident of Whittier, Cal., and his olographic will was admitted to probate in the superior court of the county of Los Angeles. This is an appeal from a decree of distribution. The decedent was survived by his widow, Addie G. Trickett; his four children, Mary P. Sidwell, Charles W. Trickett, Frances A. Nutt, and Maggie R. Shahan; his three grandchildren, Jessie Neva O'Dell, DeRoy Eugene Colt, and Demi Morgan Colt, the issue of two predeceased daughters of the decedent. The will purported to devise and to bequeath a life estate to testator's widow in certain real property and in certain outstanding obligations due to the testator, with remainder over to his four children. These bequests were supplemented by a general residuary clause which reads as follows:

"And all other property I may have & hold at that time (the time of his death) is to be divided amongst the four children mentioned if living at that time & if any of them should dye then to be divided between the rest living & not their heirs or any other relatives or friends of mine."

The will does not in terms mention or provide for the three grandchildren above mentioned. They are the appellants, and the point is made in their behalf that they, being among the heirs at law of the testator and he having failed to provide for them in his will or to indicate that such omission was intentional, are entitled under the provisions of section 1307 of the Civil Code to share in his estate, as if he had died intestate. That Code section provides:

"When any testator omits to provide in his will for any of his children, or for the issue of any deceased child, unless it appears that such omission was intentional, such child, or the issue of such child, has the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section."

[1] The quoted Code section places a child and the issue of a deceased child in the same category, so that, if no provision be made for them in the will of a decedent, they are entitled to share in his estate the same as though no will had been made, unless it appears that such omission was intentional. The intention of the testator to omit such children must be determined from the terms of the will itself, and parol evidence may not be resorted to for the purpose of showing the intention of the testator. Estate of Stevens, 83 Cal. 322, 23 P. 379, 17 Am. St. Rep. 252; Estate of Utz, 43 Cal. 200; Bush v. Lindsey, 44 Cal. 121; Estate of Wardell, 57 Cal. 484; Rhoton v. Blevin, 99 Cal. 645, 34 P. 513; In re Salmon, 107 Cal. 614, 40 P. 1030, 48 Am. St. Rep. 164.

[2] We are limited, therefore, to the terms

of the will under consideration for the determination of the question of whether or not decedent intentionally omitted appellants, his heirs at law, from his will. It must appear upon the face of the will, not only that the omission was intentional, but "the words of the will must show that the testator has the persons omitted in his mind, and having them so in his mind, has omitted them from the provisions of the will." Estate of Lindsay, 176 Cal. 238, 168 P. 113; Estate of Minear, 180 Cal. 239, 180 P. 535; Estate of Callaghan, 119 Cal. 571, 51 P. 860, 39 L. R. A. 689; Estate of Hassell, 168 Cal. 287, 142 P. 838; Payne v. Payne, 18 Cal. 291. In Rhoton v. Blevin, supra, the testator was survived by his widow, four children and three grandchildren, the issue of two deceased daughters. The material portions of the will, among other things, provided:

"First knowing that my beloved wife, Ona Blevin, will ever continue the same kind, devoted mother to our children which she has so thoroughly proven herself on all occasions, I make no provisions for said children further than herein mentioned. * * *"

Although the testator did not refer to, or in any way designate, his grandchildren by name in the will, the court held that it appeared from the face of the will that the grandchildren were not unintentionally overlooked or omitted from the will, and that by the use of the word "children" the testator meant also the issue of his deceased daughters as well as his living children. In Estate of Hassell, supra, three children were not named or provided for in the will, but there was this provision:

"Those of my heirs, not herein mentioned, has been omitted by me with full knowledge thereof."

It was held that the intent of the testator, as thus expressed, was clearly sufficient to indicate that the omission was not unintentional. In this behalf the court said:

"At law, while the word [heirs] may include others, it always includes the children of a decedent."

In Estate of Lindsay, supra, a will, after giving all the testator's property to his wife, recited that the disposition was purposely made, because he knew that she would provide for "their son" and then further declared:

"Should any other person or persons present themselves claiming to be heirs of mine, I give and bequeath to such person or persons the sum of five dollars ($5.00)."

The court held in that case that, inasmuch as the testator was writing of persons claiming to be "heirs," he must have had in mind his illegitimate children of whom he had made a public acknowledgment, and the court said:

"The will, read in the light of the law of succession, shows on its face that the testator had in mind the persons, or the very class of persons, here asserting a right to succeed to a portion of his estate. He did make provision for all such persons and the appellants, accordingly, do not bring themselves within the terms of section 1307, which is operative only where the testator 'omits to provide in his will for any of his children. * * *'"

In Estate of Minear, supra, the will stated in part:

(1) "I am a single man. I have never been married. (2) Now if there should be any other or others than the ones that I have named in my will above that claim to be my lawful heirs and can and do prove that they are to each of them I will ($5.00) five dollars if there should be any such."

The court said:

"Taking the two provisions together, we think it is perfectly clear that what the testator in effect said was this: 'I never have been married, therefore I have no children. But if any persons other than those named in my will prove they are my heirs (either as children or otherwise) I give each of them $5.00.' The true construction of the will we believe to be that the testator intended to exclude from any substantial share in his estate any one not named in his will, whether a child or otherwise."

[3] The rule of construction, announced in those cases, covers and controls the situation presented in the case at bar. From an examination in its entirety of the will in question, it appears to us that the intention of the testator was to permit only his wife and those of his children living at his death to share in his estate. The intent is sufficiently indicated, we think, by the words of the will itself. The declaration in the will was to the effect that the residue of the estate should go only to his living children, and that if any one of them should predecease him, then the share given to such child was to go to the others living at the time of his death and "& not their heirs or any other relatives or friends of mine." It is palpable, it seems to us, that the testator intended only his living children to share in his estate and to exclude therefrom all other persons. Not only did the testator make the fact of his children being alive at the time of his death an express condition precedent to his bequest to his living children, but he added, also, the proviso directing to whom such estate should go in the event of the death of any of his children. He expressly excluded the issue of those living children named in the will who might predecease him, and placed the issue of said living children, in the event of the death of their parent, in the same situation, with relation to the deceased, as now stand the appellants.

[4, 5] The clause excluding from participation in the testator's estate "any other rela-

tives," considered and construed in the light of the meaning ordinarily and in law attributed to the words employed therein, is especially significant, for, coupled with the preceding clauses of the will, it indicates the testator's intention to exclude from his bounty all persons embraced within its terms. The testator presumably knew the law, and therefore must be deemed to have used the word "relatives" in its legal sense. The word "relative" is ordinarily defined to mean "one that is connected by blood, affinity, relation" (Webster's Dictionary). And, in law, "the word 'relatives' or 'relations,' when used in a devise or bequest, should be construed, unless a contrary intention appears, as meaning those next of kin who, in cases of intestacy, would take under the statutes of distribution. * * * " 40 Cyc. 1458; Thompson v. Thornton, 197 Mass. 273, 83 N. E. 880. See, also, Estate of Sowash, 62 Cal. App. 512, 217 P. 123. Marked and measured by the meaning of the word "relatives," as employed in testamentary dispositions, the conclusion is inescapable that the testator in the instant case must have had in mind his blood relations, among whom, necessarily, were his grandchildren, the appellants herein, and consequently must have intended to exclude them from participation in his estate. The testator was emphatic in his declaration that no "other relatives" should take under his will, and as was said in Estate of Lindsay, supra, "read in the light of the law of succession [section 1386, Civ. Code], the will shows on its face that the testator had in mind the persons, or the very class of persons, here asserting a right to succeed to a portion of his estate."

The general scheme of the will and the intent of the testator, as manifested by the language of the will, compel the conclusion that the testator failed to provide for appellants, not because he was oblivious of their existence, but rather, because he did not desire them to share in his estate.

Appellants, in support of their contention, cite and rely on the case of Hargadine v. Pulte, 27 Mo. 423. The will under consideration in that case was not in all respects similar to the will in the instant case. There the testator gave his entire estate to his wife and attempted to exclude "all and every person or persons." There was not apparent on the face of the will the sedulous discrimination between the living children and the grandchildren and the clear intent that testator wished only his living children to share in his bounty as appears in the will here under consideration. The ruling of the court in the case last cited is not reasoned in extenso, and is practically rested upon the case of Bradley v. Bradley, 24 Mo. 311. In the latter case, the principal provision of the will was as follows:

"That my wife, Ann Bradley, be my sole heir to all my estate. * * *"

No mention or reference was made to the children of the deceased, nor was there anything on the face of the will indicating an intent on the part of the testator to exclude purposely his children. The Bradley Case obviously is not pertinent to the point presented here. Hargadine v. Pulte, supra, was not cited, as counsel for appellants contend, by this court with approval in the Estate of Stevens, supra. The case of Bradley v. Bradley, supra, was there cited merely as affirmatory of the proposition that parol evidence is inadmissible to show the intent of the testator to exclude his children. In re Parrott's Estate, 45 Nev. 318, 203 P. 258, also relied upon by appellants, presents a will in which the testator declared that he had "no children," which in fact was not true. There was no recital in the will there, as in the will in the case at bar, evincing an intent to exclude all "other relatives." In none of the cases decided by this court and relied upon by appellants was there any declaration in the will of the testator, as in the instant case, that no other "heirs or any other relatives * * * " should share in the testator's bounty. In Estate of Stevens, supra, the testator failed to mention or provide for his daughter, but left a legacy to her child, the testator's grandson, and it was held that the fact that he mentioned his daughter's child did not necessarily imply that the daughter was in his mind, and she was accordingly permitted to take as a pretermitted heir. In Bush v. Lindsey, supra, the will made no mention of or reference to the children of the testator. A grandson, to whom all the estate was given, was the only person named in the will. In Estate of Ross, 140 Cal. 282, 73 P. 976, the testator mistakenly assumed that his son was alive, when in fact he had died leaving issue. No reference being made to the lawful heir, the issue of the deceased son, the grandson, was permitted to take as a pretermitted heir. In Estate of Utz, supra, the will made no provision for the testator's grandchildren, nor was there any general or particular reference made to them as a class. In Estate of Van Wyck, 185 Cal. 49, 196 P. 50, provision was made for the testator's son and daughter, but no mention of a grandchild, the issue of a predeceased daughter, was made. In Estate of Matthews, 176 Cal. 576, 169 P. 233, provision was made in the will for a deceased daughter, and no reference having been made to the issue of said daughter, it was held that the latter was unintentionally excluded from the will. In re Salmon, supra, the testator gave a small legacy to the respective widows of each of his deceased sons, but made no reference to the issue of said sons, and they were permitted to take as pretermitted heirs, because the mere mentioning of the widows was held to be insufficient to manifest an intent to exclude the grandchildren. In Estate of Wardell, supra, testatrix made no provi-

sion for an illegitimate daughter. The court said:

"Her name was not mentioned in it, and it does not appear by anything in the will itself that the omission was intentional."

In short, the testamentary documents under consideration in the California cases cited by appellants and just considered and discussed failed to indicate in terms, or by necessary implication, that the testator intentionally made no provision for his heirs at law. The construction of the will and the distribution of the estate, as decreed by the trial court in the instant case, are in harmony with the requirements of the law and with the manifest intent of the testator.

The decree is affirmed.

We concur: SEAWELL, J.; WASTE, J.; LAWLOR, J.; RICHARDS, J.

---

74 Cal. App. 104

LEVIN v. BOARD OF MEDICAL EXAMINERS OF CALIFORNIA et al.
(Civ. 5372.)

(District Court of Appeal, First District, Division 1, California. July 31, 1925.)

1. Physicians and surgeons ⟸4 — Physician from another state held entitled to reciprocity license.

A physician whose examination before medical examiners in Michigan was on certificate issued by qualified college that he had passed his examination and would be recommended for graduation, and to whom diploma was issued prior to certificate admitting him to practice, *held* entitled to reciprocity license to practice in California, all other requirements being satisfied, on application made in accordance with Medical Practice Act, § 13.

2. Physicians and surgeons ⟸2—Medical Practice Act reasonably construed.

In determining whether reciprocity license to practice medicine and surgery should issue to physician licensed in another state, Medical Practice Act should receive a reasonable construction, and the spirit should prevail over the letter.

3. Mandamus ⟸87 — Mandamus will control abuse of discretion by board of medical examiners.

Abuse of discretion by board of medical examiners, in arbitrarily refusing to issue reciprocity license under Medical Practice Act to qualified physician, regularly licensed in a sister state, because of finely drawn technicality, will be controlled by mandamus.

Original mandamus by Nathan P. Levin against the Board of Medical Examiners of California, Dr. L. P. Adams, and others, to compel respondents, as the Board of Medical Examiners, to issue petitioner a license. Writ granted.

Frederick W. Kant, of San Francisco, for petitioner.

A. B. Bianchi, of San Francisco, for respondents.

TYLER, P. J. Petition for mandate to compel respondents, the board of medical examiners, to issue to petitioner a license entitling him to practice medicine and surgery in the state of California.

Petitioner alleges that he is a duly licensed and practicing physician and surgeon of the state of Michigan, where he was licensed to practice medicine on the 27th day of June, 1907, after fully complying with all of the requirements of the board of medical examiners of that state; that he practiced medicine continuously in the state of Michigan from the date of the issuance of his license up to and including the month of July, 1924, except for a period of approximately one year, at which time he was a resident physician in a hospital in the city of Denver, state of Colorado.

It further alleges that petitioner has presented satisfactory credentials concerning his practice to the board which board acknowledges are sufficient to establish the fact that petitioner is of good moral character, and that he has had no charges preferred against him nor controversies during his practice in relation to the same; that petitioner is a graduate of the Detroit College of Medicine of the class of 1907, at which time such institution was a member of the Association of the American Medical Colleges, and has always been rated class A by the American Medical Association, and that such college fully complied with the standards set by the law of the state of California in 1907, and ever since has complied with such standards.

It is then recited that in accordance with section 13 of the Medical Practice Act of the state of California (St. 1913, p. 730), the petitioner applied to the board of medical examiners of the state of California for the issuance of a certificate to practice medicine in said state, and that he paid a registration fee of $100 in accordance with the terms of said section; that he produced the certificate entitling him to practice medicine issued by the board of medical examiners of the state of Michigan, and proved to the satisfaction of the board that he was the person named in said certificate, and that it was issued to him in the year stated; that the requirements of the Detroit College of Medicine from which the petitioner graduated, and the requirements of the board of medical examiners of the state of Michigan, which board was legally authorized to issue such certificate permitting petitioner to practice medicine, was not in any degree or particular less than those which are required for the issuance of a similar certificate to prac-

tice medicine in the state of California at the date of the issuance of said certificate. Petitioner also furnished respondents with satisfactory evidence showing that the requirements of the Detroit College of Medicine, which issued the certificate to petitioner, were up to the standard set by the California board.

It is then charged that respondents found that the requirements of the board issuing such certificate were not, when said certificate was issued, in any degree or particular less than the requirements provided for by the law of the state of California at such date, and that petitioner had been a resident of the state from which the application is based for a period of one year subsequent to the issuance of such certificate, but, notwithstanding these facts, the board refused petitioner a license to practice in this state solely upon the ground that the certificate which he presented to the board of medical examiners of the state of Michigan upon entering the examination in that state was not in fact a diploma.

Petitioner then alleges that he had taken a full course at the Detroit College of Medicine, and was on the 24th day of May, 1907, given a certificate by the secretary of that college stating in substance that petitioner had passed his final examinations at said college, and would be recommended to the trustees of such college for graduation; that petitioner presented his certificate to the board of medical examiners of the state of Michigan on May 27, 1907; that on May 30th following, at a conference of the examiners of the Detroit College of Medicine petitioner received a diploma from such college conferring upon him the degree of doctor of medicine. Upon the filing of the application an alternative writ was issued by this court. Respondents appeared and demurred and answered. From the answer it appears that petitioner filed a class C application for reciprocity with the respondent board on the 8th day of June, 1925, petitioning said board for a reciprocity license to practice medicine and surgery in the state of California, under and by virtue of section 13 of the Medical Practice Act of this state; that the application was made and based upon a license and certificate to practice medicine and surgery in the state of Michigan, which license was dated, made, and issued on the 27th day of June, 1907; that the application certified that the Michigan license was procured on a written examination taken and had on the 27th, 28th, and 29th days of May, 1907, and that said petitioner was admitted to said written examination on the degree and diploma of doctor of medicine issued by the Detroit College of Medicine and Surgery on the 30th day of May, 1907.

It is admitted that the Detroit College of Medicine is a member of the Association of American Medical Colleges, and is classified by the American Medical Association as Class A, and its graduates are and have been admitted to practice in the state of California at all times upon the diploma issued by it. They deny, however, that petitioner had received such a diploma at the time he presented himself for examination before the board of medical examiners of the state of Michigan, and the act of said board in subsequently admitting petitioner to practice adopted a standard less than that required by the laws of this state, which justified them in refusing to issue petitioner the reciprocity license applied for. In this connection it appears from the answer to the petition that petitioner, in support of his declaration that he had received a diploma of the Detroit College of Medicine, also presented to respondent board a document issued by the secretary of the Detroit College of Medicine informing petitioner that he had passed his final examinations by the faculty and would be recommended to the board of trustees for graduation.

It was upon this certificate that petitioner was permitted to take his examinations before the board of medical examiners of the state of Michigan. It further appears, however, that at the time petitioner herein presented himself to the board last mentioned the college had not issued diplomas to its graduates, but that they were in fact issued a few days later on the 30th day of May, 1907, and prior to the time petitioner was given his certificate to practice medicine and surgery in the state of Michigan.

The sole question here presented, therefore, is whether or not petitioner in legal contemplation was possessed of a diploma from the medical college mentioned at the time he was permitted to take his examinations before the board of medical examiners of the state of Michigan.

[1, 2] If the act of such board permitting him to take the examinations before his diploma could be actually made out and issued to him constituted the maintaining of a standard not equal to this state, then petitioner is not entitled to the relief sought. If, on the other hand, the possession by him of the certificate and the subsequent issuance to him of his diploma was to all legal intents and purposes the possession by him of a diploma, then it is conceded petitioner is entitled to a license on reciprocity, and it should be issued to him. To state the question is to answer it. The certificate was to all intents and purposes the equivalent of a diploma. It certified that petitioner had passed his final examinations, and he was therefore entitled as a matter of right to a diploma. Nelson v. Lincoln Medical College, 81 Neb. 533, 116 N. W. 294, 17 L. R. A. (N. S.) 930. Moreover, the diploma was in fact issued to him before he was granted his license. To say that under such circumstanoes he was not possessed of a diploma en-

titling him to take his examinations would be to put a narrow construction upon our statute, which requires the filing of a diploma prior to the taking of examinations. The statute should receive a reasonable construction, and the spirit and reason should prevail over the letter.

We are therefore of the opinion that petitioner is entitled to the relief sought.

[3] While, ordinarily, the action of an officer clothed with a discretion is not reviewable if exercised upon matters left to his discretion, yet where the discretion is abused and made to work injustice, it may be controlled by mandamus. In this case we think the board acted arbitrarily and abused its discretion.

Let the writ issue.

We concur: CASHIN, J.; KNIGHT, J.

---

74 Cal. App. 135

PEOPLE v. SWAAR. (Cr. 1212.)

(District Court of Appeal, Second District, Division 1, California. Aug. 10, 1925. Hearing Denied by Supreme Court Oct. 8, 1925.)

1. Embezzlement ⟸44(1)—Evidence held sufficient for conviction.

Evidence *held* sufficient to justify conviction of embezzlement.

2. Criminal law ⟸829(1)—Instructions covered by others properly refused.

Where subject-matter of proposed instructions was fully covered by other instructions given, they were properly refused.

3. Criminal law ⟸814(1)—Instructions on collateral matters, or on matters of slight materiality, properly refused.

Where instructions, although correct, were upon such collateral matters, or matters of such slight materiality that refusal could not work any serious prejudice, they were properly refused.

4. Criminal law ⟸768(1)—Instruction as to duty of jury to consider right of people to have laws enforced held not improper.

Instruction, advising jury that duty requires them to consider right of people to have laws properly executed, and that, unless you do your duty, laws may as well be stricken from the statute books, *held* not error.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

Ray Swaar was convicted of embezzlement, and he appeals. Affirmed.

William M. Morse, Jr., of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CURTIS, J. Defendant was convicted of the crime of embezzlement and appeals from the judgment and order denying his motion for a new trial. He first questions the sufficiency of the information upon which he was placed on trial. While the information may be subject to some of the defects claimed for it by appellant, we are of the opinion that it sets forth in reasonably clear and concise language the essential elements of the crime of embezzlement. We are unable to perceive how appellant could have been materially prejudiced by any of the alleged deficiencies in said information, even assuming that they are as glaring as appellant claims them to be.

[1] It is next claimed that the evidence was not sufficient to justify the verdict. Particular stress is laid by appellant upon the receipt given by him for the bonds which he is charged with embezzling. He insists that this receipt clearly shows that the bonds were delivered to him by the owner and complaining witness for the purpose of enabling him to raise money with which he could procure an oil lease, and that he and the complaining witness were to share equally in the profits of such investment. If the evidence in the case substantiated appellant's claim that the receipt showed the true and correct terms and conditions under which the bonds had been delivered to him, we might concede the force of appellant's arguments. The receipt was written by appellant himself, some days after the bonds had been delivered to him. The complaining witness was appellant's father-in-law, and testified that he read the receipt to the best of his ability, but that he could not read all the writing, as he was a poor scholar. He further testified that the sole purpose for which the bonds were delivered to appellant was in order that the latter could use them to show his good faith in negotiating for an oil lease, and that the bonds were to be returned to him in their original form, upon the completion of said negotiations—if the lease was consummated, or if appellant failed in his endeavor to secure a lease—in either event, the bonds were to be returned intact to him, the owner. While this testimony of the complaining witness was contradicted by that of his daughter, the wife of appellant (the appellant himself was not a witness in the case), the jury evidently accepted the version of the transaction given by the complaining witness. His testimony was sufficient to show that the bonds were simply intrusted to the defendant for a certain and definite purpose, and not given, or the title thereto transferred, to appellant as claimed by the latter. The evidence further shows that the bonds, three in number and of the par value of $2,500, were hypothecated by appellant with a bank as security for the personal obligations of appellant, and that one of said bonds, of the value of $1,000, had never been recovered at the time of the trial,

which evidence would tend to prove that appellant, after the bonds had been intrusted to him, without right and fraudulently, converted them to his own use. The evidence on the whole was, in our opinion, sufficient to justify the verdict against the appellant.

[2, 3] Appellant assigns as error the ruling of the court in refusing to give certain instructions, nine in number, proposed by him. The subject-matter of some of these proposed instructions was fully covered by other instructions given by the court. Others of said refused instructions did not contain a correct statement of the law as applied to the facts in this case, while still others, although correctly stating the law, were upon such collateral matters, or upon matters of such slight materiality, that their refusal by the court could not have worked any serious prejudice to appellant's rights. A detailed consideration of each of these proposed instructions, and the reasons which justified the court in refusing to give them, is not necessary, nor would any useful purpose be served by setting forth the same in detail.

[4] Appellant also makes objection to two of the instructions given by the court at the request of the prosecution. One of these instructions was evidently taken verbatim from an instruction given and approved in the cases of People v. Wolff, 182 Cal. 728, 190 P. 22, and People v. Ramey (Cal. App.) 232 P. 724. The objection to the other, that it is not justified by the evidence, is equally untenable.

The judgment and order denying motion for a new trial is affirmed.

I concur: CONREY, P. J.

---

74 Cal. App. 109

PEOPLE v. SCHOMIG. (Cr. 1238.)

(District Court of Appeal, First District, Division 1, California. Aug. 1, 1925. Hearing Denied by Supreme Court, Sept. 28, 1925.)

1. Statutes ⊜77(1)—Act must confer particular privileges or impose peculiar disabilities on class arbitrarily selected to be declared unconstitutional as "discriminatory law."

Constitution forbids special laws only where general and uniform law can be made applicable, and, to declare law unconstitutional as discriminatory, it must appear that it is not founded on natural, intrinsic, or constitutional distinction, but confers particular privileges or imposes peculiar disabilities or burdensome conditions in exercise of common right on class arbitrarily selected from general body of those who stand in precisely same relation to subject of law.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Law.]

2. Constitutional law ⊜230(3)—Statutes ⊜76(1), 87—Act, imposing fine only on corporation violating it, held not void as discriminating against individuals.

As corporation cannot be imprisoned, but its officers and agents may be held criminally responsible with it as coprincipals (Pen. Code, § 31), and subjected to same penalties as other individuals, St. 1919, p. 1252, section 17 of which imposes fine only on corporation engaging in business of real estate broker or salesman without license, in violation of sections 1 and 2, is as uniform and general in operation as possible, and hence not violative of Const. Cal. art. 1, § 21, article 4, § 25, subds. 2, 33, or Const. U. S. Amend. 14.

3. Constitutional law ⊜230(3)—Statutes ⊜76(1), 87—Constitutionality of act held not affected by failure to prescribe punishment for copartnerships violating it; "person."

That St. 1919, p. 1252, prescribes no punishment for copartnerships engaging in business of real estate broker without license, does not make it invalid, as against Const. Cal. art. 1, § 21, article 4, § 25, subds. 2, 33, or Const. U. S. Amend. 14; partnership, as respects criminal responsibility, not being person separate from its component members, and hence unable to commit crime, especially in view of Pen. Code, § 7, defining "person" as including corporations, but not mentioning copartnerships.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Person.]

4. Partnership ⊜175—Members may be proceeded against for criminal offenses committed as copartners.

Though copartnership may not be punished as separate entity for criminal act, such as transaction of real estate brokerage business without license, in violation of St. 1919, p. 1252, delinquent members of firm are responsible for its acts and may be proceeded against for criminal offenses committed as copartners.

5. Brokers ⊜5—Receipt, showing collection of purchase money by defendant, held admissible in prosecution for engaging in brokerage business without license.

In prosecution for engaging in business of real estate broker without license, in violation of St. 1919, p. 1252, where state proved that defendant personally carried on negotiations for sale of property, collected deposit from vendee, etc., receipt in defendant's handwriting, showing that he collected first two installments of purchase price, was admissible as showing his continuation of activities in relation to sale, as against objection that real estate broker's duty ends when he has procured buyer.

Appeal from Superior Court, Alameda County; Lincoln S. Church, Judge.

A. Schomig was convicted of engaging in the business of a real estate broker and salesman without procuring a license, and he appeals. Affirmed.

Carl S. Wood, of Oakland, for appellant.

U. S. Webb, Atty. Gen., and Wm. F. Cleary, Deputy Atty. Gen., for the People.

KNIGHT, J. The defendant, A. Schomig, was convicted by a jury of violating an act of the Legislature relating to real estate brokers and salesmen (Stats. 1919, p. 1252), to wit, engaging in the business of a real es-

tate broker and salesman without first procuring a license therefor, as required by said act. He was sentenced to pay a fine of $200 or suffer a jail sentence, and he has appealed from the judgment.

The constitutionality of the act is attacked upon the ground that its provisions are discriminatory (subdivisions 2 and 33, § 25, art. 4, and section 21, art. 1, Const. Cal.; Amendment 14, Const. U. S.), it being contended that while said act purports to deal with individuals, copartnerships, and corporations as a class, it prescribes a different penalty for an individual than it does for a corporation and exempts a copartnership from punishment altogether.

Section 1 of said act provides:

"It shall be unlawful for any person, copartnership or corporation to engage in the business, or act in the capacity of a real estate broker, or a real estate salesman within this state without first obtaining a license therefor."

Section 2 of said act, so far as it is material here, reads:

"A real estate broker within the meaning of this act is a person, copartnership or corporation who, for a compensation, sells, * * * real estate, * * * for others as a whole or partial vocation."

Section 17 of the act provides:

"Any person or corporation acting as real estate broker or real estate salesman within the meaning of this act without a license as herein provided shall, upon conviction thereof, if a person, be punished by a fine of not to exceed two thousand dollars, or by imprisonment in the county jail or state prison for a term not to exceed two years, or by both such fine and imprisonment, in the discretion of the court; or if a corporation, be punished by a fine of not to exceed five thousand dollars."

[1, 2] The Constitution does not deprive the Legislature of power to pass all special acts; but forbids special laws in all cases where a general and uniform law can be made applicable (Argyle Dredging Co. v. Chambers, 40 Cal. App. 332, 181 P. 84), and in order to declare a law unconstitutional, as being discriminatory, it must appear that it is not founded upon a natural, intrinsic, or constitutional distinction, but that it confers particular privileges or imposes peculiar disabilities or burdensome conditions in the exercise of a common right, upon a class arbitrarily selected from the general body of those who stand in precisely the same relation to the subject of the law. Pasadena v. Stimson, 91 Cal. 238, 27 P. 604; Bloss v. Lewis, 109 Cal. 493, 41 P. 1081. It is manifest that a corporation cannot be imprisoned; it can only be fined; but its officers and agents through whose efforts the commission of the criminal act has been accomplished may be held criminally responsible as coprincipals with the corporation (Pen. Code, § 31; State v. Ice & Fuel Co., 166 N. C. 366, 81 S. E. 737, 52 L. R. A. [N. S.] 216, Ann. Cas. 1916C, 456), and if convicted be subject to the same penalty as other individuals. It would therefore appear that so far as corporations are concerned the law has been made as uniform and general in its operation as it was possible to make it, and consequently is not violative of the Constitution in the manner complained of.

[3] In reference to copartnerships it will be noted that penalties are prescribed by the act for the punishment of individuals and corporations, but none as to copartnerships. We are of the opinion, however, that this omission does not affect the constitutionality of said act for the reason that in so far as criminal responsibility is concerned, a partnership is not recognized as a person separate from its component members in the sense that a corporation is a separate entity (People v. Maljan, 34 Cal. App. 384, 167 P. 547) and therefore cannot commit a crime. California Jurisprudence (vol. 20, p. 680) states the rule in the following language:

"In most respects a partnership is but a relation, with no legal being as distinct from the members who comprise it. It is not a person, either natural or artificial. Thus a partnership, as such, cannot be guilty of crime, but guilt attaches to the delinquent member or members"—citing People v. Maljan, supra, and other cases.

[4] True, it has been held that a partnership may be regarded as a separate entity for some purposes (Furlow P. B. Co. v. Balboa L. & W. Co., 186 Cal. 754, 200 P. 625; Modesto Bank v. Owens, 121 Cal. 223, 53 P. 552; Gleason v. White, 34 Cal. 258; John Bollman Co. v. S. Bachman & Co., 16 Cal. App. 589, 117 P. 690, 122 P. 835), but those purposes are entirely dissociated with the question of responsibility for the commission of criminal acts; and our attention has not been called to any case wherein a copartnership has been treated as a "person" and thus subjected to punishment for committing a criminal act. Moreover, the Penal Code of this state declares that the word "person" shall include corporations as well as natural persons (Pen. Code. § 7), but no mention is made of copartnerships. It does not follow, though, from the fact that the copartnership itself as a separate entity may not be punished, that criminal acts committed through the operation thereof may not be made the subject of criminal prosecutions, for it is well settled that the delinquent members of the firm are responsible for the acts of the copartnership, and may be proceeded against for criminal offenses committed as copartners. 31 Corpus Juris, p. 692; 31 Cyc. 535; 20 R. C. L. p. 919.

[5] It is further contended that the trial court erred in admitting in evidence, over appellant's objection, a certain receipt, in appellant's handwriting, showing that after the sale of the property, appellant collected the first two installments of the purchase price from the vendee. Appellant urges that the

duty of a real estate broker ends when he has procured a buyer ready, able, and willing to make the purchase, and that, consequently, in thereafter collecting said installments appellant was not acting in the capacity of a real estate broker or salesman.

The main defense of appellant to the charge was that the sale was not made by or through him, but by a Mrs. Wasnick, who was a licensed real estate broker operating out of appellant's place of business; that, although he collected the commission of $190 from the vendor, he afterwards paid it to Mrs. Wasnick and retained no part of it for himself. The evidence of the prosecution proved, however, that appellant personally carried on the negotiations for the sale of the property with the vendor and the vendee; that he also personally collected a deposit of $150 from the vendee, and subsequently had a settlement with the vendor for bills incurred in making repairs to the property and for expenses incurred in making the sale, which included an item of $190 for commissions, and that he gave his personal receipt to the vendor upon payment thereof. It was therefore permissible, we think, for the prosecution to show, as one of the circumstances connecting appellant with the transaction of sale, a continuation of his activities in relation thereto.

Judgment affirmed.

We concur: TYLER, P. J.; CASHIN, J.

---

74 Cal. App. 114

ELBERTA OIL CO. et al., v. SUPERIOR COURT OF CALIFORNIA IN AND FOR KINGS COUNTY et al. (Civ. 5076.)

(District Court of Appeal, Second District, Division 1, California. Aug. 1, 1925.)

1. Corporations ⊂⊃283(3)—Stockholders' proceeding to set aside election of directors must be commenced and heard in county in which election was held.

As stockholders may institute proceeding to set aside election of directors, under Civ. Code, §§ 312, 315, only, sole method prior to enactment thereof being by quo warranto in name of people, such proceeding may be commenced and heard only in county in which election was held.

2. Corporations ⊂⊃283(3)—Stockholders' proceeding to set aside election of directors cannot be instituted in wrong county subject to right to change place of trial to proper county.

Const. art. 12, § 16, does not authorize institution of stockholders' action, under Civ. Code, §§ 312, 315, to set aside election of directors, in another county than that in which election was held, subject to court's right to change place of trial to proper county; such section of Constitution referring to personal and transitory actions against corporations, not to local actions or actions over subject-matter of which certain courts are clothed with exclusive jurisdiction by Constitution or statute.

3. Constitutional law ⊂⊃56—Act, conferring jurisdiction of action on superior court of specified county, held not unconstitutional as limiting jurisdiction conferred by Constitution on every such court.

Const. art. 6, § 5, does not confer concurrent jurisdiction on every superior court of state in any special proceeding instituted therein, but merely gives such court jurisdiction of all such proceedings not otherwise provided for, without designating which court shall have jurisdiction over any particular proceeding, and hence does not invalidate Civ. Code, §§ 312, 315, conferring jurisdiction of stockholders' action to set aside election of directors on superior court of county in which election was held.

4. Prohibition ⊂⊃4—Adequacy of remedy by appeal within sound discretion of appellate court.

Whether remedy by appeal is adequate, even where jurisdiction of cause is plainly lacking, rests in sound discretion of appellate court on original application for writ of prohibition.

5. Prohibition ⊂⊃3(5)—Appeal from order, granting injunction against continued management of corporation by directors, held not adequate remedy.

Injunction, directing defendants, in stockholders' suit to set aside election of directors of corporation, to refrain from acting as directors or officers of company, is not mandatory, but preventive or prohibitory injunction, operation of which would not be stayed by appeal, which therefore would not be adequate remedy precluding writ of prohibition against further proceedings in such action, where corporation had expended many times amount of injunction bond in drilling for oil, and its lease was subject to cancellation unless work was prosecuted continuously until oil in paying quantities was found.

6. Prohibition ⊂⊃3(5)—Writ, prohibiting action in excess of, or without, jurisdiction refused only when appeal is adequate remedy.

It is only when appeal is adequate remedy that court will refuse to prohibit tribunal from acting in excess of, or without, jurisdiction.

Petition by the Elberta Oil Company, and others for a writ of prohibition to the Superior Court of California in and for Kings County and K. Van Zante, Judge thereof. Demurrer to petition overruled.

Strother P. Walton, of Fresno, for petitioners.

J. L. C. Irwin, of Hanford, H. A. Savage, of Fresno, W. T. Kendrick, Jr., of Los Angeles, and Fred Baruch, Jr., for respondents.

CURTIS, J. Petition for writ of prohibition against the superior court of the county

of Kings and the Honorable K. Van Zante, judge of said court, directing them to desist and refrain from further proceedings as to the first two causes of action in a certain action pending in said court. Said action, in so far as said two causes of action are concerned was instituted under sections 312 and 315 of the Civil Code, to set aside an election of certain of the petitioners herein as directors of the Elberta Oil Company, which said company it is alleged in said complaint is a corporation organized, existing and doing business under the laws of the state of California, with its principal place of business in the city of Fresno, in the county of Fresno, in this state. The third cause of action involved the legality of an assessment levied by the board of directors of said company, but this proceeding is in no way directed against the action of said superior court as to said third cause of action. No further reference will therefore be made to said third cause of action. It appears from said complaint that, at the time said action was instituted in the said county of Kings, to wit, on March 4, 1925, another action substantially, if not identically, like it, excepting as to the parties plaintiff, was then pending in the superior court of the county of Fresno, this latter action having been instituted on February 10, 1925. The plaintiffs in said action filed in the county of Kings were alleged to be stockholders of said Elberta Oil Company, as were also the plaintiffs in the action instituted in the county of Fresno, but the plaintiffs in the one case were entirely different stockholders from those who were plaintiffs in the other. In the Kings county case, the court issued a temporary injunction against all of the petitioners herein, directing them to absolutely desist and refrain from the management and control of said corporation, and from acting as the directors or officers of said company, and from doing or attempting to do or perform any act or acts as directors, secretary, or officers of said corporation, excepting to pay certain taxes, rent, labor bills, and insurance premiums.

The respondents have appeared herein and filed a demurrer and answer to said petition. The demurrer is both general and special, and also raises the question of the court's jurisdiction. The only argument, however, presented by respondents in support of their demurrer has been made in behalf of their general demurrer. We will assume, therefore, that respondents do not seriously rely upon their special demurrer, and that they do not seriously question the jurisdiction of this court to entertain this proceeding.

It is contended in support of the general demurrer that the petition herein fails to show that the superior court of Kings county has not jurisdiction of the action set forth in the first two causes of action in the complaint thereof. In other words, respondents' position is that the superior court of Kings county has jurisdiction over said action instituted therein for the purpose of setting aside an election of a board of directors of a corporation, even though said election of said board of directors was not held in said county. Section 312 of the Civil Code, after providing that at all elections had for any purpose in corporations formed for profit there must be a majority of the subscribed capital stock represented, further provides that:

"Any vote or election had other than in accordance with the provisions of this article is voidable at the instance of absent or any stockholders or members, and may be set aside by petition to the superior court of the county where the same is held."

Section 315 of the Civil Code is as follows:

"Upon the application of any person or body corporate aggrieved by any election held by any corporate body, the superior court of the county in which such election is held must proceed forthwith to hear the allegations and proofs of the parties, or otherwise inquire into the matters of complaint, and thereupon confirm the election, order a new one, or direct such other relief in the premises as accords with right and justice.

"Upon filing the petition, and before any further proceedings are had under this section, five days' notice of the hearing must be given, under the direction of the court or the judge thereof, to the adverse party, or those to be affected thereby."

[1] Prior to the enactment of these sections of the Code, or of legislation similar thereto, the only method of setting aside an election of directors at a stockholders' meeting was by quo warranto proceedings, instituted in the name of the people of the state. Whitehead v. Sweet, 126 Cal. 67, 58 P. 376. Such a proceeding could not be maintained by a stockholder nor by any number of aggrieved stockholders. The only authority, therefore, to institute in this state a proceeding like that brought against petitioners is derived from the provisions of the two sections of the Code to which we have just referred. In one instance it is provided that the election is voidable and may be set aside "by petition to the superior court of the county where the same is held," and the language of the other section is that "the superior court of the county in which such election is held" is vested with authority to proceed and hear the complaint of the aggrieved stockholders. This hearing, however, must be preceded by a five days' notice given under the direction of the court, or the judge thereof, to the adverse party. It is apparent from the language of these sections that it was the intent of the Legislature to provide a special and summary proceeding in which the election of directors of a corporation might be inquired into, and the validity thereof de-

termined by the court. By the express terms of these sections of the Code, it is provided that such a proceeding must be commenced and heard only in the county in which the election was held. The Supreme Court in Chollar Mining Co. v. Wilson, 66 Cal. 374, 5 P. 670, in passing upon the jurisdiction of the superior court of the city and county of San Francisco to hear a certain proceeding then pending in said court, used the following apt language:

"The authority to the superior court to proceed is wholly statutory. It is a special proceeding provided by statute, not according to the course of the common law; and to invest such court with jurisdiction, the requisites of the act must be complied with, and it must so appear on the face of the record. If not so complied with, the court has no jurisdiction to proceed."

In an earlier case, Reed v. Omnibus R. R. Co., 33 Cal. 212, 217, the Supreme Court announced the rule as follows:

"When the statute creating the new right and prescribing a particular remedy for violation thereof, provides that the remedy must be pursued in a particular court, the rule we are considering excludes all other jurisdictions. The forum named in the statute is an element in the method of redress."

The case of Reed v. Omnibus R. R. Co. was approved in the case of Smith v. Omnibus R. R. Co., 36 Cal. 281, and has never been overruled or even criticized, to our knowledge, by the Supreme Court. It was cited with approval in the case of Clear Lake, etc., v. Lake County, 45 Cal. 90, 92. The Supreme Court in Otis v. City and County of San Francisco, 170 Cal. 98, 100, 148 P. 933, referring to the Reed Case with others announcing the same doctrine, gives its approval thereof in the following language:

"We have no disposition to criticize any of the cases cited by appellant. The principles enunciated in each and all of them are perfectly sound. Where a right is thus created by statute and the method of securing that right pointed out, in all essentials the legislative directions must be followed."

[2] It is further argued, however, by respondents that, under section 16 of article 12 of the Constitution, they were authorized to institute their action in the superior court of Kings county, subject to the right of said court to change the place of trial to the proper county. This section of the Constitution undoubtedly refers to personal or transitory actions against corporations, and has no reference to local actions or to actions where either the Constitution or the statute has clothed certain courts with exclusive jurisdiction over the subject-matter of such actions. All the cases cited by respondents in support of their last contention are actions based upon mere money demands against a corporation, and in none of these actions was there any statutory or constitutional provision for the institution of actions of such character in any particular court of the state. Two of the cases upon which respondents rely are Trezevant v. Strong Co., 102 Cal. 47, 36 P. 395, and Bond v. Karma-Ajax Consolidated Mining Co., 15 Cal. App. 469, 115 P. 254, and were each instituted for the purpose of recovering a money judgment. The other case cited by respondent was Lakeside Ditch Co. v. Packwood C. Co., 50 Cal. App. 296, 301, 195 P. 284, in which the court said, referring to the nature of the action, "it is purely and simply a personal or transitory action, and, being such an action, it clearly comes within the class of actions referred to by section 16 of article 12 of the Constitution, and is, therefore, as to the matter of venue, governed by said section of the organic law."

[3] Respondents further claim that the action instituted by them in the superior court of Kings county was a special proceeding provided by the statute, and that under section 5, article 6, of the Constitution, the superior court is given general jurisdiction "of all such special cases and proceedings as are not otherwise provided for." Respondents argue that the jurisdiction of the superior court to entertain an action brought under section 315 of the Civil Code is provided for in the above section of the Constitution, and that it is not within the power of the Legislature to limit this jurisdiction in any manner. By this same section of the Constitution, jurisdiction is conferred upon the superior court, "in all criminal matters amounting to a felony." Respondents will hardly contend that, under this constitutional provision, an accused charged with a felony could be prosecuted in any superior court of this state, in the face of section 777 of the Penal Code providing that:

"The jurisdiction of every public offense is in the county wherein it is committed."

It is unquestionably true that where the Constitution has conferred jurisdiction upon any court of the state, any legislative enactment is void which attempts to limit the jurisdiction thereby conferred. This principle is elementary and needs no authority to support it, but the fallacy in respondents' argument is in asserting that by the above section of the Constitution concurrent jurisdiction is conferred upon every superior court of the state in any special proceeding which may be instituted therein. All said section attempts to provide, in so far as special proceedings are concerned, is that the superior court shall have jurisdiction of all such proceedings as are not otherwise provided for. It does not purport to designate which of the superior courts of the state shall have jurisdiction over any particular proceeding. In the absence of any such pro-

vision, the Legislature may make such designation. This principle is well stated by the Supreme Court in Smith v. Westerfield, 88 Cal. 374, 379, 26 P. 206, 207, as follows:

"Jurisdiction of special proceedings is conferred by the Constitution upon the superior court; but inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of this jurisdiction, is limited by the terms and conditions under which the proceedings were authorized."

We think it appears, therefore, from the above authorities that the exclusive jurisdiction of proceedings instituted under sections 312 and 315 of the Civil Code is in the superior court of the county in which the election mentioned in said sections has been held. It follows, therefore, that the superior court of Fresno county, being the county in which said election was held, has exclusive jurisdiction of any and all proceedings instituted under said sections of the Code to set aside said election, and that the Superior court of Kings county is without any right, authority, or jurisdiction to entertain the same.

[4] Respondents further contend that, even conceding that the superior court of Kings county has no jurisdiction over said action, in so far as the first two causes of action of the complaint are concerned, still petitioners' application for a writ of prohibition should be denied, as they have a plain, speedy, and adequate remedy in the ordinary course of law by an appeal. Respondents rely in support of this claim, in the main, upon the case of Greenberg v. Superior Court (Cal. App.) 235 P. 92. It was there held that:

"The writ of prohibition may issue only upon a showing that the petitioner has no 'plain, speedy, and adequate remedy in the ordinary course of law.' * * * The right of appeal from the order complained of has always been held a 'remedy in the ordinary course of law.'"

It was also stated in this case that:

"Cases have been cited wherein the reviewing court held that the want of jurisdiction to make the order complained of was apparent, and that, though an appeal would lie from the order, it could not be said to be a 'speedy and adequate remedy,' because of the expense and trouble incident to the particular litigation. These cases all rest on the principle that the writ of prohibition is a writ of discretion, and not a writ of right, and the discretion of the reviewing court was exercised in each case in view of the exceptional circumstances presented."

Respondents also rely upon the following cases: United Railroads v. Superior Court, 172 Cal. 80, 155 P. 463, and Agassiz v. Superior Court, 90 Cal. 101, 27 P. 49. From the authorities to which our attention has been called, we are of the opinion that the correct rule upon this subject was stated by Judge Shaw in his concurring opinion in Glide v. Superior Court, 147 Cal. 29, 81 P. 228, wherein he used the following language:

"The question whether or not the remedy by appeal is adequate is, even in cases where jurisdiction is plainly lacking, a matter resting in the sound discretion of this court upon the particular circumstances of each case. Upon such a question precedents are of little value."

[5] In the Greenberg Case it was held that the remedy by appeal was adequate, and the court denied the application of petitioner therein for writ of prohibition against the respondent court to prevent the enforcement of an order to pay certain rentals to receiver made after judgment. The appellate court held that, by an appeal from said order and the filing of an undertaking on appeal, the execution of said order would have been stayed, and that this remedy in the ordinary course of law was plain, speedy, and adequate. The injunction issued against the petitioners herein, directing them to refrain from doing certain acts enumerated therein, is a preventive or prohibitory, and not a mandatory, injunction. Its operation, therefore, would not be stayed by an appeal. United Railroads Co. v. Superior Court, 172 Cal. 80, 155 P. 463, and Jacobsen v. Superior Court, 192 Cal. 319, 219 P. 986, 29 A. L. R. 1399. The only protection afforded petitioners herein, the defendants in said Kings county action, in case of an appeal and reversal of the order granting a temporary injunction, is by virtue of the bond given by the plaintiffs in said action upon the granting of said injunction. The order granting the temporary injunction recites that the amount of this bond is $1,000. We have already alluded to the fact that by the injunction the petitioners are restrained from the management and control of the business of the Elberta Oil Company. This injunction runs against, not only those petitioners who are the de facto directors of said company and whose election it is sought by said action to set aside, but against the corporation itself. From the petition it appears that the Elberta Oil Company, at the time of the institution of said action against it and the other petitioners herein, was engaged in drilling for oil on certain lands situated in the county of San Luis Obispo; that it had expended in the neighborhood of $85,000 in such work; that it had drilled a well on said lands to a depth of 2,680 feet, and that the indications were that within a short time oil would be produced in paying quantities from said well; that it is extremely hazardous to allow said well to stand without attention, and that said well was being drilled upon lands held by said company under a lease, one of the conditions of which is that said lease will be subject to cancellation, unless the work of drilling for oil on said land is

prosecuted diligently and continuously until oil is found in paying quantities.

The temporary injunction restrains all the petitioners, including the Elberta Oil Company, from the management and control of said corporation, and from doing any act with the exception of those already mentioned. Under such a state of affairs, will an appeal be an adequate remedy and protection to respondents? We think not. In the first place, an appeal would not stay an execution of the order of injunction. Therefore, pending the appeal, all work of drilling the well and of any other character must cease, and the property of the corporation, upon which many thousands of dollars have been expended in its development, left to deteriorate, if not to become an absolute loss. Furthermore, should the lease of the land, upon which the well now being drilled is situated, be forfeited for failure to comply with the provisions of the lease requiring a continuous prosecution of the work thereon, a contingency not unlikely to happen, then not only would the company and its stockholders lose the large sums of money already invested therein, but they would sustain the further loss also of any prospective profits which might accrue from the discovery of oil upon said land. The amount of such damages would not only be exceedingly difficult, but practically impossible, to fix in any action which might be brought by petitioners against respondents, in the event they should be successful on said appeal. It is quite evident that a bond of $1,000, under such circumstances, would be woefully inadequate. Respondents' reply to this situation is that the petitioners are authorized, in the event the bond is deemed insufficient, to apply to the superior court, in which the action is pending, for an order to increase the amount of said bond to a sum which would cover all probable damages that petitioners might sustain by reason of the granting of said injunction. It is true that a bond given under such circumstances has been held to be legal and binding upon the parties executing the same. Lambert v. Haskell, 80 Cal. 611, 22 P. 327.

[6] There is, however, no assurance that in case such an application were to be made by petitioners, the relief prayed for would be granted. The cases are numerous in this state wherein the writ of prohibition has been granted, although the petitioners therein were entitled to an appeal, on the ground that an appeal was not an adequate remedy. Ophir Silver Mining Co. v. Superior Court, 147 Cal. 467, 82 P. 70; Davis v. Superior Court, 184 Cal. 691, 195 P. 390; Consolidated Adjustment Co. v. Superior Court, 189 Cal. 92, 207 P. 552. It is only when an appeal is an adequate remedy that the court will refuse to prohibit a tribunal in acting in excess of or without jurisdiction. As was said by the Supreme Court, in Havemeyer v. Superior Court, 84 Cal. 327, 397, 24 P. 121, 139 (10 L. R. A. 627, 18 Am. St. Rep. 192):

"The statute does not say that the writ will not issue in any case where there is an appeal. There must not only be a right of appeal, but the appeal must furnish an adequate remedy, in order to prevent the issuance of the writ. A number of cases have been decided in this court in which writs of prohibition have been refused, because there was a right of appeal, but in all of those cases the appeal afforded a complete and adequate remedy for the threatened excess of jurisdiction."

We conclude, therefore, that the petition alleges facts sufficient to entitle petitioners, provided said facts are true, to the writ as prayed for. The demurrer, therefore, of respondents is hereby overruled.

The answer filed herein raises a number of issues of fact, which must be determined before this matter can be finally disposed of. Therefore the parties hereto are given 20 days within which to file a stipulation of the facts herein. If, however, they are unable to agree as to said facts, within said time, then an order will be made by this court appointing a referee to take the testimony of the parties hereto and report the same to this court.

I concur: CONREY, P. J.

---

74 Cal. App. 125

PEOPLE v. RYAN. (Cr. 1213.)

(District Court of Appeal, Second District, Division 1, California. Aug. 3, 1925.)

1. Forgery ⊂⊃8 — Drawing check payable to cash under fictitious name, if in good faith, not a forgery under Penal Code.

Drawing of check payable to cash under assumed name, if done in good faith, and not for purposes of defrauding, is not the use of a fictitious name within the meaning of Pen. Code, § 470, providing that one, who with intent to defraud signs the name of a fictitious person, shall be guilty of forgery.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Fictitious Name.]

2. Forgery ⊂⊃8—Use of fictitious name on check drawn to order of cash forgery under Penal Code, where intended to defraud.

Where accused deposited forged check under fictitious name payable to order of such fictitious person, and drew against that account by check payable to cash in the fictitious name, contention that a check payable to order of maker is not subject of forgery, until indorsed, does not apply to crime of forgery of fictitious name under Pen. Code, § 470, as amended in 1905 (St. 1905, p. 673), where fictitious name was adopted for use in a fraudulent transaction.

3. Criminal law ⊂984—Several counts, charging drawing and forging of different checks, do not constitute one crime, though deposited at one time.

In a conviction for forgery on several counts involving different checks, where some of counts charged drawing of checks and others only forging, depositing of checks in bank at one time did not constitute one crime.

4. Criminal law ⊂984 — Forging different checks constitutes different offenses, but utterance of different forged checks at same time constitutes one offense.

In a conviction for forgery on several counts, the making and forging of different checks constituted different offenses, but the passing and utterance of several forged checks, at same time, constituted but one offense.

5. Criminal law ⊂1184—Judgment of conviction reduced, where several sentences on different counts are of equal duration by making one sentence for one crime.

Where several sentences for forgery were erroneously imposed on different counts, and there is no doubt of defendant's guilt, and punishment on all counts was of equal duration, a new trial will not be granted, but judgment of conviction will be reduced under Pen. Code, § 1260, giving court power to modify judgment by striking sentences so as to make one sentence for one crime.

Appeal from Superior Court, Los Angeles County; Edwin F. Hahn, Judge.

William Francis Ryan was convicted of forgery on 26 counts, and he appeals. Sentence on 5 counts stricken, otherwise affirmed.

Wallace W. Davis and Halverson & Price, all of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., Erwin W. Widney, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

CONREY, P. J. The defendant was convicted on 26 counts of an indictment, of which 9 counts charged the commission of forgery, and 17 charged the commission of the crime of forgery of a fictitious name. There was no demurrer to the complaint, and the points on appeal relate to the case as made by the evidence.

Appellant's first point is that the checks described in counts 5, 11, 16, 23, 27, and 32 were not forgeries or forgeries of a fictitious name within the meaning of the statute. Count 5 may be taken as representing this group. The defendant was accused therein of the crime of "forgery of a fictitious name, a felony." The document containing the alleged forgery reads as follows:

"Los Angeles Branch 16–66 Bank of Italy
Savings Commercial Trust.
"Los Angeles, Cal., 3/22, 1923.
"Pay to the order of cash $2781.00, twenty-seven eighty-one no/ dollars.
"M. P. Layton."

It was alleged, among other things, that the said check "was then and there false and fictitious to the then knowledge of the said William Francis Ryan, and there was not then and there or at all any such person or individual as M. P. Layton, and the said William Francis Ryan then and there well knowing that he had no authority so to sign the name of said fictitious person to and upon said check."

[1] Appellant claims that because the check was payable to the order of cash and was his own personal check, as the bank well knew, although signed in the assumed name, such assumed name represented a real person and cannot be held to be fictitious. The argument is grounded upon the proposition, to which we agree, that a person may adopt a name different from that by which he has been known, and may transact business in that name. If this be done in good faith, and not for the purpose of defrauding in the transaction, the use of such assumed name, even in the drawing of a check, would not be criminal. The use of such a name in that manner would not be the use of a fictitious name, within the meaning of the statute. The persons guilty of forgery as described in section 470 of the Penal Code include one who, "with intent to defraud, signs the name of another person, or of a fictitious person, knowing that he has no authority so to do, to * * * any * * * check. * * *" Section 476 of the Penal Code imposes punishment in the state prison upon one who "makes, passes, utters, or publishes, with intention to defraud any other person, * * * any fictitious bill, note, or check, purporting to be the bill, note, or check, or other instrument in writing for the payment of money or property of some bank, corporation, copartnership, or individual, when, in fact, there is no such bank, corporation, copartnership, or individual in existence, knowing the bill, note, check, or instrument in writing to be fictitious."

[2] The method of procedure of the defendant is illustrated by the transactions relating to the fifth count. Having been first introduced to the Bank of Italy under the assumed name of M. P. Layton, he deposited two forged checks payable to the order of M. P. Layton, the total of these two checks amounting to $16,610. Thereafter he drew against that account by his check as M. P. Layton payable "to the order of cash," in the sum of $2,781. Admittedly the evidence was sufficient to establish the fact that there was no M. P. Layton. In substance, the contention amounts to nothing more than that, although, according to the evidence, defendant was guilty of obtaining money under false pretenses, yet that he was not technically guilty of the crime of forgery or forgery of a fictitious name.

Special reliance is placed by appellant upon decisions which hold that "it is the essence

of forgery that one signs the name of another to pass it off as the [genuine] signature * * * of that other" (People v. Bendit, 111 Cal. 274, 278, 43 P. 901, 902 [31 L. R. A. 831, 52 Am. St. Rep. 186]); and that a check payable to the order of the maker can defraud no one, and is not the subject of forgery until it is indorsed by the maker. People v. Thornburgh, 4 Cal. App. 38, 87 P. 234. We think that these decisions are not applicable to the crime of forgery of a fictitious name as defined by section 470 of the Penal Code, as amended in 1905 (St. 1905, p. 673), in a case where, as here, it appears that the assumed and fictitious name was adopted by the criminal for the specific purpose of using it in the consummation of the fraudulent transaction. In an elaborate note on this subject found in 9 A. L. R. 407 et seq., at page 411, it is said:

"But while one may sign a fictitious name which he has adopted for innocent purposes without being guilty of forgery, and while an assumption of a name generally for purposes of fraud is not sufficient to convict of forgery unless in the particular case fraud is shown in using the name, yet, if such fraud is shown, the fact that the name had been previously assumed by the one signing it, and used for purposes of fraud generally, with no reference to the particular fraud, will not prevent the signature being a forgery; one cannot acquire a right to use a name not his own for fraudulent purposes, by using it any number of times previously for such purposes. Commonwealth v. Costello (1876) 120 Mass. 358."

[3] The second point urged by appellant is that he has been erroneously convicted on several counts and separately sentenced thereon, when in fact there was in relation to those counts not more than one criminal offense committed. This argument covers several groups of transactions. They may be illustrated by counts 6, 8, and 10, under which it was shown that on or about the 19th day of June, 1923, under the assumed name of O. V. Snell, the defendant deposited with the First National Bank of Los Angeles three forged checks, payable to the order of O. V. Snell, one for $3,960, one for $14,880, and one for $16,570. Of these three checks, the first purported to be signed by C. M. Olsen, the second by A. H. Gregg, and the third by J. M. Auckland. The evidence shows that, in opening an account with the bank, the defendant presented all of these checks at the same time. Appellant argues that on these facts the depositing of this group of checks constituted a single utterance, and that thereby, if he was guilty of any crime, he committed one crime and not three.

Count 6 charges that the defendant, with intent to cheat and defraud, etc., did willfully, etc., make, utter, publish, and pass one of said checks. Count 8 charges that the defendant with like intent, did willfully, etc., make, forge, alter, and counterfeit another of said checks. Count 10 charges that the defendant, with like intent, did willfully, etc., make, forge, alter, and counterfeit the third of said checks. It will be noted that the uttering and passing of the check is charged in the sixth count only. In People v. Frank, 28 Cal. 507, it appeared that the indictment included in one count both the charge that the defendant feloniously made, forged, and counterfeited a described draft, and that, the same having on its face been first accepted and indorsed, as stated in the indictment, and having said forged indorsement thereon, he did feloniously utter, publish, and pass said instrument and said forged indorsement. The Supreme Court held that the indictment was good whether it be regarded as containing two counts or one; that each of the stated acts singly or altogether, if committed with reference to the same instrument, constituted but one offense. But the state claimed that the case was different from those usually presented in which the several charges relate to the same instrument, because the draft in question appeared to have been accepted and indorsed between the time of alleged forgery and the time of alleged uttering of the instrument, and that it thereby became a different instrument, so that there were two offenses instead of one. The court held, however, that the mere adding of other parties did not destroy the identity of the instrument nor the unity of the transactions, and that the act of forging and the act of uttering were therefore both committed with reference to the same instrument; that so long as the various acts mentioned in the statute were committed with reference to the same instrument, they must be regarded as constituting one continuous transaction. People v. Frank, supra, is the only California decision cited by appellant. In view of the fact that in the case of the three counts now under consideration there were three separate instruments involved, it becomes clear that the Frank Case is not applicable here.

[4] Appellant further refers to decisions which hold that the passing or utterance of several forged instruments at the same time constitutes but one offense. We are satisfied that the greater weight of authority is definitely in favor of this proposition. State v. Egglesht, 41 Iowa, 574, 20 Am. Rep. 612; State v. Moore, 86 Minn. 422, 90 N. W. 787, 61 L. R. A. 819, and note. But, on the other hand, it seems to have been held, with good reason, that the mere false making and forging of two separate instruments, although done at the same time, are separate and distinct offenses. This was the implication in the opinion of the Supreme Court of California in People v. Frank, supra, to which we have referred. In State v. Moore, supra, the court said:

"It is true that the forging of a note, and a mortgage purporting to secure its payment, are separate offenses,"

—although the court also held that the indivisible single act of uttering two such instruments constitutes a single crime and not two crimes. In the note, at 61 L. R. A. page 822, the proposition is stated, followed by reference to a number of decisions, that the forgery of several instruments at the same time is regarded generally as the commission of a separate offense for each instrument. Evidently this statement referred to the direct act of forgery considered apart from the utterance of the instrument.

Accepting the foregoing as a correct statement of the law, and remembering that utterance, or passing, of a check was charged in only one of the three counts, we conclude that appellant was correctly convicted and sentenced separately for the three offenses covered by counts 6, 8, and 10. The same is true of the group included in counts 20, 21, and 22, wherein count 20 alone charges utterance of the forged paper. The case is different with respect to the other four groups. In the group composed of counts 12, 13, and 15, utterance of a check is charged in counts 12 and 13, but not in count 15. In the group composed of counts 17, 18 and 19, utterance is charged in counts 17 and 18, but not in count 19. In the group composed of counts 24, 25, and 26, utterance is charged in counts 24 and 25 and omitted from count 26. In the group composed of counts 28, 29, 30, and 31 utterance is charged in counts 28, 29, and 30, and omitted from count 31.

It thus appears that, under counts 12 and 13, appellant has been made to suffer two sentences to be served consecutively for a single crime. Under counts 17 and 18 there are two like sentences for a single crime. Under counts 24 and 25 there are two like sentences for a single crime, and under counts 28, 29, and 30 there are three like sentences for a single crime.

[5] There being no doubt of the defendant's guilt in point of fact, a reversal of these particular judgments should not open the case for a new trial, unless some rule of procedure compels that result. The crimes involved in this action do not include any instance of inequality in the duration of the punishment provided by law. There can be no miscarriage of justice if the sentences are reduced in number in such manner that there remains only one sentence for one crime. The Penal Code, § 1260, provides that the court may reverse, affirm, or modify the judgment "and may, if proper, order a new trial." In view of the equality in penalties as between the different offenses, the defendant cannot be substantially interested in the selection of the judgment which shall stand if the remaining sentence or sentences for the same offense are set aside. The superior court might have made that selection, and the defendant would not have been prejudiced thereby. Lovejoy v. State, 40 Tex. Cr. R. 89, 48 S. W. 521. See note of that and other cases in 16 L. R. A. (N. S.) 561 et seq.

The court below pronounced a separate sentence on each count, under which the defendant was convicted, and provided that the sentences run consecutively. Appellant has treated these separate sentences as constituting, which they do, in substance, a single judgment, and has appealed "from the final judgment of conviction" in the action. It is ordered that the judgment be, and the same hereby is, modified as follows: By striking from said judgment the sentence imposed and based upon conviction under counts 13, 18, 25, 29, and 30 of the indictment. In all other respects and with reference to all other portions of said sentences and judgment, the same are hereby affirmed.

I concur: CURTIS, J.

---

74 Cal. App. 87

McMULLIN v. LYON FIREPROOF STORAGE CO. (Civ. 3990.)

(District Court of Appeal, Second District, Division 2, California. July 29, 1925.)

1. **Appeal and error ⇐1011(1)—Determination of trial court that delivery by warehouseman was without written order final, where record shows conflicting evidence.**

In action for conversion by warehouseman, where warehouseman contended delivery was made on plaintiff's written order, *held*, that, in view of conflicting evidence as shown by record, findings of trial court are final.

2. **Warehousemen ⇐25(5)—Warehouseman liable for delivering community property to wife without husband's consent, where goods deposited in husband's name.**

Where husband deposited community goods with warehouseman in his own name, warehouseman could not deliver goods to the wife without the written consent of the husband, and such delivery was not justifiable, under Warehouse Act, §§ 9(a), 10, and hence warehouseman is liable for conversion in making such delivery as though he had delivered to utter stranger.

3. **Husband and wife ⇐267(1)—Storage by husband of community property not a disposal of same without consideration within statute.**

Where husband stored community property in warehouse as though it was his separate estate, such storage was not a disposal of them without consideration, within purview of Civ. Code, § 172.

4. **Warehousemen ⇐24(7) — Warehouseman not liable for greater than agreed value of articles in receipt, though guilty of negligence in delivering to wrong party.**

Where application for storage in warehouse receipt provided that responsibility of warehouseman was limited to $25 per article,

which was below their actual value, *held*, in view of Civ. Code, § 2175, and despite Warehouse Act, § 57, that such agreement was not violative of section 3 of Warehouse Act providing that a warehouseman may not limit liability for failure to exercise ordinary care, and warehouseman is not therefore liable for actual value of articles or a greater amount than agreed on, even though guilty of negligence in delivering them to wrong party.

Appeal from Superior Court, Los Angeles County; J. P. Wood, Judge.

Action by Fred McMullin against the Lyon Fireproof Storage Company. Judgment for plaintiff, and defendant appeals. Modified and affirmed.

Charles A. Post and H. S. Clewett, both of Los Angeles, for appellant.

Lucius L. Solomons, of San Francisco, and Fred C. Peterson, of Oakland, for respondent.

WORKS, J. This is an action in conversion. Plaintiff, a married man, deposited certain personal effects, the community property of himself and his wife, with defendant, a warehouse keeper, and they were stored by defendant in plaintiff's name. Defendant thereafter delivered the articles to the wife and the present action was the result of the delivery; suit having been instituted after due demand by plaintiff for a return of the goods. Plaintiff had judgment and defendant appeals.

[1] One of the questions of fact at the trial was whether the delivery of the property to the wife was made upon the written order of respondent, presented to appellant by the wife. The trial court found that the wife presented no such order to appellant and that respondent issued no such order. It is contended that the finding was not supported by the evidence. The wife testified that the alleged order was given her by respondent; that she exhibited it to appellant before the personal property was delivered to her, but did not leave it with appellant; and that she thereafter destroyed it. Other witnesses testified that they had seen the alleged order. On the other hand, respondent testified that he never issued or made such a document. Under these circumstances the finding must stand. The record shows but a conflict of evidence and the determination of the trial court upon the subject is therefore final.

The court also found that appellant delivered the articles to the wife "without authority and contrary to the terms and conditions of its storage receipt" which was issued to respondent when he made deposit of the goods. It is insisted that this finding was not sustained by the evidence and in support of the contention the argument is advanced that, the deposited articles having been community property, a delivery to the wife was a delivery to the husband, or, at least, that the wife, because of her community interest, was as much entitled to the possession of the property as was the husband, although the delivery for storage with the depositary was made by him and not by her. This point is also made against a finding of the trial court that appellant converted the goods to its own use by making delivery of them to the wife.

The business of appellant as a warehouse keeper is regulated by the provisions of an act of the Legislature passed in 1909 (Stats. 1909, p. 437; Deering Gen. Laws 1923, Act 9059). Section 8 of the act provides, in part, the portions omitted not being pertinent to the present inquiry:

"A warehouseman, in the absence of some lawful excuse provided by this act, is bound to deliver the goods upon a demand made either by the holder of a receipt for the goods or by the depositor. * * * In case the warehouseman refuses or fails to deliver the goods in compliance with a demand by the holder or depositor, * * * the burden shall be upon the warehouseman to establish the existence of a lawful excuse for such refusal."

Section 9 reads:

"A warehouseman is justified in delivering the goods, subject to the provisions of the three following sections, to one who is— (a) the person lawfully entitled to the possession of the goods, or his agent, (b) a person who is either himself entitled to delivery by the terms of a nonnegotiable receipt issued for the goods, or who has written authority from the person so entitled either indorsed upon the receipt or written upon another paper, or (c) a person in possession of a negotiable receipt by the terms of which the goods are deliverable to him or order or to bearer, or which has been indorsed to him or in blank by the person to whom delivery was promised by the terms of the receipt or by his mediate or immediate indorsee."

Section 10 of the act follows:

"Where a warehouseman delivers the goods to one who is not in fact lawfully entitled to the possession of them, the warehouseman shall be liable as for conversion to all having a right of property or possession in the goods if he delivered the goods otherwise than as authorized by subdivisions (b) and (c) of the preceding section and though he delivered the goods as authorized by said subdivision[s] he shall be so liable, if prior to such delivery he had either (a) been requested, by or on behalf of the person lawfully entitled to a right of property or possession in the goods, not to make such delivery, or (b) had information that the delivery about to be made was to one not lawfully entitled to the possession of the goods."

Sections 11 and 12 are also referred to in section 9, but nothing in either of them is material to the present controversy.

At the time of the deposit of the personal property with appellant by respondent, the former issued to the latter its nonnegotiable warehouse receipt, in accordance with pro-

visions of the Warehouse Act to which we have not found it necessary to refer. The receipt contained the following language:

"Received for the account of Fred McMullen, the goods enumerated in the schedule annexed. * * * Goods will be delivered upon receipt of a written order signed by the person in whose name they are stored. * * *"

Appellant also issued to respondent, at the time the goods were deposited, a document, a part of which, under the heading, "Important," read:

"Many of our customers are not familiar with warehouse rules that are required by the laws of this state, and which are for the protection of the customer who stores his goods, as well as for the warehouseman. Goods can only be delivered on the order of the party in whose name they are stored. This rule applies to husband, or wife, as well as others. * * * Should you desire to allow any other than yourself to have access to, or to remove, any or all of your goods, please fill in, sign, and mail us the attached blank order and have the party so authorized sign his or her name for identification."

The blank order mentioned was part of the document.

[2, 3] Under the provisions of the Warehouse Act, and upon the language of the documents issued by appellant to respondent pursuant to its terms, we cannot perceive how appellant can justify a delivery of the stored goods to the wife of respondent. It is at once obvious that the delivery was not proper under the provisions of either subdivision (b) or subdivision (c) of section 9 of the act, as the wife was not within the terms of either. How can she have been within the language of subdivision (a)? Was she "lawfully entitled to the possession of the goods" merely because they were community property? Under the provisions of subdivision (a) the warehouse keeper doubtless could have delivered the property to any one who was entitled to their exclusive possession as against respondent, with impunity. That seems apparent from the very language of the law. But such a right on the part of appellant is very different from a right to deliver possession to an individual who enjoyed an equal right of possession with respondent—assuming that the wife had that right. Here we might possibly rest the matter, for the wife could claim no more than that she was in law entitled to the possession of the goods equally with her husband. The point now suggested, however, need not be decided, for she could not justify even a claim as great as that referred to. "The husband has the management and control of the community personal property, with like absolute power of disposition, other than testamentary, as he has of his separate estate; provided, however, that he cannot make a gift of such community personal property, or dispose of the same without a valuable consideration, or sell, convey, or incumber the furniture, furnishings, or fittings of the home, or the clothing or wearing apparel of the wife or minor children that is community, without the written consent of the wife." Civ. Code, § 172. It would not seem that the act of respondent in depositing for storage the property here in question came within that part of this section following the word "provided." By that act he did not make a gift of the property or dispose of it without consideration. Surely, the question of consideration, within the meaning of the statute, was not involved in his storing the goods with appellant for safe-keeping, and we therefore need not pause to determine whether his deposit for storage amounted to a disposal of them. The property consisted of furniture and fittings for the home, it is true, but in storing it respondent plainly did not "sell, convey or incumber it" as the provision forbidding such acts without the written consent of the wife is intended by the statute. The inhibition of section 172 thus being put out of consideration, respondent dealt with the goods in storing them as if they were his separate estate, as allowed under the first part of the enactment. Not only does this seem plain upon the face of the section, but the Supreme Court has lately so declared, in effect. Roberts v. Wehmeyer, 191 Cal. 601, 218 P. 22. Not only so, but, if a cause of action for the recovery of the goods had arisen in favor of the community while appellant yet held them, the wife could not have maintained suit to enforce the claim, if respondent were still alive and were still her husband, and if the cause of action arose from no act of his. Chance v. Kobsted (Cal. App.) 226 P. 632. Under all these circumstances it seems futile to assert that appellant could deliver the goods to the wife, in the manner shown by the evidence presented here, and thus provide itself with a defense against this action brought by respondent. It would seem manifest that appellant is, in the present action, in no better situation than it would have been if the goods had been delivered under the same circumstances to an utter stranger to the community relationship existing between respondent and his wife. In support of the defense made by it, appellant cites Schuler v. Savings & Loan Soc., 64 Cal. 397, 1 P. 479; Tibbetts v. Fore, 70 Cal. 242, 11 P. 648; People v. Swalm, 80 Cal. 46; Steele v. Marsicano, 102 Cal. 666, 36 P. 920; and Fennell v. Drinkhouse, 131 Cal. 447, 63 P. 734, 82 Am. St. Rep. 361, but we think none of these cases bears upon the question presented.

[4] The findings of the trial court show that respondent made written application to appellant for the storage of the goods which were placed in appellant's care; that the warehouse receipt issued when the goods

were received by appellant recited that the responsibility of appellant under the storage arrangement should be limited to the sum of $25 for each piece or parcel stored, or its contents, unless the value thereof was made known at the time of storage, when a higher rate for the service would be charged than was really exacted; that the value of certain packages which were stored was not made known to appellant at the time and that appellant never had notice of the value thereof; and that appellant charged respondent a lesser rate of storage than it would have charged if a higher value than $25 per package had been declared by respondent at the time the goods were stored. Not only did the warehouse receipt contain the recital above stated, limiting the liability of appellant, but the written application for storage made by respondent contained language practically identical in form, and, in effect, asked for a low rate of storage because of the low valuation placed on the packages. The trial court found, however, in its conclusions of law, that respondent was entitled to judgment for the full value of the articles included in the packages in question and rendered judgment accordingly. It is now contended that the judgment was in this respect excessive; that is, it is insisted that the judgment, in so far as it was based upon the value of the packages mentioned, should have been limited to the sum of $25 for each package, whereas, the trial court found the actual value of each to be more than that sum and accordingly gave judgment for more. Respondent contends that appellant had no right to limit its liability in the respect mentioned, and that, therefore, the judgment was correct.

We first state the line of argument advanced by respondent, in effect, upon the interesting question thus presented. Section 2 of the Warehouse Act specifies what must be the contents of a warehouse receipt. Section 3 provides, in part:

"A warehouseman may insert in a receipt, issued by him, any other terms and conditions, provided that such terms and conditions shall not * * * in any wise impair his obligation to exercise that degree of care in the safe-keeping of the goods intrusted to him which a reasonably careful man would exercise in regard to similar goods of his own."

This language imports that a warehouseman may not by his warehouse receipt attempt to limit his liability for a failure to exercise at least ordinary care. Therefore, did the delivery of the goods in question here to the wife of respondent show a failure upon the part of the warehouseman to exercise that degree of care in their safe-keeping? In other words, did the breach of the bailee's agreement to deliver only to respondent, or upon his order, amount to negligence? There seems, argues respondent, in effect, to be but one answer to these questions. The exact point was before the court in Rex v. James, 62 Tex. Civ. App. 238, 131 S. W. 248, and it was there held that a delivery of goods to a person not entitled to them under the warehouse receipt issued in that case was negligence entitling the holder of the receipt to recover. In truth, the principle here involved was before this court in a comparatively recent case; the only difference being that the bailee there was not a warehouseman. An automobile had been placed in a public garage under an agreement of the keeper of the place to exercise ordinary care and prudence in the keeping and preservation of it. The evidence was that the car was delivered by the bailee to a person other than the bailor, but it was contended that this proof did not show a want of the exercise of ordinary care. In disposing of the contention this court remarked:

"It surely cannot be said that ordinary care is exercised in the keeping of an automobile under such a contract as was made here if that contract is breached by a delivery of the car to a stranger. We have no doubt that the trial court, after finding that the contract required only the exercise of ordinary care by respondent, intended the finding that the contract had been breached as a finding that such care had not been exercised. At any rate, to our minds, the finding so operates. It would be difficult to imagine a stronger case of lack of exercise of such care." Mehesy v. Mission Garage, 60 Cal. App. 275, 212 P. 643.

The act of appellant, which is the basis of the present action, having been an act of negligence, it remains to inquire, says respondent, how its attempt to limit its liability to $25 per package of the goods stored operated as an attempt to protect itself from acts of that character. On this head a part of the language used in a decided case is apposite, says respondent, although the court rendering the opinion declared that the language referred to was not necessary to the decision. The action was against a warehouseman and was brought to recover the value of a hand bag which had been stored with him, but upon which he had placed a value of $10 in the warehouse receipt or coupon issued by him. The court said:

"I think that the clause of the coupon which attempted to limit the liability of the defendant impaired its obligation to exercise that degree of care in the safe-keeping of the goods intrusted to it which a reasonably careful man would exercise in regard to similar goods of his own, and hence was a condition which the defendant had not the legal right to insert in the coupon and was void. It is a matter of common knowledge that the value of a hand bag and its contents carried by a person traveling is often many times $10, and manifestly a condition in a receipt which limits the liability of the bailee to so small a sum weakens his sense of obligation to exercise that degree of care which he would be likely to exercise if he knew

that he would be held liable for the full value of the parcel stored in the event of its loss." Healy v. New York Cent. R. Co., 153 App. Div. 516, 138 N. Y. S. 287.

The decision was affirmed by the Court of Appeals of New York without opinion. Upon these premises it is argued that the judgment of the trial court, in the respect which is now under examination, was correct. The argument of appellant upon the question is now, in effect, to be stated. Section 2175 of the Civil Code reads:

"A common carrier cannot be exonerated, by any agreement made in anticipation thereof, from liability for the gross negligence, fraud, or willful wrong of himself or his servants."

It will be observed that this enactment is like the inhibitive portion of section 3 of the Warehouse Act. Decisions based upon section 2175 of the Code are therefore of interest in measuring the effect of the similar provision of the Warehouse Act. The Supreme Court has several times been called upon to solve questions under the former which are akin to the one here presented under the latter. In one of the cases a common carrier had contracted to transport certain horses over its lines by means of a car which was chartered for the purpose by the owner of the horses at a certain rate. The shipper presented to the carrier his written "request" for the service to be rendered and in it he stated the value of each of the horses to be $20. Each was, in fact, worth much more than that sum. The "request" stated that the shipper desired the execution of a particular form of contract for the service to be rendered, which specified a lower shipping rate than that which would have been charged but for the low valuation placed on the horses. The contract between the parties was upon the form requested. The instrument recited that in case of the loss or injury of the animals through the gross negligence of the carrier the amount to be by their owner "claimed * * * shall be adjusted on the basis of value at the time and place of shipment not exceeding the declared value" set forth in the "request," "and on which declared value the rate or rates of transportation hereinbefore named by first party [the carrier] are based." There were other clauses of the contract which strengthened, amplified, and made more certain and positive the substance of the matter just quoted. Two of the horses were lost in transit through the gross negligence of the carrier, and the shipper brought suit for damages. The jury after a refusal of the trial judge to instruct that the damages found, if any, must be limited to the sum of $20 for each animal, rendered verdict for a larger sum. In reversing the judgment, the Supreme Court said:

"Now, to examine the contract under the terms of section 2175 of the Civil Code, to see if it comes within its prohibition. That section prohibits the carrier from entering into any contract in anticipation of gross negligence exonerating itself from liability therefor. Undoubtedly, a contract which attempted to relieve the carrier from liability for gross negligence, or attempted to fix a liability for only half the actual value of the property carried, or any other proportion less than such actual value, would be obnoxious to the prohibition of the section and void. But the contract in question here does not attempt to relieve the carrier from liability for the actual value of the property shipped, nor does it provide for any partial exemption from liability, nor does it provide for exemption from responsibility at all. On the contrary, the carrier assumes full responsibility for loss or injury to the property occasioned through its gross negligence to the full extent of the actual value of the property as declared by the shipper, and which valuation, by the contract between them, was agreed to be its actual valuation for all purposes. As to these purposes, it is not correct to assume that the special contract was made solely in anticipation of liability, or that liability was the principal subject-matter of the contract. It was not entered into with a view of providing solely for exemption, nor was that by any means its contemplated purpose. While it is true that the actual value of property may, in fact, be in excess of an agreed valuation in a contract, and as to that excess it may be said that the carrier is exonerated from liability, this does not render the contract otherwise fairly entered into fixing the agreed valuation, invalid. If to that extent exemption may be said to result in some instances under an agreed valuation, it only follows indirectly, because it is not the main or chief object of the contract to attain it. The primary purpose of this contract was, as the rates of transportation charged by the carrier were measured by the valuation of the property shipped, to fix an agreed valuation of the horses in question as a basis upon which freight rates should be charged and paid, on condition that in case of loss the responsibility of appellant should be measured by such agreed valuation. The contract is one in which the valuation of the property was agreed to for the purpose of fixing transportation charges and as measuring the responsibility of appellant. It was not a contract limiting liability. It was a contract dealing primarily with value—the value of the horses shipped. That was agreed to, and, of course, the agreed valuation must be deemed to be the actual valuation of the property—its actual valuation for all purposes of the contract; and as appellant assumed responsibility for loss to the full extent of such valuation there is no room for claiming that the contract was an attempt to exonerate it from the liability which the statute imposed. On the contrary, it assumed under it full liability for the actual value as that actual value was agreed on. Under this view of the contract, we cannot see how it violates the section of the Code relied on. That section, while it prohibits contracts relieving the carrier from liability for the value of property intrusted to it for carriage and loss through its gross negligence, was not intended to limit the right of contract between shipper and carrier as to what that value may be. It prohibited only the making of

a contract limiting liability. The limitation of liability necessarily imports a responsibility less than full responsibility. Full responsibility under the statute for the loss of the property carried could not exceed its actual value, and while under the statute a carrier cannot by contract exonerate itself from liability for such value, there is nothing in the statute which prohibits the parties by contract from determining freely in advance what the actual value of such property is as the measure of the responsibility of the carrier when it attaches." Donlon Bros. v. Southern Pac. Co., 151 Cal. 763, 91 P. 603, 11 L. R. A. (N. S.) 811, 12 Ann. Cas. 1118.

Appellant also cites, as based upon the same doctrine, Michalitschke v. Wells, Fargo & Co., 118 Cal. 683, 50 P. 847; Merrill v. Pacific Transfer Co., 131 Cal. 582, 63 P. 915; and Mering v. Southern Pacific Co., 161 Cal. 297, 119 P. 80.

Leaving now the argument of appellant, we do not pause to consider whether all of the three cases last cited are in point, as the language of the opinion in Donlon Bros. v. Southern Pacific Co. is so explicit as to leave nothing to be desired in furtherance of an endeavor to ascertain the rule in this state upon the subject treated so exhaustively in that case. A vigorous dissent from the conclusion reached in the opinion, upon views similar to those expressed in Healy v. New York Cent. R. Co., supra, was filed by one of the members of the court, but the principle announced has ever since remained the law of the state. The case was cited with approval in Mering v. Southern Pacific Co., supra, and was followed in Reeder v. Wells, Fargo & Co., 14 Cal. App. 790, 113 P. 342; Olcovich v. Grand Trunk R. Co., 179 Cal. 332, 176 P. 459; and Crenshaw Bros. v. Southern Pacific Co., 40 Cal. App. 603, 181 P. 252. It was mentioned in Walther v. Southern Pacific Co., 159 Cal. 769, 116 P. 51, 37 L. R. A. (N. S.) 235. The present controversy would seem to be ruled by Donlon Bros. v. Southern Pacific Co. Respondent endeavors to escape the principle stated in that case by means of a section of the Warehouse Act which reads:

"This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." Sec. 57.

The act has been adopted in a number of the states, and respondent cites, along with Healy v. New York Cent. R. Co., supra, cases from different jurisdictions which it is contended adhere to a rule in direct conflict with that announced by the carrier cases decided by the Supreme Court of this state and which are above listed. We have not halted to determine to what extent the courts of other states, in construing the provisions of their laws identical with or similar to section 3 of our Warehouse Act have aligned themselves together. We have not endeavored to ascertain to what extent they have attempted to make uniform, or have succeeded in making uniform, the law upon such a question as arises here. In view of the decision in Donlon Bros. v. Southern Pacific Co., supra, we have no interest in that question. The case is directly in point and applies in principle to section 3 of the Warehouse Act equally as it does to section 2175 of the Civil Code. If, because of the language of section 57 of the Warehouse Act, a rift is to be made in the law of bailments in this state, so that one rule shall obtain under section 3 of that act and an utterly different rule shall apply under section 2175 of the Civil Code, the chasm can be created only by the Supreme Court. We are bound by the line of decision laid by that tribunal. In view of the law as there expressed, the question as to how far it is necessary to go to satisfy the terms of section 57 of the Warehouse Act is a question for our court of last resort. In our opinion the contract limiting the liability of appellant to $25 per package of the goods stored by respondent with it was not invalid as being within the inhibition of section 3 of the Warehouse Act. This view requires a modification of the judgment.

Other points are made by appellant, but they are either concluded by our views upon questions which we have above determined, or they fall of their own weight.

The judgment is modified by striking therefrom the figures $759.97, and inserting therein in lieu thereof the figures $375.85. As so modified the judgment is affirmed.

We concur: FINLAYSON, P. J.; CRAIG, J.

---

74 Cal. App. 132

WIGMAN v. SUPERIOR COURT OF CALIFORNIA IN AND FOR LOS ANGELES COUNTY et al. (Civ. 5108.)

(District Court of Appeal, Second District, Division 1, California. Aug. 4, 1925.)

1. Courts ⟸80(1)—Pleading ⟸218(1)—Inferentially intended, under code rule requiring demurrer to specify grounds or be disregarded, that demurrer specifying grounds shall be considered on merits, and court rule could not override statute.

Under Code Civ. Proc. § 421, providing that code rules govern sufficiency of pleadings, it is inferentially intended by section 431, providing that demurrer must specify grounds thereof or be disregarded, that if demurrer does specify grounds authorized by section 430, the defendant is entitled to have a ruling on the merits, and superior court rule 10, par. 8, requiring notation of authorities on demurrer, but containing no penalties for refusal, could not override

the statute so as to permit the court to refuse to pass on the demurrer by reason of the omission of the notation.

2. Mandamus ⟸48—Mandamus to compel consideration of demurrer on merits will issue where court has refused to consider it at all.

Where court in form overruled demurrer, but in fact refused to consider it, mandamus to compel consideration of demurrer on merits will issue, since court, under Code Civ. Proc. § 1085, has declined to perform an act which law enjoins as a duty resulting from its office.

Application by H. Wigman for writ of mandamus, directed to the Superior Court of the State of California in and for Los Angeles County and Hugh J. Crawford, Judge thereof, to compel consideration of demurrer on merits. Writ issued.

Crouch & Crouch, of Los Angeles, for petitioner.

Anne O'Keefe, of Los Angeles, for respondents.

CONREY, P. J. [1] On application for writ of mandamus. The petitioner, as defendant in an action pending in the superior court, demurred to the complaint on several grounds stated in the demurrer, but did not note on the demurrer or file therewith any note or memorandum of the authorities in support thereof. Paragraph 8 of rule 10 of the superior court of Los Angeles county provides that a party demurring shall note on the demurrer the authorities in support thereof, or file a separate memorandum of such authorities. The rule does not declare what penalty or default shall result from failure to comply with these requirements. When the demurrer was called for hearing the judge called attention to the fact that the demurrer was not accompanied by any points and authorities. For that sole reason, without examining the demurrer itself, he refused to consider the demurrer, and entered an order overruling the same.

Section 421 of the Code of Civil Procedure reads as follows:

"The forms of pleading in civil actions, and the rules by which the sufficiency of the pleadings is to be determined, are those prescribed in this code."

Section 430 authorizes the defendant to demur to the complaint. Section 431 provides that the demurrer must distinctly specify the grounds upon which any of the objections to the complaint are taken. "Unless it does so, it may be disregarded." Inferentially it is thus intended, and in effect enacted, that, if the demurrer does distinctly specify any of the grounds of demurrer authorized by section 430, the defendant is entitled to have a ruling upon his pleading according to its merits.

In Klokke Investment Co. v. Superior Court, 39 Cal. App. 717, 179 P. 728, this court had under consideration an order for publication of summons, and a rule of the superior court which required that, where mailing a copy of summons and complaint was ordered, such mailed documents must be registered. The Code, in its provision for mailing of such documents, did not require that they be registered. This court held that, assuming that the case presented was one which required the mailing of the documents, the statute was satisfied when the mailing was made as therein required. "The acts necessary to give jurisdiction, as specified in an act of the Legislature, cannot be added to or limited by rule of court."

But in the case at bar we may assume that the rule under consideration, which directs the notation or filing of the authorities in support of a demurrer, is a valid rule, since it does not purport to be more than a rule of procedure upon a matter wherein the cause and the parties are within the jurisdiction of the court. The rule does not attempt to provide that a party failing to comply therewith shall be denied a ruling upon the merits of the demurrer. The case is not analogous to one which might arise under the provisions of section 527 of the Code of Civil Procedure, wherein it has been provided that where a temporary restraining order has been obtained, together with an order to show cause why a preliminary injunction should not be granted, the moving party must serve upon the opposing party a copy of his complaint, affidavits, and points and authorities, and that if he shall fail so to do within the time specified the court shall dissolve the temporary restraining order. Kelsey v. Superior Court, 40 Cal. App. 229, 235, 180 P. 662. Even if it be conceded that a rule might be sustained, imposing some such penalty or consequence for failure to file points and authorities in support of the demurrer, the fact is that the rule now under consideration does not contain any such provision. The rights of the demurring defendant rest completely and solely upon the sections of the Code relating to demurrers, to which we have referred. The defendant having filed a demurrer, such as the statute permits, and having attempted to present said demurrer, he is entitled to have a ruling upon the merits thereof.

[2] This is not a case where it is sought to obtain an order controlling the discretion of the court in its disposition of the matter before it. The order which the court made, although in form an order overruling the demurrer, was in effect a refusal to consider the demurrer at all. It is in this aspect alone of the case that the court has declined to perform "an act which the law specially enjoins,

as a duty resulting from an office, trust, or station." Code Civ. Proc. § 1085.

The demurrer to the petition herein is overruled.

Let the peremptory writ issue.

I concur: CURTIS, J.

---

74 Cal. App. 10

JONES v. SOUTHERN PAC. CO. et al.
(Civ. 2896.)

(District Court of Appeal, Third District, California. July 28, 1925. Hearing Denied by Supreme Court Sept. 24, 1925.)

1. Railroads ⟸400(6)—Whether signal was given held for jury.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, whether bell was rung or signal given *held* for jury.

2. Trial ⟸139(1)—Witnesses' negative testimony that they heard no signals and saw none, though opposed to positive testimony, presents a question for jury.

Negative testimony of witnesses who are in position to hear and to observe an accident, who declare they heard no signals and saw none, even if opposed to positive testimony that signals were given, presents a question for jury.

3. Railroads ⟸397(1)—Evidence held admissible to show lack of care of enginemen and speed.

In action for death of employee of independent corporation making repairs on track intersection when struck by defendant's train, evidence that train stopped some 1,700 feet beyond intersection was admissible to show lack of care of enginemen and speed at which train was traveling.

4. Death ⟸58(1)—Presumption deceased used ordinary care.

Presumption is that deceased used ordinary care for his own safety.

5. Railroads ⟸396(1)—Person injured presumed to have seen train standing.

Where several trains, other than train striking employee of independent corporation repairing an intersection, had passed point at which he worked, and to which he gave right of way, it would be presumed that he saw train which struck him standing still at a water tank a short distance from the intersection.

6. Railroads ⟸383(2)—"Stop, look, and listen" rule inapplicable to trackmen.

The "stop, look, and listen" rule, applicable to travelers and to railroad employees not engaged in duties of their employment, cannot apply to persons lawfully at work repairing an intersection of railroads.

7. Negligence ⟸136(14, 26)—Negligence and contributory negligence for jury.

Questions of negligence and contributory negligence are for jury.

8. Railroads ⟸369(3)—Failure to give signals to trackmen negligence.

Under Civ. Code, § 486, all persons at or near railway crossings, not excluding employees or invitees rightfully engaged in repairing tracks, are entitled to warning signals, a failure to give which constitutes one kind of negligent operation of train.

9. Railroads ⟸369(3)—Trackmen entitled to benefit of signals.

While party injured must use reasonable, ordinary care, and cannot recover for injuries due to his own negligence, duty as to persons engaged in repairing tracks is reciprocal resting on railroad to use reasonable, ordinary care by means of such proper and adequate warnings and signals as will reasonably be adequate to avoid injury to persons lawfully on the tracks.

10. Railroads ⟸355(5) — Employee of independent corporation repairing track invitee.

Status of employee of independent corporation, engaged in repairing intersection of railroad when struck by train, was not that of a mere licensee nor of a trespasser, but analogous to that of an invitee.

11. Appeal and error ⟸1056(1)—Any error in excluding testimony whether witness saw enginemen after accident held not prejudicial.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, any error in excluding testimony whether witness saw enginemen of train striking decedent after the accident happened *held* not prejudicial.

12. Appeal and error ⟸1042(2)—Striking out of defendant's answer without notice held not prejudicial.

Court's act in striking out portion of defendant's answer without notice *held* not prejudicial, where appellant admitted that portion stricken out might not ordinarily have been relevant or admissible in evidence.

13. Jury ⟸137(2)—Court held not to have abused discretion in permitting plaintiff to pass peremptory challenge to jurors and later exercise it.

In action for death of plaintiff's decedent, court *held* not to have abused its discretion in permitting plaintiff to pass her peremptory challenge to jurors and later exercise it.

14. Death ⟸66—Testimony as to deceased's appearance and health held admissible.

In action for death of plaintiff's decedent when struck by defendant's train, testimony as to deceased's appearance and bodily health at various times and places prior to the accident *held* admissible.

15. Death ⟸61—Testimony as to decedent's appearance in hospital held admissible as bearing on severity of injuries.

In action for death of plaintiff's decedent when struck by defendant's train, testimony as to decedent's appearance during time he was alive in hospital after accident *held* admissible as bearing on nature, extent, and severity of his injuries which resulted in his death.

---

16. Evidence ⊂⊃357—Letter from railroad to corporation, requesting track intersection to be repaired, held admissible as showing reason for presence of decedent on track.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, letter from defendant railroad to corporation, requesting that intersection be repaired, *held* admissible as showing reason for presence of decedent on crossing; it being immaterial that no written answer was sent, since no written reply was requested or expected.

17. Railroads ⊂⊃401(8) — Trial ⊂⊃194(17), 260(8)—Instruction held properly refused as being upon fact and not accurate definition and being sufficiently covered by another instruction.

In action for death of plaintiff's decedent when struck by defendant's train, instruction defining ordinary care *held* properly refused as being an instruction on fact and not accurate as a definition and being sufficiently covered by another instruction.

18. Trial ⊂⊃260(8)—Instruction on measure of damages held properly refused, where fully covered by another instruction.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on measure of damages *held* properly refused, where fully covered by another instruction.

19. Trial ⊂⊃228(3), 260(10)—Instructions on measure of damages held properly refused, in view of other instructions, and as containing speculative references.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on measure of damages *held* properly refused, where, in so far as it correctly stated the law, it was fully covered by other instructions, and contained speculative references whether deceased might have been liable to become wholly or partially dependent for support on plaintiffs.

20. Trial ⊂⊃253(4)—Instruction on contributory negligence held properly refused as omitting element of negligent contribution.

In action for death of plaintiff's decedent when struck by defendant's train, instruction that, if deceased in any manner contributed to accident which resulted in his death, verdict should be for defendant, *held* properly refused, since to bar a recovery deceased must have negligently contributed to happening of accident.

21. Trial ⊂⊃194(17)—Instruction on contributory negligence held properly refused as directing jury as to matters of fact.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on deceased's contributory negligence *held* properly refused as directing jury as to matters of fact.

22. Railroads ⊂⊃370—Sounding whistle in cities not required.

Railroad is not required to sound whistle in cities, in view of Civ. Code, § 486, though there is no law forbidding that to be done.

23. Trial ⊂⊃260(8)—Instruction on duty of railroad to give signals held properly refused, in view of other instructions.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction on duty of railroad to sound bells or whistles when approaching a highway crossing *held* properly refused, in view of other instructions.

24. Trial ⊂⊃260(8)—Instruction on duty of railroad to maintain signals at place of accident held properly refused, in view of another instruction.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on duty of railroad to maintain an automatic or other signal at point of accident *held* properly refused, in view of another instruction covering same subject.

25. Trial ⊂⊃252(9)—Instruction on law of last clear chance held properly refused under the evidence.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on law of last clear chance *held* properly refused under the evidence.

26. Trial ⊂⊃194(6)—Instruction as to positive and negative evidence held properly refused as invading province of jury.

In action for death of plaintiff's decedent when struck by defendant's train, instruction on relative weight of positive and negative evidence *held* properly refused as invading province of jury.

27. Railroads ⊂⊃383(2)—Instruction held erroneous as assuming it to be duty of section men at all times to look out.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction that railroads may rightfully assume that section men will look out for approach of trains, and that they owe no duty to warn them, *held* properly refused, as assuming it to be duty of section men at all times to look out for approach and passage of trains.

28. Railroads ⊂⊃381(2)—Section man must use reasonable care.

Section man must use reasonable ordinary care to protect himself from approach and passage of trains.

29. Railroads ⊂⊃400(10)—Contributory negligence of trackman held for jury.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, whether decedent exercised reasonable and ordinary care and watchfulness *held* for jury.

30. Railroads ⊂⊃383(2)—Trial ⊂⊃191(8)—Instruction held properly refused as assuming it to be duty of trackman to look out at all times, and that he knew trains were likely to pass.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction that a person working on a rail-

road track, where trains are likely to pass at short intervals, must exert due diligence to avoid such dangers, and that his failure to do so constitutes absolute negligence, *held* properly refused, as assuming it to be duty of decedent to look out at all times for approach of trains, and that decedent knew trains were likely to pass at short intervals.

31. Trial ⊂⊃191(8)—Instruction held properly refused as implying that decedent failed to heed warning of foreman and that his failure contributed to his death.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction that, if decedent's failure to heed foreman's warning to look out for trains contributed to his death, defendant would not be liable, *held* properly refused, as implying as matter of fact that decedent failed to heed warning of foreman, and that his failure contributed to his death.

32. Trial ⊂⊃228(3), 260(8)—Instruction held properly refused because of the use of word "approximately" and as being covered by other instructions.

In action for death of plaintiff's decedent when struck by defendant's train, instruction that, if decedent's neglect contributed approximately to accident resulting in his death, he could not recover, *held* properly refused because of use of "approximately" instead of "proximately" and as being covered by other instructions.

33. Railroads ⊂⊃383(2)—Instruction on duty of trackman to look held as incorrect.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction that one working on a railroad track must avail himself of every opportunity to look and listen for approaching trains, and that, if decedent taking such precautions would have seen or heard approaching trains, his death raised presumption that he did not take the required precautions, *held* properly refused as not embodying a correct statement of the law.

34. Trial ⊂⊃194(17)—Instruction that deceased did not look and listen for trains at all held properly refused on the facts.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction, which would have told jury as a matter of fact that decedent did not look and listen for trains at all, *held* properly refused as being on the facts.

35. Trial ⊂⊃194(17)—Instruction that deceased was negligent held properly refused as invading domain of fact.

In action for death of plaintiff's decedent when struck by defendant's train, instruction that deceased remained carelessly in place of danger, and was negligent, *held* properly refused as invading domain of fact.

36. Trial ⊂⊃194(17), 253(7)—Instruction held properly refused as invading province of jury and being hypothetically argumentative and not including all qualifying facts essential.

In action for death of plaintiff's decedent when struck by defendant's train, instruction, implying that deceased did not use his eyes and ears while working, and that he failed to exercise due care, *held* properly refused as invading province of jury on matters of fact, and being hypothetically argumentative, and not including all qualifying facts essential.

37. Trial ⊂⊃191(8)—Instruction implying that decedent did not use all his faculties held properly refused as instructing on matters of fact.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction, implying that decedent did not use all his faculties, but merely listened and did not look, *held* properly refused as instructing on matters of fact.

38. Trial ⊂⊃260(8)—Instruction that defendant would not be liable though negligent held properly refused as being fully covered by another instruction.

In action for death of employee of independent corporation, making repairs on track intersection when struck by defendant's train, instruction that, if deceased was negligent and his negligence proximately contributed to his death, though defendant was negligent also, it would not be liable, *held* properly refused as being fully covered by another instruction.

39. Trial ⊂⊃260(4)—Instruction on credibility of witnesses held properly refused, where fully covered by other instructions.

Instruction on credibility of witnesses *held* properly refused, where fully covered by other instructions.

40. Trial ⊂⊃244(5)—Neither party entitled to have instructions as to credibility of particular witnesses.

Neither party to litigation is entitled to have instructions as to credibility of particular witnesses.

41. Appeal and error ⊂⊃1067—Refusal of instruction containing a part only of rule of statute held not prejudicial, where not sufficiently qualified.

In action for death of plaintiff's decedent when struck by defendant's train, refusal of instruction that there was no duty on part of defendant to blow its whistle when approaching crossing within corporate limits where accident occurred, *held* not prejudicial, since it contained a part only of the rule of Civ. Code, § 486, and was not sufficiently qualified.

Appeal from Superior Court, San Joaquin County; George F. Buck, Judge.

Action by Ruth Jones against the Southern Pacific Company, a corporation, and others. Judgment for plaintiff, and named defendant appeals. Affirmed.

See, also, 236 P. 336.

Levinsky & Jones, of Stockton, for appellant.

Cooley & Crowley and Cooley & Gallagher, all of San Francisco, for respondent.

McDANIEL, Justice pro tem. The plaintiff, Ruth Jones, widow of B. B. Jones, deceased, and the mother of the plaintiffs Virginia Jones, Nannie Stevens, and Mrs. Fletcher Stevens, prosecutes this action against the Southern Pacific Company, a corporation. Walter W. Webb and Charles P. Alexander, respectively fireman and locomotive engineer on extra freight No. 2327, also are defendants, but were not served with summons; this action, therefore, being against the Southern Pacific Company alone, to recover damages for the death of said B. B. Jones, alleged to have been occasioned by the negligence of defendant on the 4th day of August, 1921, at the city of Lodi, Cal. Jones was a track laborer in the employ of the Central California Traction Company, a corporation, but working on the tracks of the appellant. Before submission, the cause was abandoned by the plaintiffs Virginia Jones, Nannie Stevens, and Mrs. Fletcher Stevens, and dismissed as to them by order of court. Code Civ. Proc. § 581, subd. 4.

The jury returned a general verdict, in the sum of $10,000, for the plaintiff, Ruth Jones, against the Southern Pacific Company, appellant herein, and also returned answers upon submitted special issues, the first six of which having been requested by the plaintiff and the remaining six by the defendant. Those special issues and answers were found and returned, over the signature of the foreman as follows:

"No. 1. Was the manner of operating the freight train involved in the accident careless and negligent? Ans. Yes.

"No. 2. Was the death of B. B. Jones caused by the careless and negligent operation of the freight train involved in the action? Ans. Yes.

"No. 3. Did the engineer in charge of the engine keep such a lookout as would be kept by an ordinarily prudent man, under the same circumstances, while traveling from the water tank to the crossing at East Lodi avenue, in the city of Lodi? Ans. No.

"No. 4. Did B. B. Jones come to his death by reason of any negligent act or omission on the part of the engineer? Ans. Yes.

"No. 5. Did the fireman, in the engine involved in the accident, keep such a lookout as would be kept by an ordinarily prudent man under the same circumstances, while traveling from the water tank to the crossing at East Lodi avenue, in the city of Lodi? Ans. No.

"No. 6. Did B. B. Jones come to his death by reason of any negligent act or omission on the part of the fireman? Ans. Yes.

"No. 7. Was the defendant Southern Pacific Company, as to B. B. Jones, negligent in failing to maintain an automatic or other signal at, or near, the point of the accident complained of? Ans. No.

"No. 8. Was the defendant Southern Pacific Company, as to decedent, B. B. Jones, negligent in failing to keep or maintain a flagman or watchman at the crossing where the accident complained of occurred at the time of said accident? Ans. No.

"No. 9. (A) Was the locomotive as to which plaintiffs charge defendant with negligent operation equipped with a bell, as defined in the instructions I have given? (B) Was that bell rung at a distance of at least 80 rods from the place where the Southern Pacific Company's Railroad crossed the highway on, or near, which B. B. Jones was killed? (C) Was it kept ringing until it crossed said crossing? Ans. (A) Yes. Ans. (B) No. Ans. (C) No.

"No. 10. Did the decedent, B. B. Jones, use ordinary care in looking out for the approach of the locomotive and train which it is alleged caused his death? Ans. Yes.

"No. 11. Was the decedent, B. B. Jones, warned by his foreman to look out for trains using the tracks on or near the point where B. B. Jones was working? Ans. Yes.

"No. 12. Was there anything that would have prevented the deceased, B. B. Jones, from seeing the approaching train, if he had looked in the direction from which the train was coming? Ans. No."

The evidence is before us in a bill of exceptions with 139 specifications of error. Counsel for appellant, even in the amplitude of indefatigable industry, has not argued every specification. We have examined all of them, however.

The railroad track of the Southern Pacific Company is located on Sacramento street in the city of Lodi. The street and track extend in a northerly and southerly direction. Lodi avenue crosses Sacramento street at right angles, and upon it are located car tracks of the Central California Traction Company. This railroad crossing is a public street crossing within the corporate limits of the city of Lodi. It appears to be the duty of the traction company to keep the intersection in repair at its own expense, subject to the rights of the Southern Pacific Company.

On July 30, 1921, the superintendent of the Southern Pacific Company, G. E. Gaylord, sent a letter to the Central California Traction Company, for the attention particularly of J. J. Hooper, its superintendent; a copy is as follows (letter heading omitted):

"Gentlemen: Attention Mr. Hooper. Crossing at Lodi avenue, our main line, Lodi, so badly out of line, considered necessary this afternoon to place 8-mile slow order over same. Hope you can arrange to have your forces drive this crossing into line, calling upon my section forces at Lodi for such assistance as they may be able to render you.

"Yours truly, G. E. Gaylord."

This notification seems never to have been replied to in writing, but on August 4, 1921, the Central California Traction Company sent its gang of workmen, under section foreman H. H. Woodside, to said crossing to do the work as directed in the notification. They had been working at the crossing or

the immediate vicinity about 2 hours before the accident mentioned in the complaint. B. B. Jones, a member of that section gang, had worked as such for Central California Traction Company about 3 months. The entire crew, including Jones, after working at that place a while, was sent to other points along the track near by, when Jones, by order of the foreman, returned to the intersection to continue work at that point.

From the crossing looking south, one's view of the track is unobstructed for 2 miles or more, except when trains may be passing thereon, and one on an approaching engine has an unobstructed view of the crossing and any one upon it a like distance.

Mr. Woodside, the section foreman, testified that on that morning he had warned all of the section men, including the deceased, saying, "Whatever you do, look out for those trains," and, further, that he had repeated this two or three times the same morning. That admonition expressed the duty of every ordinarily prudent person in such a place to exercise reasonable care for his own safety.

Jones was a man 65 years and 6 months of age, in sound health, and of normal faculties, and the evidence did not disclose he had defect either of vision or hearing. The particular work he was doing when the accident occurred was digging with pick and shovel a jack hole under one of the track rails to prepare a foundation for a track-lifting implement.

While so at work, in a stooping position, with his back toward the rails and the approaching train, his hearing probably affected by sounds of other nearby moving trains, he was struck by the freight train of defendant, receiving injuries from which he died, one leg being almost amputated by the wheels of the train, and his skull fractured. A witness stated that he observed the iron step of several of the passing cars strike Jones upon the head as the latter, after being run down, tried to raise himself from the ground.

Shortly before the fatality, the train, not running on regular schedule, was stopped at a water tank situated on the main line, 1,534 feet south of the point of accident. It remained there for approximately 10 minutes, then proceeded on its north-bound journey (east-bound in railroad parlance) at a speed of 6 or 8 miles per hour to and past the point of accident. The time occupied in traveling the distance from the water tank to the crossing might have been a minimum of 2 minutes and 15 seconds, or a maximum of 4 minutes.

There is a conflict in the testimony as to whether or not any whistle was sounded or bell rung as the train left the water tank and approached the crossing. This conflict will be fully examined.

Both appellant and respondent in argument agree that under the facts no features are presented to bring this case within the rule of the last clear chance. It will be unnecessary, therefore, to pay any attention to that rule. It is conceded that Jones did not see the train immediately before it ran upon him, and that neither the engineer nor the fireman observed Jones at the crossing during any time while the engine traveled from the water tank to the intersection.

Appellant earnestly contends it was in no wise guilty of negligence in the operation of the train, or in causing the injuries to the deceased, but that his death was directly and proximately due to his negligence in failing to exercise ordinary care for his own safety; that, if appellant was negligent in any manner or at all, nevertheless his death was directly and proximately due to his contributory negligence.

Respondent argues that appellant was guilty of negligent operation of its train, resting the argument partly upon the charge that signals were not given, as required by section 486, Civil Code.

Defendant's fireman, engineer, and brakemen testified that the whistle was sounded a number of times, and a bell of the requisite weight was automatically ringing from the time the train left the water tank until it passed the crossing and intersection at Lodi avenue.

About the time of the accident, there were switch engines and trains of the Southern Pacific Company being operated and worked in the yards of said company at Lodi; the said yards extending on the east side of the main track both north and south of the crossing, wherein are four so-called house tracks, upon which, at the time, the Central California Traction Company also was moving cars.

Jones was not working within the train-yard itself, but on the main line track, which bounds the west side of the switch yard, and the train which struck him was a through freight, bound east.

Opposing the testimony of the trainmen as to signals, the witness T. P. Trick testified in part as follows:

"Q. Did you hear anything prior to the time you noticed the train? A. The reason we looked, we heard the train noise, and then we looked around, and then we seen the train. I didn't hear anything else; I didn't hear any noise of any kind before I saw the train, except the train noise, and didn't hear any other noise of any kind made by that train within 2 minutes of the time I first saw the train. * * * What I mean by the train noise was, you always hear noise when the train goes by, feel it or hear it when it is so close, and I heard nothing else. When we worked there we pay attention to our work and to nothing else. There was no steam coming out of the engine on the side I was on. * * * When I stated that all the freight trains that passed that crossing made

the same noise, I referred to the noise that it makes when it passes a crossing by the cars. I didn't mean that I didn't pay any attention to anything else except that work."

This witness testified he was at the traction depot, about 100 or 120 feet from the crossing, at the time of the accident.

The witness A. D. Buller, who was 25 or 50 feet from the crossing when the accident occurred, testified:

"The noise the train was making was just the noise the wheels will make when they run over the track, wheels—railroad car wheels—will make a noise when they run on the track; that is the only noise I heard.

"Q. Did the engine make any other noise? A. No, sir.

"Q. * * * During the time you were walking from the place where you first saw Mr. Jones, did you hear the engine of the train make any noise other than that noise which you say was made by the wheels on the track? A. No, sir."

It appears to have been understood at the trial that the foregoing evidence was introduced for the purpose of showing no signals or warnings were given of the approach of the train. That the attorney for defendant so understood it is shown by the cross-examination of the witness.

Mr. Levinsky said: "I am cross-examining him on the basis of his claiming he didn't hear that whistle." In his direct examination the witness did not say he did not hear the whistle, so counsel's remark must have had reference to the statement of the witness that he heard no noise except those he described. If counsel for defendant understood the effect of the witness' testimony to be that he did not hear any warning signal, it is probable that the jury so understood it and that the witness meant to be so understood. Counsel for defendant had objected to the question asking directly whether the bell was rung, on the ground that it was leading and suggestive. The objection was overruled, and such ruling is assigned as error on appeal. Later in the trial counsel for plaintiff seems to have so formed his questions as to avoid the objection made, and it is fair to infer that all persons connected with the trial understood that the questions and answers concerning noise had reference to the matter of warning signals. It also may be noted in folio 529, the following answers were given:

"Mr. Levinsky (cross-examination of witness Buller): Q. This train may have whistled for this crossing and you did not hear it? A. And it may not; I know it did not. I have my normal hearing and every train in Lodi when it whistles if I am away even half a mile, I think I hear it if it whistles.

"Q. Because you did not hear it is the only reason you say it did not whistle, is that correct? A. Well, is there another way to know it, could I see it, if it whistles?

"Q. Please answer my question. A. Well, it is just that, I have another reason—if it whistles it blows the steam up from the whistle, I didn't see that, I didn't see even the steam of the whistle."

Herbert Waite testified as follows:

"It might have been 40 feet, it might be 30 feet, something like that; I couldn't tell how far I was from the crossing.

"Q. At the time the train passed you, was it making any noise? A. Well, some noise, of course. I don't know—I don't know how to answer the question. Noise ordinarily that it would make going by a place, I should imagine. I know—it made a noise, that is all. I couldn't tell what particular part of the train made a noise; the noise sounded like the ordinary noise that any train would make—oh, it made a noise, yes, but I couldn't describe it. I didn't hear any bell ring as the train passed me.

"Q. State whether or not, within 2 minutes of the time you heard the train passing you, you heard any bell ring. A. Well, that I couldn't say, because I never noticed the train until it got right there. At the time the train passed me, I don't remember of hearing any whistle.

"Q. Do you remember hearing either any bell or any whistle within 2 or 3 minutes of the time the train passed you? A. Well, I never noticed the train until it got right there. No; I didn't notice it to remember of."

[1] It seems clear that this testimony is sufficient to raise a conflict as against the testimony of the train crew, who testified to the giving of the signals and presented a question for the jury's determination, and would be sufficient, if believed, to justify the inference that no bell was rung or signal given.

[2] In this connection it may be said that negative testimony of witnesses who are in a position to hear and to observe, who declare they heard no signals and saw none, even as opposed to positive testimony that signals were given, presents a question to be submitted to the jury, and it has been held such negative evidence may be sufficient to sustain a verdict. Jones on Evidence, § 898; volume 23, C. J., § 1787, where many cases upon the question are cited.

We find in Thompson v. Los Angeles, etc., Ry. Co., 165 Cal. 748, 134 P. 711, a holding which in principle we deem applicable, as follows:

"But we think it must be held that there was enough in the evidence to justify the jury in finding that the motorman was negligent in not giving proper warning, by bell or whistle, of his approach. It is true that the only evidence that he did not give such warning was negative, consisting of the statements of the people in the automobile that they heard no signal. But, if they were so situated, as they undoubtedly were, as to have been able to hear a bell or whistle sounded from the motor car, their failure to hear is some evidence that no such signal was given [citing cases]. That there was positive testimony to the contrary does not conclusively establish that a warning was given. It creates merely a conflict of

testimony, which is finally resolved, so far as this court is concerned, by the verdict of the jury. This circumstance alone supports the finding of negligence."

In Exposita v. United Ry. Co., 42 Cal. App. 320, 183 P. 576, wherein a verdict for defendant was returned, the court, in speaking of negative testimony, held:

"The defendant offered the only kind of evidence available in the nature of the case. Its negative character affected its weight and sufficiency. Conclusive proof is never necessary to justify the verdict of a jury. The jury had the right to draw its own inferences from the evidence."

Burke v. Brooklyn W. & W. Co., 86 App. Div. 296, 83 N. Y. S. 795, holds:

"Whether the bell of defendant's engine was rung as the train approached the place of the accident is a question for the jury, though five persons testified it was rung, all being employees of defendant, and four of them engaged in the management of the train, and only two testified they did not hear the bell, but only the rumbling of the cars, they being near the train, and the attention of one of them being attracted, when it was some distance away, to the danger of children approaching the track."

[3] The defendant company's negligence is also predicated upon the alleged failure of the enginemen to maintain a lookout as they passed from the water tank to and over the crossing. The testimony of the engineer and fireman disclosed that they observed many persons, presumably section laborers, along and close to the track between those points, but did not see the man Jones at work at the intersection of the tracks, and did not know of the happening of the accident until after they had brought the train to a standstill after receiving stop signals. The day was a bright, clear day. The train stopped some 1,700 feet beyond the intersection, to the north. Evidence of this fact was clearly admissible as tending to some extent to show a lack of care of the enginemen, as well, perhaps, as to throw light upon the speed at which the train was traveling.

From these undisputed facts the jury may well have inferred negligence on the part of the men in charge of the operation of the train.

[4, 5] The presumption is, of course, that the deceased used ordinary care for his own safety. Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393; Green v. Southern Pacific Co., 53 Cal. App. 194, 199 P. 1059. In support of this presumption there is evidence, as hereinbefore noticed, that several trains other than this special freight had passed the point where Jones worked, to which he, in the exercise of ordinary care, gave the right of way. Undoubtedly Jones saw, or will be presumed to have seen, the train standing still while at the water tank. He undoubtedly then continued with his work under the assumption that trains would not be operated without warning signals to give him an opportunity to protect himself and avoid being run down. Kiye Konno v. Northern Pac. R. Co. (Wash.) 221 P. 318. That case cites Anest v. Columbia & P. S. R. Co., 89 Wash. 609, 154 P. 1100, which was a case where a track inspector was run down, while riding on a speeder, by an engine which was proceeding, tender first, wherein the evidence was held to warrant a finding that those in charge of the engine were guilty of negligence in not keeping a proper lookout.

We find California authorities we deem squarely in point in Egan v. Southern Pac. Co., 15 Cal. App. 766, 115 P. 939, and Barboza v. Pacific Portland Cement Co., 162 Cal. 36, 120 P. 767.

In the Egan Case the injured person was an employee of the defendant. Here the deceased was an employee of an independent corporation which had been requested by defendant to send its track workers to the intersection to make necessary repairs. There the train was backed upon the workman without warning or placing any one upon the rear of the train for the purpose of keeping a lookout and giving warnings. Here the train was not backing but advancing, with the engineer and fireman in the engine at the front of the train, where there was full opportunity, in the exercise of ordinary care, to have observed the injured party and to have given warning. Nevertheless, they failed either to see or to warn. The engineer knew there were persons engaged in work near to and upon the track.

It is true that, if the deceased had looked, he could have seen the approaching train, and one step would have taken him to safety, as the jury found in its answer to the special issue No. 12, but, shortly before the accident, he had seen the train motionless 1,534 feet away from him. No warnings, under the finding of the jury, were given. There was nothing to communicate an intention of immediate movement upon the part of those in charge of the train.

We quote from the Egan Case the following:

"Plaintiff was there to work, and to this work it was his duty to give attention. Having first exercised his sense of sight and no imminent danger being evident, it was his duty to resume work, and he was rightfully upon the track. If it be said that it is the duty of one thus employed to be constantly exercising his sense of sight, it is the equivalent of saying that he must not work when a train is standing upon the track above him, for he could not work and at the same time observe the approach of the train. One thus employed upon the track occupies a very different position from the pedestrian or stranger entering upon the track and using the same as a thoroughfare or seeking to cross the same. In both instances care and the exercise of the senses are required before entering upon the place of dan-

ger, but the duty which devolves upon the one to continue the exercise of his sense of sight should not be held to devolve with the same strictness upon the other employed by the railroad company to work upon the track. Plaintiff being rightfully upon the track and in the performance of the duty enjoined upon him by the defendant in the exercise of an employment upon said track, had a right to assume that the train would not be backed down upon him without warning, and it should not be said that he contributed to his own injury in the doing of that which his employment required that he should do. Morgan v. Robinson Co., 157 Cal. 348, 107 P. 695. The evidence supported the findings implied by the verdict, and we see no error in the action of the court denying a new trial."

If we substitute in the next to the last of the preceding sentences the word "run" for the word "backed," the foregoing quotation fits both the facts and the principles of law involved herein most perfectly.

In the Barboza Case, supra, the plaintiff, as administrator, brought suit against the defendant, cement company, for the negligent killing of his intestate. The deceased was a laborer employed by the Southern Pacific Company and, while engaged in repairing the track near Tolenas station, he was struck and killed by defendant company's train, made up of a number of cars propelled from the rear by a locomotive. Among the averments of negligence was that defendant failed to ring a bell or blow a whistle, which averment the jury in its verdict found to be true.

"No bell was rung nor was the whistle blown. There was a brakeman on a car next the engine and another on the third car from the forward end of the train. From this position the second brakeman saw that the deceased and the others were in danger and signaled the engineer to stop, but it was then too late to bring the train to a complete standstill in time to prevent the injury. There was evidence that the train, at the time it was bearing down on the deceased, was running at the rate of eight miles an hour. A through train of the Southern Pacific Company was at the same time passing upon the main line track and the noise produced by this through train was, as the jury may have well inferred, sufficient to prevent the men working on the track from hearing the approach of defendant's train. The engineer in charge of the latter had seen the men at work when he had brought his train into Tolenas and knew, or might have known, that they were still at work when he started to return. The point where plaintiff was working was within the limits of the Southern Pacific yard at Tolenas, but it was not at the end of the yard equipped for switching work, or in which the switching was usually done.

"In this state of the evidence we cannot assent to appellant's contention that, as matter of law, it should be held that the defendant was not guilty of negligence. Whether or not, under all the circumstances, a due regard for the safety of the men on the track required the defendant to give warning of the approach of its train by ringing a bell or blowing a whistle, or by having upon the front car of its train a man who could see persons or objects on the track, were questions of fact to be determined by the jury. It is no doubt true that the rules with reference to the necessity of giving warning of an approaching train by means of whistles or bells or otherwise, are not always applicable to engines and cars which are being moved about the tracks of railroad yards while switching. Aerkfetz v. Humphreys, 145 U. S. 418, 36 L. Ed. 758, 12 S. Ct. 835; Crows v. New York C. R. R., 70 Hun, 37, 23 N. Y. S. 1100. But, as we have seen, the point where the train struck Augustus was not within that part of the yard devoted to switching and the train had completed its switching and had started on its return run to Cement. Furthermore, the noise produced by the passing train was a factor which the jury might well have considered as requiring greater effort to warn persons on the track than would have been required if the conditions had been such that the approach of defendant's train itself might have been more readily heard.

"Nor can it be said, as matter of law, that the deceased was guilty of contributory negligence. A man working upon a railroad track is, of course, bound to take reasonable precautions for his own safety. Knowing that trains are likely to pass, he must use the care which an ordinarily prudent man would exercise to avoid being struck by such train. But what is reasonable care under the circumstances is, like the question of defendant's negligence, primarily to be determined by the jury. The work in which Augustus was employed required that he be in the middle of the track and in a stooping position. Obviously he could not perform his work properly if he were constantly looking to see whether a train was approaching. In view of the further fact that the noise of the passing train interfered with his opportunity of hearing defendant's train, the question whether he was guilty of negligence in not becoming aware of the cars bearing down upon him was properly submitted to the jury. On the facts bearing upon both these questions, i. e., the negligence of the defendant and the contributory negligence of the plaintiff, the case is very similar to Egan v. Southern Pacific Co., 15 Cal. App. 766, 115 P. 939."

The jury was justified, therefore, under the evidence in this case, in inferring negligence on the part of defendant in two respects, viz.: Failure of the enginemen to maintain a reasonable lookout, and also failure to give the proper crossing signals and warnings.

[6] Many other authorities may be cited to support the proposition, under more or less similar circumstances to those shown here, that the common "stop, look, and listen" rule applicable to travelers and to railroad employees not engaged in the duties of their employment cannot apply to persons lawfully at work repairing an intersection of railroads. Ala. T. N. R. Co. v. Huggins, 205 Ala. 80, 87 So. 546; Louisville N. R. Co. v. Heidtmueller, 206 Ala. 29, 89 So. 191.

[7] Questions of negligence and contributory negligence are for the jury. Southern R. Co. v. Wright, 207 Ala. 411, 92 So. 654; Cincinnati, etc., R. v. Owsley, 191 Ky. 661,

231 S. W. 210; Louisville & N. R. Co. v. Heidtmueller, 206 Ala. 29, 89 So. 191; Polluck v. Minneapolis & St. L. R. Co., 44 S. D. 249, 183 N. W. 859, which distinguishes between the rules applicable to licensees and invitees.

Lamport v. S. P. Co., 183 Cal. 326, 191 P. 527, involves the point that it was a question for the jury to determine whether or not the failure of the trainmen to observe and warn the deceased of danger was negligence. In that case a switchman had been run down by the backing upon him of a train, while he was engaged in signaling the engineer of another train, where there was evidence that the deceased was directly on a line between the engineer and the switchman of the other train, so as to be clearly in the field of their vision. And, of course, if he, the injured man, had looked, as in the instant case, he could have seen the approaching train. The court held:

"No argument is required to demonstrate the proposition that under these circumstances they should have observed him and warned him of the danger, or that it was at least a question for the jury to determine whether or not their failure to do so was negligence. It is obvious from the mere statement of the facts that the evidence tended to show negligence, if it did not demonstrate it absolutely."

Lawrence et al. v. S. P. Co., 189 Cal. 434, 208 P. 966 (a collision case between an auto and a train), holds that the question of contributory negligence in failing to stop, look, and listen was a question of fact for the jury's determination, and a verdict against the United States Director of Railroads was sustained.

Roberts v. S. P. R. Co., 54 Cal. App. 315, 201 P. 958, wherein the order granting a new trial against the defendant was affirmed, the court reiterates the general rule that the question of contributory negligence is one of fact for the jury under proper instructions, and is not one of law, save in those cases in which, judged in the light of common knowledge and experience, there is a standard of prudence to which all persons similarly situated must conform. In such case failure to reach that standard is contributory negligence as a matter of law.

In our opinion those two California cases, Egan v. S. P. and Barboza v. Portland C. Co., supra, are determinative of almost every issue presented on the argument by the appellant. Some of the authorities relied upon most confidently are distinguished in the Barboza Case. Appellant cites many cases of pedestrians and travelers, wherein the "stop, look, and listen" rule has been applied, and argues their applicability to the case at bar. He also cites other cases in support of the proposition "that the agents and servants in charge of railway trains owe no duty to look out for the safety of brakemen and section hands." That last quotation is from Kirkland v. Bixby et al., 282 Mo. 462, 222 S. W. 462. The longer quotation from the same case, made by counsel for appellant in his brief, in some respects was not accurately made, nor is the application of the rule as broad as appellant seems to regard it, for the court in that case applied it only as to those cases where the "humanitarian rule" is not pleaded nor invoked. That action was one under the federal Employers' Liability Act. The court there said:

"The rule in this state requires section men to protect themselves from passing trains. In other words, the train crew, so far as section men are concerned, have the right to expect a clear track, and the humanitarian rule (when violated) is the only salvation for the unfortunate section man."

In Moore v. St. Louis S. F. Ry. Co. (Mo. App.) 267 S. W. 945, it is held:

"At the foundation of the humanitarian rule lies the principle that no one has the right knowingly or negligently to injure another when he knows, or should know, if reasonably careful, that his fellow is in danger of injury at his hands and he possesses the means of removing the danger."

[8] In California, as we have shown, the humanitarian rule, in principle at least, has been crystallized in the statute and in the best-considered cases. In the instant case, it was the duty of appellant's employees in charge of its train to keep a vigilant lookout. The line of demarcation between this and traveler's crossing cases has been shown. Under section 486, Civil Code, all persons at or near railway crossings, not excluding employees or invitees, rightfully engaged in repairing tracks, are entitled to warning signals, a failure to give which constitutes one kind of negligent operation of trains.

[9, 10] The authorities cited by counsel are not necessarily in conflict with the well-settled and reasonable rule applicable in a case like this that, while the party injured must use reasonable, ordinary care and cannot recover for injuries due to his own negligence, the duty to use reasonable care in such a relation as shown by the evidence herein is a reciprocal duty, resting upon the railroad company to use reasonable, ordinary care by means of such proper and adequate warnings and signals as will reasonably be adequate to avoid injury to the persons lawfully employed upon the tracks. The status of the deceased, Jones, was not that of a mere licensee, nor of a trespasser, but analogous at least to that of an invitee. The case of Midland Valley R. Co. v. Kellogg et al., 106 Okl. 237, 233 P. 716, holds:

"In the case of a licensee, who is on the premises by invitation, express or implied, the company is required to exercise that degree of care and watchfulness to protect against injury to such person that is commensurate with the probability that such person may be upon its track at that point."

"In the case of a bare or mere licensee, being one whose presence on the premises is merely tolerated, the company, as in the case of a trespasser, owes no duty except not wantonly or willfully to injure such person after his perilous position is discovered."

We may remark that Soares v. Davis, 64 Cal. App. 486, 222 P. 165, is easily distinguishable upon the facts from the case on appeal. In that case, the undisputed evidence established that warning signals were given. There was conflicting testimony as to some signals, but as to other signals there was no conflict; for which reason the court held that, as a matter of law, the negligence of the deceased had been conclusively established.

The case of Neidlein v. Southern Pacific Co., 180 Cal. 63, 179 P. 191, which cites with approval Aerkfetz v. Humphreys et al., supra, and other cognate authorities cited by counsel for appellant, is not at all, in its facts or guiding principles, authority, under the evidence, in the case at bar. There the accident was in what is strictly a switchyard, and the injured party was a switchman working in the freight shed at Sacramento within the yard when crushed between two cars, in a position where the enginemen neither knew nor had reason to suspect him to be.

The accident, as pointed out, in the instant case occurred on the main through line of the defendant company, on the western border of its train yard. The injuries were inflicted by an extra through freight. The deceased Jones was known or should have been known by the defendant to be working at the precise point where he was killed. There is a marked distinction in the decisions between the two kinds of cases. Egan v. S. P. Co., supra; Barboza v. Portland Cement Co., supra.

The case of Flowers v. Virginian R. Co., 135 Va. 367, 116 S. E. 672, was one wherein a railroad employee of an independent contractor was struck by an engine of the defendant while he was leaving work; he was held to be an invitee, not a mere licensee. We quote:

"While it is the duty of employees of an independent contractor employed on or along a railroad to use reasonable care for their safety, yet as between them and the railroad company this duty is reciprocal, and in such cases the law does not require of such employees at work on or along the tracks to maintain a constant lookout for approaching trains, and at the same time pursue their labors, but does require of the operatives of trains an active vigilance, and to give reasonable danger signals to attract the attention of the persons so employed, to avoid doing injury to them, and to enable them to get out of the way of moving trains. Instructions to the jury to the contrary were rightfully rejected."

Additional cases supporting our views are Wineinger v. Union Pac. Co. (C. C. A.) 276 F. 65; Cubitt v. N. Y. C. R. Co., 278 Pa. 366, 123 A. 308; Hastings v. Southern Shore R. Co., 272 Pa. 212, 116 A. 155; Wigmore on Evidence (2d Ed.) 1068, par. 664; McDonald v. N. Y. C. R. R., 186 Mass. 474, 72 N. E. 55; Thompson v. L. A. R. Co., 165 Cal. 748, 134 P. 709; Bethlehem Steel Co. v. Raymond Concrete Pile Co., 141 Md. 67, 118 A. 279; Dempsey v. N. Y. Central, 81 Hun, 156, 30 N. Y. S. 724; Milauskis v. Terminal R., 286 Ill. 547, 122 N. E. 81. Duty to exercise ordinary care to invitee: Ingram v. Rutland Co., 86 Vt. 550, 86 A. 813; Ill. Central R. R. v. Frelka, 110 Ill. 498.

We have examined with care appellant's argument on alleged errors occurring during the trial. We believe that, as to all the preliminary rulings included in the bill of exceptions prior to the actual commencement of the trial, covering the questions of the alleged promise of counsel for respondent to dismiss the action as against the defendants Webb and Alexander, the denial of the first motion for continuance and the later granting of the same, and continuance of the case from the 23d day of October, 1923, to the 1st day of November, 1923, the objection to the impanelment of the jury and taking testimony, preliminarily, of Mrs. Ruth Jones, the denial of the motion to remove the cause to the federal courts, and all of the matters covered in the first 23 specifications, the rulings of the trial court were free from any error affecting the substantial rights of appellant.

[11] Very many of the specifications were to alleged errors of the court sustaining or overruling objections to questions merely because of their form as to being leading or suggestive. In this respect, wherever such objections were sustained to appellant's questions, in every instance the evidence sought to be elicited was put before the jury by further questions; hence nothing of importance was excluded. Where appellant's objections were overruled, the questions were not harmfully leading. It appears to us that some of the specifications, even if technically well taken, were almost frivolous. To illustrate: The witness Woodside stated:

"I don't know that I ever looked at the engineer [referring to seeing the engine as it passed him about the time of the accident].

"Q. By Mr. Gallagher: You don't remember seeing him at the place where Mr. Jones was lying beside track at any time, do you? A. No; I didn't see him pass the crossing.

"Q. You didn't see him pass the crossing. Did you see him at any time after he passed the crossing? A. Of course, I seen him after he passed; somebody drawed my attention to him.

"Q. I will ask you if he came back to the point of the collision.

"Mr. Levinsky: Object to that as incompetent, immaterial, and irrelevant, occurring after the accident happened.

"The Court: Answer the question; objection overruled. A. I don't know.

"Mr. Gallagher: Q. Did you see him there? A. No I did not, I was there after the accident happened.

"Q. Did you see the fireman there?

"Mr. Levinsky: The same objection.

"The Court: Objection overruled. To which defendant excepted.
"A. No, I did not."

If it be conceded that the rulings on the foregoing questions were erroneous, it is impossible to deduce that they were prejudicial.

[12] Appellant predicates error on the action of the trial court in striking out a portion of the answer of the defendant Southern Pacific Company without notice. He admits that the portion stricken out might not ordinarily have been relevant or admissible in evidence, yet insists that error was committed. If the striking out was error, then, under that admission of counsel, we determine no substantial injury could have resulted from the order.

[13] The objections to the impanelment of the jury were not well taken. The permission given respondent to pass her peremptory challenge to the jurors and later exercise such peremptory challenge was not error. The ruling was within the discretion of the court. No abuse of discretion was shown. Silcox v. Lang, 78 Cal. 118, at page 123, 20 P. 297; Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, at page 559, 147 P. 238.

[14, 15] The objections to the relatives of the deceased testifying to his appearance and bodily health were properly overruled, as were the objections to the witness testifying as to the appearance of the deceased at various times and places prior to the accident and after the accident while in the hospital. His appearance during the time he was alive in the hospital was certainly material as bearing on the nature, extent and severity of his injuries which resulted in his death.

[16] The objections to the admission in evidence of the letter from the superintendent of the Southern Pacific Company to the Central California Traction Company were properly overruled. It is important to show the reason for the presence of Jones upon the crossing. The fact that no written answer was sent is of no importance. No written reply was requested, and there is nothing in the letter to indicate one was expected.

We believe no errors affecting the substantial rights of appellant were committed by the trial court in any of its rulings concerning the admissibility or rejection of testimony. Our attention has not been called to any material evidence which was excluded, nor to any at all prejudicial which was admitted.

We pass now to a consideration of the instructions.

Instruction numbered 4, requested by appellant and refused, is as follows:

"The court further instructs you that ordinary care is that degree of care which an ordinarily prudent person, situated as the decedent, B. B. Jones, was, as shown by the evidence and circumstances, at or about the time of the accident, would usually exercise for his own safety."

[17] The refusal of that instruction was proper. It is an instruction upon fact, and is not accurate as a definition, because of the use of the word "usually" instead of the more appropriate word "ordinarily" or "reasonably" in the last line. The subject of ordinary care is sufficiently covered in defendant's instructions numbered 2 and 3, defining negligence and contributory negligence, which were given.

Instruction numbered 6, which appellant argued was refused, was given by the court as requested.

Instruction numbered 7, requested by appellant and refused, is as follows:

"If you should believe from the evidence that the plaintiffs have proven their case by a preponderance of the evidence, and if you believe that the plaintiffs are entitled to damages, then I instruct you that the plaintiffs can recover only for the pecuniary loss suffered by them through the death of B. B. Jones, and that the loss of society, comfort, and care suffered through the bereavement can only be considered for the purpose of estimating such pecuniary loss, and that you cannot consider the loss of society, comfort, and care suffered through the bereavement for the purpose of adding anything more than pecuniary loss. And I further instruct you that you cannot and must not consider grief, mental suffering, and sorrow, or either of them, in arriving at the amount of damages, and that you cannot allow exemplary damages, or vindictive damages."

[18] There was no error in the refusal because the subject of the instruction (the measure of damages) was fully covered in defendant's instruction numbered 5, which was given.

Instruction numbered 8, requested by appellant and refused, is as follows:

"If you find from the evidence in this case that any plaintiff is entitled to damages, then I charge you that in determining the pecuniary loss and injury sustained by any such plaintiff, if any, you should take into consideration in determining the amount of such pecuniary loss and injury the age of said deceased, and the length of time which he would reasonably have been, according to the evidence in this case, expected to live, had this accident not happened, and also for how long during the continued expectancy of the life of said deceased would he have been able to earn money by his physical exertion and labor, and whether or not said deceased might have, through age or sickness, been likely to have become wholly or partially dependent for support upon the plaintiffs, or any of them."

[19] There was no error in the refusal, because, in so far as it correctly states the law, it was fully covered by other instructions given, viz. in instruction numbered 5; and it contains speculative references whether or not the deceased "might have, through age or sickness, been likely to become wholly or partially dependent for support upon the plaintiffs." This speculative portion warranted its refusal.

Instruction numbered 5, referred to heretofore, given at the request of appellant, copied for convenient inspection, is as follows:

"If you find from the evidence in this case that the defendant Southern Pacific Company is liable for any damages as to Ruth Jones, one of the plaintiffs in this case, which were caused by the death of said B. B. Jones, I then charge you that in determining and assessing such damages, you shall assess the same at the present worth of the pecuniary loss and injury sustained by said Ruth Jones, and in this regard I charge you that, in determining the actual pecuniary loss and injury sustained by her, you will take into consideration the age of said Ruth Jones, how long said Ruth Jones might reasonably be expected to live after the death of said B. B. Jones, the age of said B. B. Jones, his earnings at and prior to the time of his death, his habits as to thrift and economy, whether there would have been any likelihood or probability of said deceased acquiring property which would have descended to, or have been received by, said Ruth Jones, what contributions, if any, were made by said deceased, or would likely to have been made by said deceased had he continued to live, to, or for, said Ruth Jones, and you may take into consideration in determining said actual pecuniary injury and loss, the actual pecuniary value, if any, of the society, comfort, and companionship of said deceased to and with said Ruth Jones for the period of time that it reasonably might be expected to have continued, but that you shall not consider or place any value upon any grief, mental suffering, or sorrow sustained by her as a result of said death."

[20] Instruction numbered 14, requested by appellant and refused, is as follows:

"If you believe, from the evidence, that the deceased, B. B. Jones, in any manner contributed to the accident which resulted in his death, and for which this suit has been brought, then I charge you that you must find a verdict for the defendant Southern Pacific Company."

This instruction is clearly not the law. It was properly refused. B. B. Jones, by his mere presence on or near the crossing, when struck by the train, of course, contributed to the accident which resulted in his death. In order to bar a recovery, the deceased must have negligently contributed to the happening of the accident. The instruction omits the element of negligent contribution. Rush v. Lagomarsino (Cal. Sup.) 237 P. 1066.

Instruction numbered 15, requested by appellant and refused, is as follows:

"You are instructed that it appears from the evidence in this case that the deceased, B. B. Jones, was guilty of conduct amounting to negligence and lack of ordinary care, which conduct was a contributing and proximate cause of his death, and that therefore your verdict should be for the defendant Southern Pacific Company."

[21] A mere inspection shows that this instruction directed the jury as to matters of fact, and therefore was properly refused. The giving of respondent's instruction numbered 29, which correctly stated the law, constituted no possible reason why the court should instruct the jury that the deceased was guilty of negligence.

Instruction numbered 16, requested by defendant and refused, is as follows:

"In another part of these instructions you are advised as to the law of this state regarding the duty of a railroad company to provide and sound bells or whistles when approaching a highway crossing, this instruction is to advise you that it is not necessary that both the whistle be sounded and the bell rung. If either the whistle is sounded or the bell rung, as required by law in approaching the crossing, the duty of the railroad company is performed."

[22, 23] It was properly refused because it does not correctly state the law applicable to the facts in this case. Under our view of section 486, Civil Code, the law requires the ringing of the bell within the corporate limits of a city, at a distance of at least 80 rods from the place where the railroad crosses any street, road, or highway, and to be kept ringing until it has crossed such street, road, or highway; there is no requirement that the whistle be sounded in cities, although of course there is no law forbidding that to be done. The subject was covered by other instructions given, to wit, 15 and 22, given at request of respondent.

[24] Instruction numbered 17, requested by appellant and refused, is as follows:

"You are instructed that it was not the legal duty of the defendant Southern Pacific Company, at, or immediately before, the time of the accident sued for in this action, to have maintained any automatic, or other signal at, or near, the point of said accident, and you are instructed that you cannot find a verdict in favor of the plaintiffs, or either, or any, of them, because of such absence of any such automatic or other signal."

Instruction numbered 20 on the same subject, as to automatic signals, flagmen or watchmen, fully covered the subject-matter of 17; the giving of both instructions would have been useless repetition.

[25] Instruction numbered 18, requested by appellant and refused, is as follows:

"You are instructed that there was no duty on the part of the engineer or fireman of the engine that struck B. B. Jones to stop said engine west of the crossing, unless they, or either of them, at a time when said engine could have been stopped west of the crossing, actually discovered said Jones in a place of danger and realized and believed that he either could not or would not extricate himself in time to prevent the accident, if the train continued at its then rate of speed."

As will be observed, this instruction is upon the subject of the law of the last clear chance, concededly not in this case; hence its refusal was not error.

Instruction numbered 19, requested by appellant and refused, is as follows:

"I instruct you that, where the evidence is conflicting as to whether the whistle was blown or not and whether the bell was rung or not, and there is affirmative testimony that the whistle was blown and that the bell was rung, and negative testimony by other witnesses that they did not hear it, the affirmative evidence of the fact that the whistle was blown and that the bell was rung should overcome the negative evidence that the whistle was not blown and that the bell was not rung, and that testimony of the witnesses that they did not hear the whistle blown or the bell rung is not positive evidence that the whistle was not blown or that the bell was not rung."

[26] This instruction was upon the weight of evidence, which it was the sole province of the jury to determine. Its refusal was correct.

Instruction numbered 22, requested by appellant and refused, is as follows:

"Crossing signals are not intended, or required, for the benefit of section men at work upon, or along, the track near a crossing, and the failure to give such signals is not negligence as to such section men thus engaged."

The authorities hereinbefore cited show that said instruction 22 does not embody the law of this case. Crossing signals under our law are intended for the benefit of anybody who may be on or approaching a crossing, and does not except or exclude persons rightfully at work upon or along or near a railroad crossing.

Instruction numbered 23, requested by appellant and refused, is as follows:

"Railroad companies in the operation of their trains, may rightfully assume that section men, while at work upon, or along, the track, will look out for the approach and passage of trains at all times, and ordinarily such railroad companies owe to section men no duty to warn them of the approach of trains."

[27-29] This instruction, as shown in the foregoing opinion, upon the authority of the Egan Case, supra, and the Barboza Case, supra, does not embody the law of California. It assumes it to be the duty of any section man at all times to look out for the approach and passage of trains. The true rule is he must use reasonable, ordinary care to protect himself. It is manifest that, if he spent all his time, when he had work on a railroad track to perform, in looking out for the approach of trains, he could never do his work. The question whether or not he exercised reasonable and ordinary care and watchfulness was a question of fact for the jury to determine.

[30] Instruction numbered 24, requested by appellant and refused, is as follows:

"A person working on, or along, a railroad track, where cars, or trains, are passing, or likely to pass at short intervals, while in a position to be endangered by such trains, must pay attention to his surroundings, and he must employ his natural faculties, and exert due diligence to avoid such dangers; he must look and listen to ascertain whether danger is threatened by his situation, and his failure to do so constitutes absolute negligence as a matter of law."

It was properly refused for the same reasons as was 23, and in addition it assumes the deceased knew trains were likely to pass at short intervals.

[31] Instruction numbered 25, requested by appellant and refused, is as follows:

"If you believe, from a preponderance of the evidence in this case, that the deceased, B. B. Jones, had been warned by the foreman of the section men with whom he was working, to look out for the trains of the defendant Southern Pacific Company, and that his failure to heed such warning proximately contributed to his death, then your verdict should be for the defendant Southern Pacific Company."

The foregoing instruction was properly refused, because it clearly implies, as a matter of fact, that Jones failed to heed the warning of the foreman, and that his failure contributed to his death. This subject has been sufficiently amplified hereinbefore.

Instruction numbered 26, requested by appellant and refused, is as follows:

"If you believe, from the evidence, that the deceased, B. B. Jones, was careless or negligent, and that his neglect contributed approximately to the accident resulting in his death, the plaintiff cannot recover, even though you should believe from the evidence, that the defendant Southern Pacific Company negligently omitted to give warning of the approach of its train by blowing the whistle or ringing the bell."

[32] This instruction was clearly erroneous because of the use of the word "approximately" instead of "proximately." It perhaps might easily have been amended, but the trial court no doubt felt that the instructions given covered the subject, and we agree in that view.

Instruction numbered 28, requested by appellant and refused, is as follows:

"The railroad track of a steam railway must itself be regarded as a signal of danger, and one working upon or along said railroad track must avail himself of every opportunity to look and listen for approaching trains. If B. B. Jones, taking these precautions, would have seen or heard the approaching trains, the very fact of his injury and death will raise the presumption that he did not take the required precautions."

[33] Under the authorities and the law of California on the subject of workmen, the foregoing does not embody a correct statement of the law. If a workman on a railroad crossing avails himself of every opportunity to look and listen for approaching trains, he will be looking and listening all the time and not working at all. The refusal was not error.

[34] Instruction numbered 29, requested by appellant and refused, is as follows:

"If you should believe from a preponderance of the evidence that no whistle was sounded, and no bell was rung, on the train of the defendant Southern Pacific Company, these circumstances did not excuse the deceased, B. B. Jones, from looking and listening while working upon, or along, the railroad track of the defendant Southern Pacific Company. And, if you believe that the deceased, B. B. Jones, relied upon his belief that he did not hear any whistle or any bell, and therefore he did not remove from the place at which he was working on or along the railroad track of the defendant Southern Pacific Company and by reason thereof he was injured, which injuries resulted in his death, the plaintiffs cannot recover any damages, and your verdict must be for the defendant Southern Pacific Company."

The foregoing clearly instructs upon the facts, and would have told the jury as a matter of fact that the deceased did not look and listen for trains at all, and was properly refused.

Instruction numbered 31, requested by appellant and refused, is as follows:

"The failure of the engineer to sound the whistle or ring the bell, if you find from a preponderance of the evidence in this case that such was the fact, did not relieve said B. B. Jones from the necessity of taking ordinary precautions for his own safety. Negligence of the railroad employees in such particulars, if any you find, was no excuse for negligence on the part of said decedent. He was bound to exercise all of his senses and faculties to avoid being struck by any approaching train and not to remain carelessly in a place of danger."

[35] This instruction also invaded the domain of fact, and would have told the jury that the deceased, Jones, remained carelessly in the place of danger, and was guilty of negligence. It was properly refused.

Instruction numbered 32, requested by appellant and refused, is as follows:

"Assuming that the duty of the defendant Southern Pacific Company was to anticipate that a person might be working upon, or along its railroad track, there was also a duty on the part of the deceased, B. B. Jones, to exercise reasonable and ordinary care while working upon or along the railroad track of the defendant Southern Pacific Company, and if you believe, from the evidence, that the deceased, B. B. Jones, if he had used his eyes and ears while working upon or along said track, and before he was struck by the engine or cars, could have observed the approach of the train on the track, and so have avoided the accident, his failure to exercise such care, and thus to make use of his eyes and ears, is contributory negligence, and in such event your verdict must be for the defendant Southern Pacific Company."

[36] This was properly refused also because it invades the province of the jury by instructing, impliedly at least, upon matters of fact. It clearly implies that deceased did not use his eyes and ears while working, and that he failed to exercise care. It is hypothetically argumentative, and does not include all qualifying facts essential.

Instruction numbered 33, requested by appellant and refused, is as follows:

"I instruct you that it is the duty of a person working on, or along, a railroad track, over, upon and along which locomotives and trains of cars frequently cross and pass over, to look and listen for coming trains. It is his duty to use all of his faculties, and it is not enough if he merely listens, believing that the people in charge of any approaching engine will ring a bell or sound a whistle."

[37] The foregoing also instructs on matters of fact because it contains the implication that Jones did not use all his faculties, but merely listened and did not look. It was properly refused.

[38] Instruction numbered 34, requested by appellant and refused, is as follows:

"If, after having heard all of the evidence in this case, you should believe, from the evidence, that the deceased, B. B. Jones, was negligent, and that his negligence proximately contributed to his death, and you should also believe from a preponderance of the evidence in this case, that the defendant Southern Pacific Company was negligent, then I instruct you that in such an event your verdict must be for the defendant Southern Pacific Company."

The subject-matter of this instruction is fully covered by instruction numbered 35, requested by appellant and given. Its refusal, therefore, was not erroneous.

[39, 40] Instruction numbered 37, requested by appellant and refused, is as follows:

"You have no right to, and cannot, disregard the testimony of the witnesses who were in charge of the train of the defendant Southern Pacific Company at the time of the accident, simply because they were, or now are, in the employ of the defendant Southern Pacific Company, and you cannot reject their testimony, or the testimony of either of them; neither can you view their testimony, nor the testimony of either of them, with suspicion, unless it has appeared to your satisfaction, from their manner of testifying, or by other satisfactory and sufficient evidence, that they have not testified truthfully."

This was properly refused, because the jury was fully instructed in other instructions upon the credibility of witnesses and neither party is entitled to have instructions as to the credibility of particular witnesses.

Instruction numbered A, requested by appellant and refused, is as follows:

"I instruct you that a railroad company is not required to blow the whistle on its engine while approaching crossings, or otherwise, within the corporate limits of a city, and, if you believe from the evidence in this case that the accident for which this suit has been brought occurred within the corporate limits of the city of Lodi, then I instruct you that there was no obligation or duty on the part of the defendant

Southern Pacific Company to blow its whistle on said locomotive approaching the crossing where the accident occurred."

[41] The foregoing instruction contains a part only of the rule of section 486, Civil Code. The refusal to give the instruction was not prejudicial. It was not sufficiently qualified.

We may summarize our conclusions as follows: (1) The motion for nonsuit was properly denied. (2) Questions of appellant's negligence and of deceased's negligence and contributory negligence were questions for the jury and properly submitted to it. (3) The general verdict of the jury finds support in the evidence. (4) No error of law prejudicial to the rights of appellant occurred upon the trial. (5) The jury followed the instructions of the court as to the law; its findings upon the special issues also find support in the evidence and are in conformity with the instructions. (6) There is no necessary nor irreconcilable conflict between the general verdict and the answers to special issues numbered 11 and 12. (7) The court did not err in ordering the general verdict to be entered and recorded, nor in refusing to enter judgment in favor of defendant Southern Pacific Company. (8) The special findings are consistent with and not, as contended, irreconcilably inconsistent with or destructive of the general verdict. The sum of money allowed by the jury as damages was not excessive, nor given under the influence of passion or prejudice, but finds support in the evidence.

The judgment is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

74 Cal. App. 1

GREENE v. TOWN OF LAKEPORT.
(Civ. 2809.)

(District Court of Appeal, Third District, California. July 28, 1925.)

1. Municipal corporations ⟸162(1)—Statutory provisions as to fees made part of ordinance.

Where board of trustees passed ordinance fixing as compensation for city treasurer "such fees as are provided for by law," and the only law which fixed fees of treasurer was Municipal Corporations Act 1883, § 876, *held*, reference to this law adopted provisions of statute and made them part of ordinance.

2. Statutes ⟸279—Not necessary to plead statute in complaint; being matter of judicial cognizance.

In action by city treasurer to recover fees under ordinance which adopted provision in Municipal Corporations Act 1883, § 876, *held* not necessary to plead statute in complaint, since it is a matter of judicial cognizance.

3. Municipal corporations ⟸162(1)—Board of trustees authorized to pass ordinance not in conflict with Constitution.

Board of trustees of city has plenary power to pass ordinance not in conflict with Constitution of state or United States and providing for the compensation of named officers during their several terms of office.

4. Municipal corporations ⟸116—Ordinance not affected by repeal of incorporated statute as to officer's fees.

Where ordinance provided that fees of treasurer should be as provided by law, the later repeal of statute pertaining to fees did not in any manner affect the ordinance, and after the repeal fees were paid in accordance with the ordinance alone.

5. Estoppel ⟸62(5)—Fact of former payment of official fees or salaries does not legalize unauthorized payments nor create estoppel.

The fact that trustees had paid to successive treasurers official fees or salaries would not legalize unauthorized payments or create an estoppel, as official compensation must be duly authorized by statute.

6. Municipal corporations ⟸162(1)—Legislature's intent to allow compensation of city treasurer to be in control of local boards.

Where Legislature in 1913 (St. 1913, p. 33, § 1), re-enacted Municipal Corporations Act 1883, § 876, with the provision for compensation of treasurers omitted, obvious intent was to allow the compensation of such officers to be in control of local board, since Municipal Corporations Act 1883, §§ 855 and 862, respecting pay of treasurers, were not amended.

7. Statutes ⟸181(1), 230—Main object of all statutory construction is to ascertain legislative will; amendments not construed as depriving adopting statute of all effect unless clearly necessary.

The main object of all statutory construction is to ascertain the legislative will, and it is to be assumed that Legislatures intend its facts to have effective operation, and amendments will not be construed as depriving adopting statute of all effect, unless there is clear necessity for such construction.

8. Municipal corporations ⟸105—Statutes ⟸51—May adopt part of one statute or ordinance in another.

In the adoption of one statute or ordinance, provisions of another statute or ordinance may be adopted by reference and become part of such adopting statute or ordinance.

9. Municipal corporations ⟸164—Trustees may not change salary after taking office.

In action by treasurer for fees, the fact that trustees by ordinance had, after his taking office, changed the salary, would not be a defense under Municipal Corporations Act 1883, § 855.

10. Pleading ⟸222—Cannot interpose answer after decision on demurrer on appeal.

Where defendant had demurred to complaint and refused to answer, a request for permission to answer after deciding demurrer on appeal was too late.

Appeal from Superior Court, Lake County; M. S. Sayre, Judge.

Action by D. W. Greene against the Town of Lakeport. From a judgment for plaintiff, defendant appeals. Affirmed.

See, also, 227 P. 645.

W. H. Hazell, of Lakeport, for appellant.

C. M. Crawford and H. G. Crawford, both of Lakeport, for respondent.

McDANIEL, Justice pro tem. This is an appeal from a judgment in favor of the plaintiff and respondent, upon the failure of the defendant to answer plaintiff's complaint within the time allowed by law, and extensions thereof granted by the court after defendant's demurrer to said complaint had been overruled. The action was brought by plaintiff to recover the sum of $957.38, alleged to be due him as and for his compensation as treasurer of the town of Lakeport, accruing between the 1st day of October, 1922, and the 1st day of October, 1923.

The material facts alleged in the complaint may be summarized as follows: That the town of Lakeport is, and at all times mentioned in the complaint has been, a municipal corporation of the sixth class, created

under and by virtue of the laws of the state of California. That on the 17th day of May, 1892, the board of trustees of said town duly adopted Ordinance No. 56, entitled, "An ordinance to fix the compensation of officers of the town of Lakeport, California," and section 3 of said ordinance reads as follows: "The treasurer, for performing the duties of his office, shall receive the fees provided by law for such service." That said quoted portion of said ordinance has never been modified, amended, or repealed since its adoption. That ever since said 17th day of May, 1892, the said town has duly and regularly paid its treasurer 1 per centum of all moneys received and paid out by him as such treasurer. That the plaintiff D. W. Greene was first elected treasurer of said town and qualified and entered upon the discharge of his duties as such treasurer in the month of April, 1916, and has ever since continued to be such treasurer, and has performed all the duties of such office according to law, having been elected biennially after such first election. That his last election was in April, 1920, when he was reelected for the term of 4 years, from which last-mentioned date up to the filing of the complaint he was and continued to be such treasurer. That part of his term he has been regularly paid the sum of 1 per cent. of all moneys received and paid out by him as said treasurer, as provided by law and the said ordinance, receiving his pay quarterly up to the 1st day of October, 1922, since which time, however, he has not been paid any compensation. That as such treasurer between the 1st day of October, 1922, and the 1st day of October, 1923, he received and paid out the sum of $95,738.91, upon which his compensation amounts to $957.38, no part of which has been paid, and it is now due, owing, and unpaid. That the board of trustees, upon the proper presentation of plaintiff's claim in due form, rejected, disallowed, and refused payment of it.

The demurrer was both general and special, the special grounds being as follows: That the complaint is ambiguous in this, (a) That it does not appear therefrom that the defendant, town of Lakeport, ever made any provisions for the compensation of the treasurer other than section 3 of Ordinance 56, as set forth and pleaded in paragraph 2 of said complaint, and there is no provision therein for the payment of 1 per cent. as compensation claimed by the plaintiff or any other compensation; (b) that it does not appear therein, nor can it be ascertained therefrom, upon what grounds the claim of compensation is based other than said Ordinance 56; (c) that it does not appear therefrom that there now is, or ever was, any fee provided by law for such services. For the same reasons it is alleged to be unintelligible and uncertain.

Appellant, in support of its claim that the complaint does not state facts sufficient to constitute a cause of action, argues that the town of Lakeport is a creature of statutory law and subject thereto, and to all successive modifications and changes thereof; that there is no vested right in an officer to collect fees, but the Legislature has the legal right to change or abolish such fees at will; that there is no implied contract or contractual relationship between an officer and the people; that section 876 of the Municipal Corporations Act, as originally enacted, (St. 1883, p. 93), was the only authority for paying compensation to treasurers prior to 1913, and it was amended, in the year 1913 (St. 1913, p. 33, § 1), by re-enactment with the compensation clause omitted; that as thus amended it abolished all fees formerly provided in said section; that plaintiff, having taken office in the year 1916, 3 years subsequent to the said amendment of section 876, is not entitled to collect any compensation at all.

Appellant in argument cites many authorities. There appears, however, to be no controversy upon the most of the propositions of law discussed; the controversy herein depends more upon the proper application of the law to the admitted facts than upon its meaning or interpretation. It therefore will be unnecessary to comment at length upon those citations. However, with reference to the leading case which appellant contends "for all practical purposes to be on all fours with the issues in this case," to wit, Kirk v. Rhoads, 46 Cal. 398, at pages 402, 403, we believe it either is not applicable at all to the admitted facts of this case (involving, as it does, the election laws), or it is in truth an authority against appellant's contention, when measured by the evident intent of the Legislature in the enactment of the several sections of the Municipal Corporations Act, which we shall proceed to examine.

The town of Lakeport was organized under the Municipal Corporations Act of 1883 (Stats. 1883, pp. 93 et seq.). Section 876 of the act, p. 275, is as follows:

"It shall be the duty of the treasurer to receive and safely keep all moneys which shall come into his hands as treasurer, for all of which he shall give duplicate receipts, one of which shall be filed with the clerk. He shall pay out said money on warrants signed by the president and countersigned by the clerk, and not otherwise. He shall make quarterly settlements with the clerk. For his compensation he shall be allowed one per cent. on all moneys received and paid by him as such treasurer. He may credit himself with such per cent. in his settlement with the clerk. Upon each quarterly settlement he shall file a statement of his account with the clerk."

Section 862, page 269, is as follows:

"The board of trustees of said city shall have power: first, to pass ordinances not in conflict with the Constitution and laws of this state or of the United States."

Section 855, p. 268, is as follows:

"The members of the board of trustees shall receive no compensation whatever. The clerk, treasurer, marshal and recorder shall severally receive, at stated times, a compensation, to be fixed by odinance by the board of trustees, which compensation shall not be increased or diminished after their election, or during their several terms of office. Nothing herein contained shall be construed to prevent the board of trustees from fixing such several amounts of compensation in the first instance, during the term of office of any such officer, or after his election. The compensation of all other officers shall be fixed from time to time by the boards of trustees."

[1, 2] We find no ambiguity, uncertainty, nor unintelligibility in the averments of the complaint. Respondent, in precise and appropriate language, bases his cause of action upon Ordinance No. 56, which by reference fixes as the compensation of the treasurer "such fees as are provided by law." At that time the only law in existence which fixed the fees of the treasurer was section 876, supra. The reference to this law thus definitely and explicitly made is, under well-settled rules of statutory construction, applicable as well to municipal ordinances as to acts of the Legislature, and adopted the provisions of the statute and made them a part of the ordinance, with exactly the same effect as if they had been set out in the ordinance in the very words and figures of the adopted law. Being a matter of judicial cognizance, it was not necessary to plead the law in the complaint.

[3] As shown by sections 862 and 855, the board of trustees of said city has plenary power to pass ordinances not in conflict with the Constitution of this state or the United States, and to fix the compensation of the named officers, and to provide that their compensation shall not be increased nor diminished during their several terms of office.

Section 881 of the same act (page 278, Statutes of 1883) permits the board of trustees by ordinance to prescribe additional duties for all officers and fix their compensation. We deem this section not involved in this proceeding.

It is apparent, upon examination of the several sections above quoted, that, as the law stood in 1892, there was presented a statutory situation, from which, in the event of the passage of any ordinance pursuant to section 855, different in terms as to compensation from those named in section 876, litigable questions might arise, based upon the fact that the act sets out two methods by which to compensate treasurers for official service.

Was there any real conflict between these two methods? Or was it the intention of the Legislature to allow treasurers to receive and retain both kinds of compensation; that is, compensation under ordinance and also fees provided by section 876?

It properly may be inferred, in the light of later changes, the Legislature considered those questions and found that in some municipalities of the sixth class ordinances had been adopted permitting respective treasurers to obtain compensation when they at the same time and for the same services were receiving and retaining fees specified in section 876; hence, in 1903 (Stats. 1903, p. 336) section 876 was amended as to the treasurer to read as follows:

"When no compensation has been allowed to him by the board of trustees, he shall be allowed one per cent., * * *" etc.

The intent in amending that section was to cut off its allowance, when other compensation had been allowed by the trustees. The amendment did not affect any existing ordinance adopted pursuant to section 855.

In 1892 and thereafter until 1913, if Ordinance No. 56 had not been enacted, section 876 alone would have provided for the treasurer's compensation; but it is also true that, if said section 876 had not then existed, the board of trustees had plenary power, under sections 862 and 855, to adopt an ordinance fixing compensation in the exact language of section 876.

As sections 855 and 876 both related to compensation for treasurers, the board of trustees passed Ordinance 56 in its existing form, thereby avoiding any and all conflict which perhaps would have existed with a different measure of compensation. It thus reconciled the two sections, which thereafter were concurrently operative until 1913.

[4] Unquestionably, under the facts stated in the complaint, the compensation of the treasurer of Lakeport, after the amendment of 1913, was paid in accordance with Ordinance No. 56 alone. This was done without violating any law or being in conflict with the Constitution of this state or of the United States. The repeal in 1913 of the part of section 876 pertaining to fees did not in any manner or at all affect Ordinance No. 56 nor section 855. In as far as treasurers are concerned, section 855 has never been amended nor repealed.

[5] We agree with appellant that no question of equitable estoppel is in this case. The fact that the trustees have paid to successive treasurers official fees or salaries would not legalize unauthorized payments, nor create an estoppel against appellant. Official compensation, whether fees or salary, must be duly authorized by statute. In this case, as indicated, we think such statutory authority existed in said Ordinance No. 56.

[6, 7] In the year 1913 the Legislature discovered that, following the amendment of 1903, the provision in section 876 for the compensation of treasurers had become superfluous and might well be eliminated; therefore it re-enacted said section with that

provision omitted. Appellant argues that this amendment repealed all laws for the payment of compensation of treasurers in municipalities of the sixth class, but the argument is not sound, because sections 855 and 862, with respect to the pay of treasurers, were not amended nor in any wise affected. The obvious intent was to allow the compensation of such officials to be altogether in the control of the local boards of trustees. The amendments were wise because they did away with uncertainty, confusion, and vexatious opportunities for litigation, eliminated the dual method where one would suffice, and avoided the possibility of double compensation for single service.

"The main object of all statutory construction is to ascertain the legislative will, and, as it is to be assumed that the Legislature intends its acts to have effective operation, such amendments will not be construed as depriving the adopting statute of all effect, unless there is a clear necessity for such construction." Ramish v. Hartwell, 126 Cal. 443, 58 P. 920; Cuthbert v. Woodman, 185 Cal. 43, 195 P. 673.

It was never the intent of the Legislature to abolish the compensation of the treasurer. De Merritt v. Weldon, 154 Cal. 545, 98 P. 537, 671, 16 Ann. Cas. 955.

[8] The principle is well settled that in the adoption of one statute or ordinance the provisions of another statute or ordinance may be adopted by reference and become a part of such adopting statute or ordinance. Don v. Pfister, 172 Cal. 25, 155 P. 60; People v. Whipple No. 2, 47 Cal. 592; Ramish v. Hartwell, supra; Kendall v. U. S., 12 Pet. 524, 9 L. Ed. 1181; Ex parte Humphrey, 64 Cal. App. 572, 222 P. 366; In re Pfahler, 150 Cal. 71, 88 P. 270, 11 L. R. A. (N. S.) 1092, 11 Ann. Cas. 911; Buck v. Eureka, 109 Cal. 504, 42 P. 243, 30 L. R. A. 409; Cavanagh v. Shaver, 56 Cal. App. 758, 207 P. 275.

The fallacy of appellant's whole argument lies in its erroneous hypothesis that the treasurers of Lakeport at all times since 1892 have received official compensation pursuant to section 876 until the year of 1913, and thereafter without any authority of law; whereas, in fact, they have received compensation pursuant to the real provisions of Ordinance 56. That ordinance, having been in effect during all of respondent's incumbency, has been the source of his right to payment for his official work. It therefore is certain that the trial court's order overruling the demurrer was correct and should be sustained.

[9, 10] Counsel for appellant suggests, if we do not entertain the same views as appellant, that it be given permission to file an answer to the complaint so that certain questions of fact may be put in issue and adjudicated. It is also stated that in the month of April, 1923, the trustees of Lakeport, by Ordinance No. 183, amended said section 3 of said Ordinance No. 56 to read as follows:

"The treasurer, for performing the duties of his office, shall receive as salary the sum of $120 per annum."

If that be one of the matters of fact appellant wishes to present in an answer, we cannot see that it could be of any avail, if pleaded herein, for section 855, supra, does not permit the treasurer's compensation to be increased or diminished after his election or during his term of office. We cannot adopt the suggestion of appellant. It had opportunity to answer and refused to do so. To have preserved all its rights and presented all the objections urged upon this appeal, it readily might have had a bill of exceptions settled and allowed reserving those matters and then have answered. It did not choose to follow that course, and the request now for permission to answer is too late and is denied.

We see no reason why the judgment should be disturbed, and it therefore is affirmed.

We concur: FINCH, P. J.; PLUMMER, J.

---

74 Cal. App. 138

PEOPLE v. SNYDER. (Cr. 1237.)

(District Court of Appeal, Second District, Division 1, California. Aug. 10, 1925. Hearing Denied by Supreme Court Oct. 8, 1925.)

1. Criminal law ⟸984—Indictment and information ⟸129(2)—Defendant may be convicted of both offenses, separately or jointly charged in different counts of same indictment.

Burglary and larceny are distinct offenses, which may be charged separately under Pen. Code, § 954, or jointly in different counts of same indictment, and defendant may be convicted of and punished for both offenses, though both grew out of same transaction.

2. Criminal law ⟸508(1)—Voluntary testimony for state by accomplice or codefendant held not prohibited by statute.

Pen. Code, § 1099, merely permits dismissal of criminal action against any one of two or more defendants, jointly charged with same crime, so that he may be compelled to testify, as shown by section 1101, declaring such dismissal an acquittal of such defendant, and does not prevent accomplice or codefendant from testifying voluntarily for state, where his evidence is not a declaration or confession.

3. Criminal law ⟸511(7)—Accomplice's testimony, defendant's admissions and confessions, and other proof held sufficient to sustain conviction.

Accomplice's testimony, corroborated by defendant's admissions and confessions, together with proof that storeroom was entered and money stolen therefrom, *held* to justify conviction of first degree burglary and larceny, though

another accomplice testified that defendant was not present at time.

4. Criminal law ⊜824(5)—Defendant cannot complain of failure to give instruction not requested by him.

In absence of request for instruction that jury must believe confession was voluntarily made before they could consider it, defendant cannot complain of failure to so instruct.

Appeal from Superior Court, Los Angeles County; Sidney N. Reeve, Judge.

Arthur Snyder was convicted of grand larceny and burglary, and he appeals. Affirmed.

John F. Groene, of San Francisco, for appellant.

U. S. Webb, Atty. Gen., and Erwin W. Widney, Deputy Atty. Gen., for the People.

CURTIS, J. The defendant was accused by information containing two counts. By the first count he was charged with grand larceny in the stealing of the sum of $800 on December 7, 1924, belonging to Arthur H. Wilkie, and by the second count with the crime of burglary in entering the store of said Arthur H. Wilkie on the same date with the intent to commit larceny. It is conceded that the evidence shows that both crimes grew out of and were the result of the same transaction. In other words, that the $800, alleged in count 1 to have been stolen by defendant, was taken from the store of the complaining witness after and on the occasion of the entry of said storeroom by defendant with intent to commit larceny. The jury found defendant guilty of each offense by verdicts rendered separately upon each count of the information, and the court pronounced judgment upon such verdicts, the sentence to run consecutively.

[1] It is first contended by appellant that the two offenses charged, being based upon one single act or transaction, constitute only one offense, and although, under section 954 of the Penal Code, the two offenses might be charged in separate counts in the information, the defendant could be found guilty of and punished for but one offense. This question seems to have been definitely settled by the Supreme Court of this state adversely to appellant's contention. In People v. Garnett, 29 Cal. 622, 628, the court held that:

"Larceny is not necessarily included in burglary, like manslaughter in murder, within the sense of the statute; on the contrary, it is no part of it. The offense of burglary is complete without any larceny being committed."

This case was approved in People v. Curtis, 76 Cal. 57, 17 P. 941, the court holding that the offense of larceny was not included in that of burglary, and that a defendant prosecuted under indictment charging him with burglary could not be found guilty of an attempt to commit larceny. In People v. Devlin, 143 Cal. 128, 76 P. 900, the defendant was charged with burglary. Upon the trial he sought to prove, as a bar to said charge of burglary, that he had, prior thereto, been convicted of the crime of larceny for stealing and carrying away certain personal property on the same occasion. The trial court sustained an objection to the introduction of this evidence, and the Supreme Court, in sustaining this action of the trial court, said:

"It is evident that one can commit burglary by entering a building with intent to commit any felony, such as rape, robbery, arson, or murder. It is also evident that the crime consists of the entry with the intent set forth in the statute. After one has entered a building with intent to commit any other felony than grand or petit larceny, he has committed burglary, but he may then find that it is impossible, for various reasons, to commit the felony which it was his intention to commit when he entered, and conclude to commit larceny by stealing some article of value in the building. He thus, in rapid succession, commits two crimes. Indeed, after he has committed burglary he might under favorable circumstances commit any felony named in the statute. He might commit rape, and in such case he would be guilty of burglary and also of rape. Therefore, we conclude that the evidence did not show, nor tend to show, that defendant had been before in jeopardy for burglary."

This case was cited with approval in People v. Kerrick, 144 Cal. 46, 77 P. 711. The weight of authority in other jurisdictions agrees with the above cases decided by our Supreme Court. "Burglary and larceny * * * are distinct offenses [and] a conviction of one is not a bar to a prosecution for the other." State v. Martin, 76 Mo. 337. "If a man feloniously enter a house * * * with intent to steal, he is guilty of burglary, though he may not accomplish the theft. If he completes the theft, he is guilty of a further offense, and may, by statute, be indicted and punished for both burglary and larceny; and he may be charged with the two offenses separately, or jointly in different counts of the same indictment." Dodd v. State, 33 Ark. 517. For further authorities upon this same subject, see note found in 31 L. R. A. (N. S.) 727. There are jurisdictions in which a contrary doctrine is held, but we are satisfied that the great weight of authority is with the rule enunciated by our own courts.

[2] The claim of appellant that the court improperly admitted the evidence of Charles Saxton, who was charged jointly with appellant, and against whom said charge was then pending, cannot be sustained. Appellant contends that an accomplice charged jointly with the defendant cannot be a witness against said defendant until he has been discharged, and cites section 1099 of the Penal Code in support of this contention.

Appellant has apparently misapprehended the meaning and purpose of this section of the Code. Its sole purpose is to permit a dismissal of a criminal action, wherein two or more defendants are jointly charged with the same crime, against any one of the said defendants in order that the defendant so discharged may be compelled to become a witness in the action. This purpose is made clear by section 1101, which declares that the dismissal so made "is an acquittal of the defendant discharged." Section 1099 has no reference to an accomplice or to a codefendant who voluntarily becomes a witness on behalf of the people. In the present action there is no intimation that the accomplice Saxton, who testified in behalf of the prosecution, made any objection to becoming a witness in the case. Having voluntarily testified, his evidence was admissible against the appellant and competent to prove any fact testified to by him, subject only to the limitations applicable to testimony given by an accomplice. Our attention has been directed by appellant's brief, in support of this last contention to a number of authorities holding that declarations or confessions of an accomplice, made after the completion of the offense, are not admissible against the other persons charged with said offense jointly with said accomplice. The cases cited by appellant correctly state the law upon the subject therein under discussion, but they have no application to the question under consideration in this action. No declaration or confession of an accomplice was admitted in evidence in this case, but, on the other hand, the evidence of one who was undoubtedly an accomplice was given at the trial against the defendant. This evidence, as we have already stated, was unquestionably admissible against the appellant. It was in no sense a declaration or confession of the party giving it, as these terms are understood in law.

[3] This testimony of the accomplice, having being corroborated by the admissions and confessions of the appellant, taken in connection with proof that the storeroom had been entered and the money stolen therefrom, justified the verdict, and was sufficient to sustain the judgment. It is true that another accomplice, named McLaughlin, testified that appellant was not present at the time the house was entered and the money stolen, but this statement on his part simply produced a conflict between his evidence and that of the witness Saxton, and the jury apparently accepted the statement of the latter, who testified to appellant's direct participation in the crime.

[4] Appellant questions the sufficiency of the evidence to justify the verdict finding him guilty of burglary in the first degree. The accomplice, Saxton, testified that the storeroom, which the defendant with his associates was charged with burglarizing, had been entered during the nighttime. There was also admitted in evidence the confession of the appellant that on the evening of November 6th, he, with his codefendants, had gone to Newhall and burglarized the store and returned to Los Angeles with the merchandise. It has repeatedly been held that the testimony of an accomplice is sufficient to prove the corpus delicti, and, when corroborated by the admission or confession of the defendant, warrants a verdict of conviction. People v. Richardson, 161 Cal. 552, 563, 120 P. 20; People v. Leavens, 12 Cal. App. 178, 184, 106 P. 1103; People v. Barnnovich, 16 Cal. App. 427, 430, 117 P. 572; People v. Tobin, 39 Cal. App. 76, 179 P. 443. Regarding the confession of appellant, he complains that the court failed to instruct the jury that before they could consider any confession as evidence, they must believe that such confession was voluntarily made. No request for any such instruction was made by appellant. He therefore cannot complain of any omission to instruct the jury in this regard.

We discover no error in the rulings of the court in refusing to give two instructions requested by appellant: One in reference to the possession of stolen property, and the other dealing with the fact that appellant was found in the presence of one of his codefendants.

Judgment and order denying motion for a new trial are affirmed.

I concur: CONREY, P. J.

---

74 Cal. App. 144

Ex parte GLAVICH. (Cr. 878.)

(District Court of Appeal, Third District, California. Aug. 12, 1925.)

1. Criminal law ⟸258(4)—Justice's court has power to amend its records to make them speak truth with respect to judgment actually pronounced.

The justice's court has power to amend its records so as to make them speak the truth with respect to judgment which it has actually pronounced.

2. Habeas corpus ⟸30(3)—Petitioner's contention that judgment was void held unsubstantial and relating to form merely.

In application for habeas corpus, petitioner's contention that judgment was void in that it unqualifiedly provided for imprisonment in default of payment of fine on conviction for selling intoxicating liquors, *held* unsubstantial and relating to form merely, inasmuch as it was shown justice's court pronounced judgment in proper form, but that justice made only a synoptical entry thereof in his docket which was corrected by justice on petition for habeas corpus.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

Application by Luke M. Glavich for a writ of habeas corpus, to be directed to the Sheriff of Amador County, to secure release from commitment following conviction for unlawful possession of intoxicating liquor. Petitioner remanded.

See, also, 239 P. 708.

Clifford A. Russell, of Sacramento, and A. L. Pierovich and C. W. Kelly, both of San Francisco, for petitioner.

Wm. G. Snyder, of Jackson, for respondent.

FINCH, P. J. Upon the application of petitioner, a writ of habeas corpus was issued herein, and the petitioner was admitted to bail pending the determination of the proceeding.

Petitioner alleges that he was convicted in the justice's court of the offense of unlawful possession of intoxicating liquor; that on the 21st day of May, 1925, judgment was entered against him as follows: "It is ordered and adjudged that the defendant, Luke M. Glavich, pay a fine of $500 or be imprisoned in the county jail 500 days;" that petitioner is illegally imprisoned in the county jail under a commitment based upon such judgment. The contention is that the judgment is void in so far as it provides for imprisonment in default of payment of the fine. Petitioner relies upon the case of Ex parte Baldwin, 60 Cal. 432, holding that a judgment couched in similar language was void as to the provision therein for imprisonment. In Ex parte Riley, 142 Cal. 124, 75 P. 665, however, a judgment in essentially the same form as that in the Baldwin Case was upheld.

The sheriff's return shows that he holds petitioner under a certified copy of a judgment pronounced on the 21st day of May, 1925. The judgment as so certified directs that the defendant be imprisoned "until the fine be duly satisfied, in the proportion of one day's imprisonment for every dollar of the fine; and on the payment of such portion of such fine as shall not have been satisfied by imprisonment, at the rate above specified, that you be discharged from custody." It is not contended that the judgment set out in the return is defective in any particular.

[1, 2] At the hearing herein it was shown that the justice's court pronounced judgment in the form stated in the return, signed a written memorandum thereof in the same form and filed it with the papers in the action, but that the justice of the peace made only a "synoptical entry of said judgment in his docket" in the form alleged in the petition herein. After petitioner made this application for a writ of habeas corpus, the justice's court corrected the entry of the judgment by setting it forth in full as it appears in the sheriff's return. The justice's court has power to amend its records so as to make them speak the truth with respect to a judgment which it has actually pronounced. Wildenhayn v. Justice's Court, 34 Cal. App. 306, 167 P. 305.

The contentions of petitioner are unsubstantial and relate to form only.

The writ is discharged, and the petitioner is remanded to the custody of the sheriff.

I concur: HART, J.

---

196 Cal. 723

Ex parte GLAVICH. (Cr. 2825.)

(Supreme Court of California. Aug. 20, 1925.)

1. Fines ⟸12—Though only fine and not imprisonment may be imposed for first offense of possession of intoxicating liquor, court may order imprisonment in satisfaction of fine.

Although, under Volstead Act, tit. 2, § 29 (U. S. Comp. St. Ann. Supp. 1923, § 10138½p), by adoption constituting part of Wright Act, only penalty that can be imposed on first offender for possession of intoxicating liquors is fine of not more than $500 and no sentence to imprisonment can be imposed, nevertheless under Pen. Code, § 1446, court may direct that defendant be imprisoned until fine be satisfied in proportion of one day's imprisonment for every dollar of fine.

2. Habeas corpus ⟸22(1)—Petitioner held not entitled to release from imprisonment in view of failure to show offense was first offense, and of court's power to order imprisonment in satisfaction of fine.

Where petitioner was committed on judgment for possessing intoxicating liquors, requiring "that petitioner pay fine of $500 or be imprisoned in county jail 500 days," which was void under Volstead Act, tit. 2, § 29 (U. S. Comp. St. Ann. Supp. 1923, § 10138½p) by adoption constituting part of Wright Act, *held*, petitioner was not entitled to release, in view of failure to show offense was first offense, and in view of court's power to imprison in satisfaction of fine.

In Bank.

Application for a writ of habeas corpus by Luke M. Glavich, to be directed to the Sheriff of Amador County, to secure release of petitioner convicted of unlawful possession of intoxicating liquor. Writ denied.

See, also, 239 P. 707.

Andrew L. Pierovich and Cornelius W. Kelly, both of San Francisco, for petitioner.

PER CURIAM. [1] Application for a writ of habeas corpus. The petitioner was convicted in the justice's court of a violation of the Wright Act (St. 1921, p. 79) in that he unlawfully had in his possession certain intoxicating liquors containing more than the legal alcoholic content. The judgment and sentence of the court was that petitioner

"pay a fine of $500.00 or be imprisoned in the county jail five hundred days." He is now in custody under the commitment issued on the judgment. The point of his application for release on a writ of habeas corpus is, that under section 29 of title 2 of the Volstead Act (U. S. Comp. St. Ann. Supp. 1923, § 10138½p), which by adoption is now a part of the Wright Act, the only penalty that can be imposed for a first offense is a fine of not more than $500. There can be no sentence to imprisonment. The point is well taken (Ex parte Adams, 61 Cal. App. 239, 214 P. 467), but it does not follow that petitioner is entitled to be released from imprisonment on this application.

[2] In the first place, it is not alleged, and is nowhere made to appear, that petitioner's conviction was for a first offense. In the second place, and assuming that the conviction was for a first offense, the court had jurisdiction to impose a fine not exceeding $500, and, in addition to imposing the fine, might have directed that the defendant be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the amount. Pen. Code, § 1446. Such may have been the intention of the court in this case, but in imposing an unqualified sentence for a definite term of imprisonment it exceeded its power. When petitioner has paid the fine imposed upon him, if he be thereafter held in custody, he will be in a position to seek his release.

The petition is denied without prejudice.

---

197 Cal. 82

HATZAKORZIAN v. RUCKER-FULLER DESK CO. et al. (S. F. 10774.)

(Supreme Court of California. Sept. 21, 1925.)

1. Trial ⟸142—Case for jury, if different conclusions can rationally be drawn from evidence.

If different conclusions can rationally be drawn from evidence by men of average intelligence, case is for jury or court trying fact.

2. Highways ⟸168—Pedestrians not negligent in traveling anywhere on public highway.

Pedestrians may travel anywhere on public highway and are not negligent in so doing.

3. Highways ⟸173(1)—Pedestrian not bound to watch behind for approaching vehicles.

Pedestrian, traveling on public highway, is under no legal duty to look back or watch behind to see whether he is in danger of being struck or run down by vehicle approaching from rear.

4. Highways ⟸173(1)—Pedestrians must exercise reasonable or due amount of care for their safety, considering conditions existing.

Pedestrians, traveling over highways, must exercise reasonable or due amount of care, considering existing conditions, for their own safety, and cannot complain of injury sustained at hands of one having equal right to use highways, if their failure to exercise such care proximately contributes to, or is sole cause of, damage.

5. Highways ⟸184(2)—Finding, that pedestrian struck by automobile was negligent, held not supported by evidence.

Finding, that pedestrian, struck by automobile approaching from rear while returning to point on highway where he left his car, was carelessly, recklessly, and negligently walking on public highway without paying attention to traffic thereon or taking any care for his safety *held* without evidentiary support.

6. Highways ⟸184(2)—Presumption that deceased exercised requisite care in absence of evidence to contrary.

In absence of testimony as to where deceased was walking when struck by automobile, presumption is that deceased, at all times while walking on highway, exercised requisite degree and amount of care for his own safety, in view of Code Civ. Proc. § 1963, subd. 4.

7. Highways ⟸184(2)—Presumption of due care by deceased pedestrian is evidence binding on jury or court until controverted.

Presumption that deceased, while walking on highway before being struck by automobile, exercised requisite degree and amount of care for his own safety, is evidence in accord with which jury or court trying facts is bound to decide, until controverted, in view of Code Civ. Proc. § 1961.

8. Highways ⟸172(1)—Care required by statute when driving motor vehicle stated.

Vehicle Act, §§ 20(a), 22, as amended by St. 1919, pp. 214, 220, §§ 12, 13, requires exercise of amount of care in driving motor vehicle on highways which circumstances or conditions of particular occasion exact, in view of character of highway and use to which it is being put.

9. Highways ⟸173(1)—Duty toward pedestrian of automobile driver blinded by headlights of approaching machine stated.

Ordinary care required of automobile driver, blinded by lights of approaching machine, while driving on dark night along highway, on narrow unpaved portion of which in front of him pedestrian was walking, was amount of care commensurate with exactions of extraordinary dangerous circumstances at time.

10. Highways ⟸173(2)—Automobilist's duty to anticipate pedestrians on highway.

It is automobile driver's duty to anticipate presence of pedestrians on highway.

11. Highways ⟸173(2)—Driver of automobile, striking pedestrian on highway, held negligent.

Automobilist traveling at 20 to 25 miles an hour on dark night after being blinded by lights of approaching automobile when between 150 and 200 feet from point of collision with pedestrian, whom he was unable to see, though his lights were in good condition and ordinarily

enabled him to discern objects from 75 to 100 yards before him, *held* guilty of negligence rendering him liable for death of such pedestrian.

12. Highways ⊂=184(2)—Testimony that deceased warned companion to keep off paved highway held admissible.

In action for death of pedestrian, struck by automobile from rear while walking along unpaved part of road, testimony of deceased's companion that deceased kept warning and admonishing him to keep off unpaved highway as somebody would probably hit him, *held* relevant and competent as tending to show that deceased realized perils and was exercising due care for his own safety.

13. Evidence ⊂=268—Expressions of bodily or mental feelings competent.

When bodily or mental feelings of individual, such as fear are material, usual expressions thereof, if not too remote, are original and competent evidence, truth or falsity of which is for jury.

14. Witnesses ⊂=268(1)—Cross-examination of defendant automobilist, as to whether he looked around windshield for object before him and was anticipating pedestrian on highway, held pertinent.

In action for death of pedestrian struck by automobile, cross-examination of defendant, as to whether he looked around right or left side of windshield to see whether he could discern object before him, while lights of approaching machine reflected through windshield, and whether he was anticipating that he might meet or overtake pedestrian or other object on highway, *held* pertinent.

In Bank.

Appeal from Superior Court, Fresno County; J. E. Woolley, Judge.

Action by Mrs. Galipsa Hatzakorzian, as administratrix of the estate of H. Hatzakorzian, deceased, against the Rucker-Fuller Desk Company and another. Judgment for defendants, and plaintiff appeals. Transferred from District Court of Appeal. Reversed.

Geo. Ohannesian, of Fresno, for appellant.

Frederick W. Docker, of Fresno, and Sloss, Ackerman & Bradley, of San Francisco (Bradley & Supple, of San Francisco, of counsel), for respondents.

HOUSER, Justice pro tem. This cause was ordered to be transferred to this court after decision by the District Court of Appeal, Third District, for the reason that it was deemed advisable to give further study to the questions involved herein, and particularly to the issues of negligence on the part of the defendants and the alleged contributory negligence of plaintiff's intestate.

After further consideration, we are in accord with the views expressed by Mr. Justice Hart in the opinion written by him for the District Court of Appeal. It is as follows:

"This is an action for damages for wrongfully causing the death of plaintiff's intestate. The case was tried by the court, without the aid of a jury, and findings and judgment were in favor of the defendants. The plaintiff appeals.

"The complaint alleges that, on the 3d day of September, 1921, the deceased, while walking in a northerly direction 'upon the extreme right-hand side of a public highway running between the town of Easton and the city of Fresno, in the county of Fresno, * * *' and not far distant from the town of Easton, was run into from the rear and fatally injured by an automobile driven by the defendant Kennell; that said Kennell was then and there the employee, servant, and agent of the defendant corporation; that said Kennell, immediately before and at the time the said automobile collided with deceased, was driving and operating said machine in a careless and negligent manner, and that by reason of such careless and negligent driving the collision occurred, and that as a result thereof bodily injuries were inflicted upon deceased from the effect of which he died. The complaint further states that the deceased left surviving him his wife, the plaintiff herein, and five minor children, all entirely dependent upon him and during the lifetime of the deceased receiving from him care, nurture, maintenance, support, etc.

"The defendants, jointly answering the complaint, denied the allegations thereof, and alleged affirmatively that the accident and the consequent death of the deceased were wholly caused by the deceased's own negligence. At the time of the trial, however, the defendants, by leave of the court, amended their answer by pleading the defense of contributory negligence, alleging that the injuries sustained by the deceased, and resulting in his death, were contributed to by his own negligence.

"The court found that, on the night of the 3d of September, 1921, the deceased was walking in a northerly direction on the right-hand side of the public highway above referred to; that 'it is true that said H. Hatzakorzian was carelessly, recklessly, and negligently walking on said public highway in the nighttime and in the darkness of the night directly in the path of traffic moving on said highway in the same direction in which the said Hatzakorzian was walking with his back to the direction of traffic on said highway without giving or paying any attention to the traffic on said highway or taking any care or precaution for his safety in the position in which he had placed himself; that said H. Hatzakorzian was familiar with and knew the use of said highway and the danger to which he negligently and carelessly exposed himself'; that the automobile which collided with and struck deceased, inflicting injuries which resulted in the latter's death, was driven and operated at the time by the defendant Kennell, but that at said time said Kennell was not driving said car in a careless and negligent manner; that the injuries to and the death of deceased by reason of the collision were not caused by 'any wrongful, careless, or negligent acts of the defendants or either of them'; that the injuries and the consequent death of the

deceased were solely and proximately due to and caused by the latter's own carelessness and negligence, and 'without any fault on the part of the defendants, or either of them.'

"There are several assignments of error, but the point particularly stressed by the plaintiff is that the evidence does not support the findings, or, in other words, that the evidence indisputably shows that the accident and resultant death of the plaintiff's intestate were directly caused by the negligence of the defendants. This contention will necessitate, of course, an extended examination of the evidence.

"The highway upon which the accident occurred is known as Elm avenue and runs practically in a straight line north and south. The paved portion of the highway was at the time of the accident 16 feet in width. It was made of gravel, asphalt, and sand, and is what is known as 'black base.' The shoulders of the highway on both sides thereof, which are made of dirt common to the locality in which the highway is situated, are approximately 10 feet in width on the one side and likewise 9 feet on the other and have a gradual slope toward the fence or pits on either side. For 7 feet, approximately, the slope from the paved portion is practically level, and at the end of the 7 feet it breaks sharply.

"The defendant Kennell and a young man named Suran Ohannesian were the only persons present at the scene of the accident when it occurred, and consequently theirs was the only testimony presented at the trial that reflected any light on the circumstances under which the collision was brought about.

"Suran Ohannesian, to whom we will hereinafter refer as Suran, was the companion of, and, at the time of the collision, was walking along the highway with, the deceased, the former walking about 20 feet ahead of the latter.

"The deceased who, at the time of his death, was 39 years of age, was a farmer and owned and operated a farm some 12 miles south of the city of Fresno. To reach his farm from Fresno, it was necessary to pass through or near the town of Easton.

"The story told by Suran of the misadventure may thus be summarized: On the 3d day of September, 1921, near the hour of 8:30 p. m., the deceased, accompanied by Suran, the latter's mother, sister and brother-in-law, left the city of Fresno in an Overland automobile together via Elm avenue for the ranch of the deceased. On reaching a point about a mile north of Easton some part of the machinery of the car in which they were riding got out of order, with the result that the machine stalled. After repeated unavailing attempts to start the car, the deceased, assisted by others of his party, moved it from the paved to the unpaved portion of the highway on the west side thereof. Suran and the deceased then started for Easton to telephone a friend in Fresno and request him to go to where their car was and tow it to the former place. They were conveyed to Easton by a passing autoist, going in the direction of that town. Arriving at Easton, deceased telephoned his friend at Fresno and immediately thereafter he and Suran started on their return to the point at which they had left the car. It was at this time near the hour of 9 o'clock, the night was very dark, and there were no lights on the highway. They were walking in a northerly direction and on the right-hand side of the highway, Suran walking and keeping ahead of deceased a distance of about 20 feet. Suran testified that as they were walking along they carried on a conversation, the deceased frequently making some jocular remark about the situation they were in because of the stalling of their machine, and that both would laugh at the remark. A number of cars passed them, going in the same direction, 'and,' Suran proceeded, 'I asked for a ride from the cars that went north to get to the car quicker and they wouldn't stop. * * * And I would keep off the highway and I would always look back and see if there was a car coming to ask for a ride, * * * and I would see Mr. Hatzakorzian off the paved highway, too. When we were about a half a mile north (of Easton) I heard a crash and looked back. Suddenly I was thrown back and fell about 10 feet and there was a hole there that I fell in and I had a hurt on my knee, and when I stood up I couldn't stand. I sat down and I saw the car that had hit us still keeping on and I hollered to him to stop, that he had hurt somebody, but he wouldn't stop and kept on going. I noticed another car come back and stop near us and I saw that Mr. Hatzakorzian's body was laying about three or four feet in front of me, and it was all crushed up and blood was covered,' meaning, as may be assumed, that the deceased was covered with blood. The 'other car,' which Suran said, 'come back and stopped near us,' turned out to be the car of Kennell, who, after striking the deceased and Suran, proceeded a short distance up the road and then turned and returned to the spot where the accident occurred. Suran stated that, just as Kennell's car passed him going north, he (Suran) noticed that the tail light on the former's car was not on, and that he observed, when Kennell returned to the place of the accident, the front lights of his car were not on. Before reaching the spot where the mutilated body of Hatzakorzian lay upon the highway (said Suran) Kennell stopped his car, got out and attempted 'to fix the fender which was bended on the wheel. He fixed it,' continued the witness, 'and he got inside, lit the lights, turned around, and came to where we were.' On cross-examination, Suran repeated that, while they were walking along the highway, as above described, he frequently looked back to see if any cars were coming, that he thought he looked back every few seconds, and when he saw a car 'coming' he would keep his eyes on it; that the last time he looked back, which was just before deceased was struck down, he saw no car back of them or traveling in the direction in which they were going; that he did not see the car strike deceased; that he could not say whether or not the deceased looked back and saw the car of Kennell approaching him from the rear; that when he (witness) was struck he was two or three feet off the paved part of the highway and on the dirt portion thereof; that when he got on the highway, after having been struck, he saw the body of the deceased near the center of the highway. Suran further testified (on redirect) that, prior to the accident, he had had a year's experience in the driving of automobiles and that from such experience he was able to give it as his opinion that Kennell, when he struck witness, was driving at the rate of between 30 and 35 miles an hour.

"Defendant Kennell left the city of Fresno at or near the hour of 3 p. m. of the day of the accident for Easton, going by way of Elm avenue, over which he had previously never traveled. The object of his visit to Easton was to negotiate the sale of chairs for the high school at that town, and for that purpose he went out to interview the principal of said school. The latter resided about two miles west of Easton. Kennell arrived at the residence of the principal about 8 p. m., and after attending to the business for which he went there, and near the hour of 9 o'clock p. m., started on his return to Fresno. After reaching Elm avenue, he turned his car to the north, traveling about 100 feet with his car in second gear and then put it in 'first high' and so operated the car until the collision occurred. He testified that he had had three years' experience in operating automobiles; that, as the night was very dark and he had never passed over Elm avenue before, he 'was driving slowly, at a fair rate of speed, between 25 and 30 miles, when a machine with glaring lights, was coming towards me, and I slowed down somewhat until I passed it, but just as I passed the machine I struck the deceased and swerved to the left of the road and also felt another obstacle, which, I presume, was the young man who testified. Then I stopped and looked back, but it was so dark—I was afraid to back up, I didn't know just where the bodies might be—that is, if they had fallen down or whether they were able to get up or not; so I kept going until I came to a place where I could turn around, which was a gate, I presume 200 feet down from where the accident occurred.' Kennell found on attempting to turn his car, that the right fender thereof was twisted and bent over the right front wheel, so that he could not make the turn. He thereupon alighted, and straightened the fender so that he could turn the car. Returning to the spot where the collision occurred, he found that Hatzakorzian had been killed and Suran slightly injured. He placed the body of the deceased in his car, and accompanied by Suran, went to the city of Fresno, taking the dead body to the morgue and Suran to the Emergency Hospital. Kennell further testified that from the time he entered the highway from the road leading from the residence of the principal of the school to the time of the collision his lights, which, he stated, were readjusted a few days before the accident, were on, and that he did not, at any time, after entering the highway, leave the paved portion thereof; that the deceased was struck by the right-hand side of the machine; that when he struck Suran the right-hand side of his car was 'about a quarter of the way on the highway—that would be about four feet.'

"Kennell, with a deputy sheriff and a deputy coroner, returned to the scene of the accident shortly after he delivered the body of the deceased at the morgue, and by the aid of spotlights the portion of the highway where the collision took place was inspected. He said he did not see treadmarks of the wheels of a car anywhere thereabouts on the unpaved portion of the highway, nor blood on that portion thereof.

"On cross-examination, Kennell said that, when returning to Fresno on the highway, he had 'ample light to drive by'; that an object in front of him would be visible from his car at a distance or 75 or 100 yards. 'To see the road clearly, that is, extremely clearly,' he said, he could see an object before him a distance, 'maybe 150 to 200 feet.'

" 'Q. So that the light you had that evening lighted up the roadway so that you saw a distance between 150 and 200 feet, is that right? A. Yes, sir.

" 'Q. And you were able to discern any obstacles that might come in your way by reason of the light you have? A. Yes.'

"He stated that in going towards the highway from the home of the school principal his rate of speed was about 15 miles an hour; that on entering the highway and after going a few feet he increased his speed to about 25 miles an hour.

" 'Q. You are quite sure not more than that? A. Quite sure.

" 'Q. When did you first notice the glaring lights you spoke of on the approaching car? A. I would say that began to obscure my vision—that is, where I could not see the road clearly in front of me, possibly, on, maybe, 100 or 200 feet—I couldn't say for certain—before the accident occurred.

" 'Q. So that, for the space of 150 or 200 feet, you couldn't see the road clearly? A. I could see the road clearly.

" 'Q. But could you discern any objects on the highway? A. I could discern any kind of a light—you can always see a light through the glare, where you cannot see anything, practically, the color of the highway itself.

" 'Q. Anything but a light you couldn't see because of the glare you speak of? A. If approximately the same color as the highway.

" 'Q. That evening you didn't see anything? A. I didn't see anything, no.

" 'Q. That was due to the glaring lights? A. Yes, sir.

" 'Q. As soon as you noticed that the lights were before you so that you could not travel, what did you do, if anything? A. Slowed down somewhat. I might explain there, when I said 20 or 25 miles an hour, I felt possibly I was driving about 25, by taking my foot off of the accelerator, the momentum of the car carried me along till up to the point about 20 miles an hour, so when the accident occurred, I feel that I was going between 20 and 25.

" 'Q. Just before the glare of the lights, you were traveling 25 miles an hour? A. I would say approximately that.

" 'Q. Probably a little more than that. A. I don't think so.

" 'Q. But what precautions did you take when you first saw the glare of the light, what did you do, anything at all, or merely allowed the car to run—what did you do, if anything, when you saw the glare of this light? A. I slowed down somewhat. As far as taking precaution and anticipating something being there, I didn't anticipate it. * * *

" 'Q. Did you put your brake on when you saw this glare was interfering with your sight? A. No, sir.

" 'Q. Did you turn your gas off? A. I took my foot off the accelerator.

" 'Q. Did you turn off the ignition? A. No, sir.

" 'Q. You merely allowed the car to run at

the rate of speed it was going, carried by its momentum, is that it? A. Yes, sir.

" 'Q. How far had you traveled in that condition, with the lights glaring on your windshield before you struck the first obstacle? A. The light was glaring in my eyes and not the windshield.

" 'Q. Through the windshield? A. Through the windshield, yes.

" 'Q. And how far had you traveled in that condition before you struck the first obstacle? A. I would say anywhere from 100 to 200 feet.

" 'Q. And from the point that you started and to the time you struck during that space you were unable to see any obstacle on the road because of this glare through the windshield upon your eyes? A. I could have seen, I believe, anything a short distance from the machine up to the time when I got practically next to the machine, when, as the evidence shows, I couldn't see anything at that time.

" 'Q. Due to the glare of the light on the approaching car? A. Yes.

" 'Q. How far were you traveling east of the edge of the highway towards the north when that glare showed into your eyes? A. Approximately two feet.

" 'Q. That is, the wheel was two feet on the inside, or the fender? A. I should say the wheel would be.

" 'Q. And how far does the fender extend to the right of the wheel, the right fender? A. about four to six inches. * * *

" 'Q. How far after you had struck the first obstacle did you travel before you struck the second? A. Might be 12 or 15 feet.

" 'Q. You were still blinded by the glare of these lights? A. No; the car had passed me, and I had struck deceased just at the time the car passed me.

" 'Q. Mr. Kennell, had you examined your brakes that day at all? A. Not that day, no. Examined them at same time the lights were adjusted.

" 'Q. Were your brakes in a condition so you could have stopped your car from the time of the glare of the approaching car shone through the window and the time you struck the first obstacle—did you have sufficient time to do that? A. I believe so, yes.

" 'Q. In other words, you could have stopped your car within the space of 150 feet if you wanted to? A. Yes.

" 'Q. But you did not? A. No, sir.

" 'Q. Was your car in such condition as to the brakes, both as to the emergency and hand brake, to permit you to stop or slow down to avoid the obstacle within the distance covered by your lights? A. You mean could I have stopped from the time I first seen the automobile coming? Yes. * * *

" 'Q. When were you first aware of the fact that you had struck a man, a pedestrian, Mr. Kennell? A. At the time I struck him.

" 'Q. You knew at once that you had struck a man? A. Yes, sir.

" 'Q. After you struck him, how far did you carry the body, if you did? A. I believe it was about 12 or 15 feet, or possibly more.

" 'Q. What portion of your car was the body carried along the highway on? A. I believe over the front headlight—the right headlight. * * * From the time I struck him I carried his body down the road about 12 or 15 feet. The body fell off the machine at that time. I felt two wheels pass over the body, and I had the brake on at the time and stopped. I stopped I presume 5 or 10 feet north of where the body fell to the ground from the car. * * * I am not entirely clear whether I came to a dead stop or not, but I know the car was in neutral and I looked behind to see if I could see anything and not being able to, I went on ahead.

" 'Q. You threw the clutch into neutral, do I understand, after you dropped the body? A. Yes, sir; that is, after I had stopped practically still, and if I was going at all, I was not going more than two or three or four or five miles an hour.

" 'Q. That is, after you had dropped the body? A. Yes. I went into second very slowly and until I could find a place to turn around. * * *

" 'Q. Was there anything to prevent you from bringing your car to a standstill at the time the lights glared through the windshield to your face? A. No.

" 'Q. But you didn't stop? A. No.'

"The above embraces a comprehensive, as well as an accurate, statement of the circumstances under which the accident occurred, so far as the only two witnesses who were present at the scene thereof when it happened knew or could give the circumstances.

"One Blasingame, a deputy sheriff, and one Ross, deputy coroner, who were the officers who returned with Kennell to the place where the accident occurred, shortly after the body of deceased was delivered at the morgue, made an examination of the highway and the ground where the accident happened. Testifying for defendant, those officers stated that they observed blood spots short distances apart on the paved portion of the highway, but saw no blood on the unpaved portion. One of the officers testified that he observed on the shoulder of the east side of the highway treadmarks of the tires of an automobile, but he expressed the opinion, based on appearances, that they were 'old marks' or had been made some time prior to the night of the accident. This testimony we do not regard as of particular consequence in the decision of the case.

[1-4] "The rule by which appellate courts must be guided in passing upon the question whether findings of fact or verdicts of juries are sufficiently supported by the evidence is this: 'That where an honest difference of opinion between men of average intelligence can arise as to the effect of the evidence—that is, if the evidence is such as that different conclusions upon the matter can rationally be drawn [from the evidence]—then the case presented is one for the jury, or the court, if the questions of fact be submitted to its arbitrament.' Firth v. Southern Pacific Co., 44 Cal. App. 511, 514, 186 P. 815, 816. There is, however, no place for that rule in the instant case. It is settled law that pedestrians have a right to travel anywhere upon a public highway, and it is, therefore, not negligence in them to do so. This is the common-law rule, and our Legislature has not changed or modified it. Raymond v. Hill, 168 Cal. 473, 482, 143 P. 743. Nor is a pedestrian under legal duty to look back or watch behind to see whether he or she is in danger of being struck or run down by any vehicle approaching him or her from the rear.

Raymond v. Hill, supra; Devecchio v. Ricketts, 66 Cal. App. 334, 226 P. 11; Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. Of course, pedestrians, as is true of every person who travels over the highways by whatsoever means or mode, must exercise reasonable or the due amount of care, considering the conditions existing as to the highways, for their own safety. If they fail in the exercise of such care and themselves thereby contribute proximately to the cause of any injury they may sustain at the hands of one having an equal right to use the highways, or if such failure is the sole cause of the damage they have suffered, then, of course, they have no ground upon which to base just complaint.

[5, 6] "In the present case, however, there is no evidence whatever tending to show that the deceased was guilty of contributory negligence or any negligence at all. In other words, the finding that the deceased, while returning to the point on the highway where he had left his car, 'was carelessly, recklessly, and negligently walking on said public highway' and was walking on said highway 'without giving or paying attention to the traffic on said highway or taking any care or precaution for his safety in the position in which he had placed himself' is wholly without evidentiary support. The testimony of Suran is that the deceased was walking on the unpaved portion of the highway immediately before the instant of time he was struck by Kennell's car. While, for sufficient reasons, as to which this court is not at liberty to enter upon an inquiry to determine whether they are or are not valid, the trial court could, as we must assume that it did, disregard Suran's testimony on that point, still his was the only testimony in the case which tended in the slightest degree to show precisely where the deceased was walking on the highway immediately before he received the mortal injuries. Kennell did not know, for he stated that he did not at any time see the deceased until after the latter was struck and his body carried on the fender of the car a distance of from 12 to 15 feet. Casting aside, then, as presumptively the trial court did, the testimony of Suran as to where and how the deceased was walking when struck by Kennell, the record furnishes absolutely no information as to where on the highway the deceased was walking, or whether he was or was not, while so walking, exercising reasonable care for his own safety under the peculiar circumstances and conditions by which he was then surrounded.

[7] "In this state of the case as to the matter now in hand, the presumption is that the deceased, while walking on the highway, was, at all times, exercising the requisite degree and amount of care for his own safety and preservation. Code Civ. Proc. § 1963, subd. 4; Crabbe v. Mammoth Channel G. Min. Co., 168 Cal. 500, 506, 143 P. 714, 716; Cogdell v. Wilmington & W. R. Co., 132 N. C. 852, 44 S. E. 618; Shannon v. Delwer, 68 Minn. 138, 71 N. W. 14. That presumption is, of course, subject to be controverted, 'but until controverted it is evidence in accordance with which the jury [or the court, as in this case] is bound to decide.' Crabbe v. Mammoth Channel G. Min. Co., supra; Code Civ. Proc., § 1961. As, therefore, there is no evidence which supports the finding that deceased was guilty of negligence while walking along the highway, or immediately before or at the time he was struck, the said presumption stands undispelled and, consequently, as proof of the fact that the deceased exercised a due amount of care for his own safety at all times while walking on the highway.

[8] "The next question to be considered is whether the finding that Kennell was not driving the automobile 'in a careless and negligent manner,' and that the injuries to and the death of plaintiff's intestate were not proximately caused by 'any wrongful, careless, or negligent acts of the defendants, or either of them,' etc., derives support from the evidence.

"Section 22 of the State Vehicle Act (Stats. 1919, p. 220, which was the law in force when the injuries complained of here were received by deceased), provides, in part, as follows: 'Any person operating or driving a motor or other vehicle on the public highways shall operate or drive the same in a careful and prudent manner and at a rate of speed not greater than is reasonable and proper, having regard to the traffic and use of the highway, and no person shall operate or drive a motor vehicle or other vehicle on a public highway at such rate of speed as to endanger the life or limb of any person or the safety of any property.'

"Section 20(a) of said act (Stats. 1915, p. 397, carried into the amending statute of 1919, Stats. 1919, p. 215), among other things, provides: 'The driver or operator of any vehicle in or upon any public highway shall drive or operate such vehicle in a careful manner with due regard for the safety and convenience of pedestrians,' etc.

"The meaning of the foregoing sections, although in general language, is plain and can hardly be misunderstood by any person of ordinary intelligence. The language of the section first above quoted herein, to wit, 'careful and prudent manner and at a rate of speed not greater than is reasonable and proper,' is relative and contemplates the peculiar circumstances and conditions under which a car may be operated over a public highway at a particular time—whether it be after nightfall and dark or in the daytime and light, the width of the highway and whether it is one which, by reason of its connections, is or may naturally be expected to be at all times subject to a heavy or light traffic. In order words, said section requires the exercise of that amount of care in driving a motor vehicle over the highways which the circumstances or conditions of the particular occasion exact, having in view the character of the highway and the use to which it is then being put. As is said in 29 Cyc. pp. 428, 429: 'The care required must be in proportion to the danger to be avoided and the consequences that might reasonably be anticipated from the neglect. The greater the risk of danger the greater must be the care. What is ordinary care in a case of extraordinary danger would be extraordinary care in a case of ordinary danger.'

[9] "Under the circumstances of the present case—the narrowness of the unpaved portion of the highway, the darkness of the night and the blinding of Kennell by the glare of the lights reflected from the headlights of the approaching machine—the highway over which Kennell was traveling was beset by danger of an extraordinary character from the time his vision became so obscured as to make it impossible for him to see plainly the road before him to

the time that he struck the deceased. Thus the ordinary care with which Kennell was charged in driving his car over the highway required such an amount of such care as was commensurate with the exactions of the extraordinary dangerous circumstances under which he was then operating his car. The respective rights and duties of drivers of automobiles and other vehicles and of pedestrians have repeatedly been by the courts of this state clearly pointed out. In Raymond v. Hill, 168 Cal. 473, 482, 484, 143 P. 743, 748, Judge Henshaw clearly points out and defines those rights and duties. After, in effect, declaring that a pedestrian, when using the public highways, may assume that the driver of an automobile approaching the former from the rear will so operate his car as to avoid colliding with or injuring him, and that failure to anticipate omission of such care does not render him negligent (see, also, on the proposition, Blackwell v. Renwick, 21 Cal. App. 131, 135, 131 P. 94; Deputy v. Kimmell, 73 W. Va. 595, 80 S. E. 919, 51 L. R. A. [N. S.] 989, Ann. Cas. 1916E, 656; Elliott on Streets and Roads [3d Ed.] § 1088), the court has the following to say with respect to the duty of drivers of automobiles: 'But as a part of the reasonable precaution which the law enjoins upon the driver of an automobile to use, is the necessity of making certain that foot passengers are aware of the rearward approach of the vehicle, that the vehicle itself is at such a distance from the pedestrian as to avoid running over him in his sudden panic from surprise at knowledge of its unexpected approach, and, finally, that the vehicle is under such control as that it may be stopped promptly.'

"The above rule is reasserted in Randolph v. Hunt, 41 Cal. App. 739, 183 P. 358.

"In Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471, in which an application for a hearing by the Supreme Court was denied, this court, through the late Justice Burnett, approved, as accurately stating the law, the following instruction given at the trial: 'It is part of the duty of the operator of a motor vehicle to keep his machine always under control so as to avoid collisions with pedestrians and other persons using the highway. He has no right to assume that the road is clear, but under all circumstances and at all times he must be vigilant and must anticipate and expect the presence of others. Accordingly, the fact that he did not know that any one was on the highway is no excuse for conduct which would have amounted to recklessness if he had known that another vehicle or person was on the highway.'

"Woodhead v. Wilkinson, 181 Cal. 599, 185 P. 851, 10 A. L. R. 291, was a case where the driver of an automobile, approaching plaintiff from the rear, ran over and inflicted serious injuries upon her. The case was tried by the court sitting without a jury, and it was found that defendant was negligent in that, when he realized that his vision was obscured by an approaching automobile so that he could not see the road before him, 'he failed to look around the side of the shield.' Complaint was made that said finding was insufficient to support a judgment for damages, the contention being, we assume (the opinion does not state the specific ground of the objection to the findings), that there was no duty cast upon the defendant under such circumstances to 'look around the end of the windshield.' The court said: 'Obviously, he would be bound as a careful driver to stop as soon as he could reach a place by the side of the road, or to place himself in a position from which he could see the road over which he was driving. He did not stop at once and if, under all the circumstances, looking around the end of the windshield was the only way in which he could safely proceed, then he was negligent in failing to adopt that plan. The same reason applies to the finding that he was negligent in failing to observe the highway immediately in front of the car which he was driving.'

[10] "That it is the duty of a driver of an automobile to anticipate the presence of pedestrians upon the highway over which he is thus traveling, is thoroughly settled as a part of the law of the road and is emphasized in Zarzana v. Neve Drug Co., 180 Cal. 32, 37, 179 P. 203, 205 (15 A. L. R. 401), and in Reaugh v. Cudahy Packing Co., 189 Cal. 335, 340, 208 P. 125, 127. In the first named of these cases it is said: 'Aside from the mandate of the statute, the driver of a motor vehicle is bound to use reasonable care to anticipate the presence on the streets of other persons having equal rights with himself to be there.'

"In the case last mentioned the court said: 'He (the driver) still remains bound to anticipate that he may meet persons at any point of the street, and he must, in order to avoid a charge of negligence, keep a proper lookout for them and keep his machine under such control as will enable him to avoid a collision with another person using proper care and caution, and if the situation requires he must slow up and stop. Kessler v. Washburn, 157 Ill. App. 532; Zarzana v. Neve Drug Co., 180 Cal. 32, 179 P. 203, 15 A. L. R. 401.'

[11] "Testing the conduct of the defendant Kennell, in operating his car on the occasion in question, by the rules and principles above set out, it is clear from his own testimony that he disregarded and violated every duty which the law imposes upon drivers of automobiles when driving the same over the public highways. In condensed form, his testimony may thus be recapitulated: (1) He was traveling, up to the time the glare reflected from the lights of the approaching automobile through the windshield of his car, at the rate of 25 miles an hour; (2) when the glare struck his eyes he was a distance of between 150 and 200 feet from where he collided with deceased; (3) the glare so obstructed his vision that he was unable to see an object on the highway before him, although his lights were in good condition and under ordinary circumstances he was able by them to discern an object before him at a distance of from 75 to 100 yards; (4) he did not see the deceased until after his car struck him; (5) when the glare first struck his eyes and blinded him, with the result as indicated, he diminished the speed of his car so that thereafter and until he struck deceased, he was still traveling at a speed of between 20 and 25 miles an hour; (6) he did not put on his brakes, nor turn off either the gas or ignition; (7) his brakes were in perfect order and he said he could have stopped his car between the time the glare first struck his eyes and the time he struck deceased, but that he did not do so,

nor make any attempt to do so; (8) that he was not anticipating the presence of pedestrians on the highway in front of him—in fact, his mind, he himself in effect stated, was not on the matter of whether he might or might not overtake a pedestrian. It is only necessary to compare the foregoing résumé of Kennell's own testimony with the requirements of the law with respect to the duties of operators of automobiles when driving over the highways of the state to force the conclusion that, from the time the glare from the lights of the approaching car first reflected through his windshield into his eyes, he proceeded on until he struck and killed the deceased with a degree of indifference or recklessness as to the rights and safety of others who might be ahead of him on the highway closely approaching, if indeed, not amounting, under the circumstances, as revealed by his own testimony, to gross negligence.

[12, 13] "In view of a probable retrial, some of the assignments involving attacks upon rulings as to the admissibility of certain testimony should be noticed herein. The court struck out on motion of defendants a statement by the witness Suran to the effect that, shortly before the fatal collision, the deceased, who, the witness said, was then walking on the unpaved part of the road, kept warning and admonishing Suran to keep off the 'paved highway,' as probably 'somebody hit you.' The testimony stricken out was relevant, and, we think, competent, if not under the rule of res gestæ, certainly because it tended to disclose that the deceased had in his mind and fully realized, as he was walking along or over the highway just before he was struck, the perils or dangers of walking over the highway in the darkness of night, and further tended to show that, while thus engaged, he was exercising due care for his own safety. 'Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light. * * * As independent explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as verbal acts, and are as competent as any other testimony, when relevant to the issue. Their truth or falsity is an inquiry for the jury.' Travelers' Ins. Co. v. Mosley, 75 U. S. (8 Wall.) 397, 404, 405 (19 L. Ed. 437); see, also, Mutual Life Ins. Co. v. Hillmon, 145 U. S. 285, 296, 12 S. Ct. 909, 36 L. Ed. 711; Belleveau v. Lowe Supply Co., 200 Mass. 237, 86 N. E. 301; Payne v. Railway Co., 153 Iowa, 445, 133 N. W. 781. 'A person's mental state of fear is provable by his declarations, unless they are too remote.' 22 C. J. p. 281; see, also, People v. Fong Sing, 38 Cal. App. 253, 258, 259, 175 P. 911, and cases therein cited. The qualifying language of the rule, as it is last stated, has no application here, since the declarations of the deceased sought to be shown were, as seen, made but a few minutes prior to the accident, and had reference to just such a contingency as happened. As to the instances of the application of the rule of res gestæ, see the following cases: Rogers v. Manhattan Life Ins. Co., 138 Cal. 285, 290, 71 P. 348, and cases therein cited; Zipperlen v. S. P. Co., 7 Cal. App. 206, 220, 93 P. 1049; see, also, 2 Starkie on Evidence, 241; Phillips on Evidence (4th Am. Ed.) 185.

[14] "It was pertinent cross-examination as to a relevant matter for the plaintiff to ask Kennell whether he looked around the right or left side of his windshield to see whether he could discern an object before him while the glare still reflected through the windshield (Woodhead v. Wilkinson, supra), and also whether Kennell was anticipating that he might meet or overtake a pedestrian or other object on the highway. Zarzana v. Neve Drug Co., supra; Reaugh v. Cudahy Packing Co., supra. As to the matter of inquiry first stated, however, the question propounded to the witness was rather indefinite in form. As to the other matter, the said defendant thereafter admitted that he did not anticipate or think of meeting or overtaking any person or object on the highway in front of him. The rulings foreclosing proper inquiry into those matters would be erroneous and probably prejudicial under some circumstances.

"There are no other assignments calling for special attention herein."

For the foregoing reasons, it is ordered that the judgment be, and the same is, reversed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; SEAWELL, J.; LENNON, J.; WASTE, J.; SHENK, J.

197 Cal. 69

MORENO MUT. IRR. CO. v. JORDAN, Secretary of State. (S. F. 11764.)

(Supreme Court of California. Sept. 19, 1925.)

Corporations ⟸298(2)—Meeting of directors of corporation at office rather than principal place of business proper under Code.

Meeting of directors of corporation at its office, as provided by by-laws, rather than principal place of business, as provided by articles of incorporation, was sufficient for creation of a bonded indebtedness, under Civ. Code, § 319, providing that meetings of directors must be held at its office or principal place of business.

In Bank.

Application by the Moreno Mutual Irrigation Company for a writ of mandate to be directed to Frank C. Jordan, Secretary of State, requiring him to file in his office certificate relative to creation of bonded indebtedness. Writ granted.

Tanner, Odell & Taft, of Los Angeles, for petitioner.

W. F. Cleary, of San Francisco, for respondent.

PER CURIAM. Petition for writ of mandate directing respondent, as secretary of

state, to file in his office a certificate relative to the creation of a proposed bonded indebtedness of the petitioner, a corporation.

It appears that the refusal of respondent to file such certificate was based solely upon the fact that the meeting of the board of directors of the petitioner called for the express purpose of acting upon the necessary preliminary resolution for the creation of the proposed bonded indebtedness was not held at the "principal place of business" of the petitioner, as designated in its articles of incorporation, but was held at the "office" of petitioner, as provided by its by-laws.

Section 319 of the Civil Code provides:

"The meetings of the stockholders and board of directors of a corporation must be held at its office or principal place of business."

It is therefore apparent that by the plain provisions of the statute the board of directors of the petitioner was authorized to hold its meetings at its office.

It is ordered that the writ issue as prayed.

---

197 Cal. 79

LESEM v. COLLIER, Judge. (L. A. 8735.)

(Supreme Court of California. Sept. 19, 1925.)

1. Exceptions, bill of ⚖53(5)—Court's refusal to settle bill of exceptions to order striking affidavits proper, where transcript raises same issue.

On motion for new trial by defendant, plaintiff's motion to strike defendant's affidavits as not filed in time was granted. Defendant appealed from a judgment denying new trial and applied for transcript under Code Civ. Proc. § 953a, and also prepared bill of exceptions to order of court striking affidavits. *Held*, refusal of court to settle bill of exceptions was not error, since petitioner had proceeded under alternative method provided in section 953a of requesting a transcript or preparing bill of exceptions, and the action of the court in striking affidavits was sufficiently raised by the transcript.

2. Appeal and error ⚖873(3)—On appeal from judgment, court may review any order on motion for new trial.

On appeal from a judgment, the court may review any order on motion for new trial under Code Civ. Proc. § 956, so that order striking affidavits in motion for new trial was presented for review on application for transcript including all matters and orders arising on motion for new trial.

In Banc.

Application by Johanna Lesem for writ of mandate to be directed to Frank C. Collier, Judge of the Superior Court of County of Los Angeles, to compel settlement of bill of exceptions. Writ denied.

J. L. Murphy, of Los Angeles, for petitioner.

Paul Barksdale D'Orr and G. A. McElroy, both of Los Angeles, for respondent.

PER CURIAM. Petitioner is seeking a writ of mandate to compel the respondent, as judge of one of the departments of the superior court of Los Angeles county, to settle a bill of exceptions. An action, entitled "Edith Terry v. Johanna Lesem et al.," was brought to trial in the court presided over by respondent, and findings and judgment in favor of the plaintiff and against this petitioner were duly made and entered. Petitioner thereupon served and filed her notice of intention to move for a new trial. Subsequently she applied to the court for an extension of time within which to prepare, serve, and file affidavits in support of the motion, and the court made and entered an order granting 30 days additional to the time allowed by law. Thereafter petitioner served the affidavits upon the attorneys for the plaintiff in action and upon her codefendant, and filed the same with the clerk of the court. The plaintiff in the action thereupon served on petitioner notice of the hearing of the motion for a new trial on the day fixed, and, at the same time, gave notice that on the hearing of the motion she would move the court for an order striking the defendant's affidavits from the files, on the ground that they were filed too late. On the day following, petitioner served on plaintiff and upon her codefendant a notice that she would bring her motion on for hearing on the day noted by plaintiff, and would then move the court for a new trial upon the minutes of the court, the records and proceedings in the action, and upon her affidavits then on file.

When the parties appeared in court on the hearing of the several motions, the plaintiff moved the court to strike the affidavits from the files upon the ground that the same were not served and filed within the time prescribed by law. The defendant, in opposition to the motion to strike from the files, introduced in evidence the order of the court granting her additional time within which to file the affidavits, together with an unqualified acknowledgment of service of the notice of the extension of time upon counsel for plaintiff. The court, however, made its order striking the affidavits from the files, and thereupon proceeded to hear the motion for a new trial. After such hearing, the motion for a new trial was denied.

The petitioner then filed notice of appeal to the Supreme Court from the judgment made and entered in the action, and in her notice asked for a review of the order refusing her a new trial. She also filed with the clerk of the court a request for a transcript of the pleadings, proceedings, and evidence

to be made up as a transcript on appeal under section 953a of the Code of Civil Procedure. In addition to the request for preparation of transcript, petitioner prepared a bill of exceptions containing the matters relating to the order of the court striking her affidavits from the files, which in due time she presented to the court for settlement. On the objection of the plaintiff in the action, the respondent refused to settle or sign the bill of exceptions on the ground that, as a transcript of the proceedings in the action had been required under section 953a of the Code of Civil Procedure, the defendant was in position to have presented to this court for its consideration all the proceedings relating to the motion for a new trial, including the action of the court in striking out the affidavits, without the necessity of the preparation of any additional bill of exceptions. Thereupon the defendant applied to this court for a writ of mandate to compel settlement and certification of the bill.

[1, 2] The action of the lower court in refusing to settle the bill of exceptions must be sustained. Petitioner is, of course, entitled to have the question of the correctness of the respondent's order striking her affidavits from the files in the proceedings on motion for a new trial considered by this court, and is entitled to have a record made up in order to properly present the question here; but, having elected to proceed under the alternative method, there was no necessity for the preparation or settlement of the bill of exceptions embodying the matters relating to the striking of her affidavits from the files. Upon an appeal from a judgment, the court may review any order on motion for a new trial. Code Civ. Proc., § 956. When any person desires to appeal from any judgment of the superior court to this court or any of the district courts of appeal, he may, in lieu of preparing and having settled a bill of exceptions, in order to present a record on appeal for the purpose of having reviewed any matter or order reviewable on such appeal, request that a transcript be made up, as provided in section 953a, Code of Civil Procedure. That section, in part, provides that if the judgment, order, or decree appealed from be not included in a judgment roll, the party desiring to appeal shall, on the filing of the notice of the clerk that the transcript is about to be presented to the judge for his approval, specify such of the pleadings, papers, records, and files in the action as he desires to have incorporated in the transcript, in addition to the matters required by the section, "and the same shall be included." It appears by the return made and filed herein that, on the refusal of the respondent to certify and sign the bill of exceptions, the petitioner did file with the clerk of the court the additional or amended notice and request for a further transcript to include the matters, papers, and orders arising, considered and made on the motion for a new trial. No doubt, therefore, the proper proceedings will be embodied in the transcript on appeal which the petitioner has requested to be prepared.

For these reasons, the petition for the writ of mandate must be denied, and it is so ordered.

---

197 Cal. 67

In re STEEHLER'S ESTATE.

STEEHLER et al. v. RILEY, State Controller.

(L. A. 8040.)

(Supreme Court of California. Sept. 16, 1925.)

Appeal and error ⟸1222—Courts ⟸80(5)—Provision inserted by clerk in remittitur, that appellant should recover costs of appeal in inheritance tax case contrary to statute, held error; the court rule not controlling the statute.

Under St. 1921, p. 1520, § 17, subd. 5, providing that no undertaking shall be required from, or costs charged against, state comptroller in inheritance tax proceedings, where judgment of reversal in inheritance tax case made no provision for costs, clerk's remittitur providing that appellants, taxpayers, recover costs of appeal was error, Supreme Court rule 23 not controlling as against statute, and on proper motion remittitur will be recalled and such provision stricken.

In Bank.

Appeal from Superior Court, Los Angeles County; Victor R. McLucas, Judge.

In the matter of the estate of William A. Steehler, deceased. On appeal of Rose H. Steehler and others from an order confirming the Inheritance Tax Appraiser's report and fixing the amount of tax to be paid by the deceased's widow, Ray L. Riley, as State Controller, appearing as respondent, the order was affirmed in part, and reversed in part, with directions (233 P. 972). On motion to recall the remittitur and strike from it a provision as to payment of costs of appeal. Motion granted, and remittitur recalled, corrected, and reissued.

Hunsaker, Britt & Cosgrove, of Los Angeles (John N. Cramer, of Los Angeles, of counsel), for appellants.

Ralph W. Smith, State Inheritance Tax Atty., and Wesley E. Marten, Asst. State Inheritance Tax Atty., both of Sacramento (Erwin P. Werner, Adrian C. Stanton, George S. Dennison, and Ida V. Wells, all of Los Angeles, of counsel), for respondent.

PER CURIAM. This was an inheritance tax case. The decision of this court in reversing the judgment made no provision for

the recovery of costs. The clerk, however, issued a remittitur containing the provision, "the appellants to recover costs of appeal." The present motion is to recall the remittitur and to strike from it the last-named provision. The motion is therefore limited to the question as to whether or not the costs on appeal were recoverable against this respondent. The Inheritance Tax Statute (Stats. 1921, p. 1520), § 17, subd. 5, provides, with reference to the state controller, that no undertaking shall "be required from or costs charged against the state controller * * * in any such proceeding." The statute was read into our decision and was a part of it. Rule 23 of this court could not, of course, prevail as against the statute. It follows, therefore, that the insertion of the words "appellants to recover costs of appeal" was in violation of the statute, was no part of our judgment, and was an inadvertence on the part of the clerk. The cases cited are not out of harmony touching this subject. The case of Petersen v. Civil Service Board (Cal. App.) 230 P. 196, was a case to which the rule of this court upon the subject of costs was properly applicable. The action of the clerk, therefore, in that case, was in conformity with our judgment and our rule, and it followed that the motion to recall the remittitur some time after the remittitur had been issued, for the purpose in reality of amending our judgment, could not prevail. Judge Knight's decision in that regard was correct, but that case has no application to the case before us. The case of San Joaquin & Kings River Canal & Irrigation Co. v. Stevinson, 165 Cal. 540, 132 P. 1021, is directly in point, and points out the procedure to be followed in such cases by this court.

The motion is granted. The remittitur is recalled for the purpose of striking therefrom the provision, "the appellant to recover costs on appeal," and as corrected is ordered to issue forthwith.

---

197 Cal. 50

LA MESA, LEMON GROVE & SPRING VALLEY IRR. DIST. v. HALLEY et al.
(S. F. 11502.)

(Supreme Court of California. Sept. 14, 1925.)

1. Waters and water courses ⟸228—Powers of districts organized under Irrigation District Act not confined to precise terms of law in force at time of organization.

General powers of irrigation districts, or methods of their management and conduct, or method or manner of issuing bonds to carry on work of district or fulfilling purpose of their organizations, are not to be limited, nor people or property owners within same confined, to precise terms of statute in force at time of organization.

2. Waters and water courses ⟸224—Principles applicable to municipal corporations applicable to irrigation districts.

Because of close similarity between irrigation districts and municipal corporations, general principles applicable to one are applicable to the other.

3. Constitutional law ⟸127—Neither charter of municipal corporation nor act regulating use of its property held for governmental purpose is a "contract" within federal Constitution.

So far as a municipality is an agency of government, it has no rights or powers, which, as between it and the state, the Legislature may not modify or abrogate at pleasure, neither its charter nor act regulating use of property held for governmental or public purposes being a "contract" within meaning of the federal Constitution.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Contract.]

4. Constitutional law ⟸93(1)—Legislature cannot divest rights acquired and vested under prior state of law.

Manner and method of levying and collecting assessments for payment of principal and interest on bonds of irrigation districts and fixation and collection of tolls and charges for use of water are matters which Legislature may change and adjust at will until private rights have been acquired and vested under prior state of law.

5. Waters and water courses ⟸230(4)—Finding of directors bonds were not necessary to be sold for irrigation district need not be in writing.

In view of Irrigation District Act, § 106, finding of directors, on which order for destruction of unsold bonds was predicated, that bonds authorized by irrigation district were not necessary to be sold need not be in writing, unless statute so expressly requires.

6. Waters and water courses ⟸230(4)—Irrigation district authorized to destroy unissued bonds.

When bonds were voted for construction of ditch system for irrigation district, and partially devoted to such purpose, and when plans became impractical and were abandoned, and when district has supplied itself with another ditch system, it may destroy unissued remainder of such bonds under Irrigation District Act, §§ 106, 107, 108.

7. Waters and water courses ⟸230(1)—No substantial rights affected by irregularities in irrigation district election on question of destroying unissued bonds.

In view of Irrigation District Act, §§ 30, 71, 106, 107, where, at election to determine question of destroying unissued bond of irrigation district, electors voted unanimously in favor thereof, no substantial rights of district or property owners nor electors therein were affected by alleged irregularities in calling or holding of election or in destroying bonds.

8. Waters and water courses ⟹254—Agreement to supply water outside irrigation district held not to invalidate option to purchase system.

Contention that irrigation district's agreement to supply water outside district rendered option agreement to purchase water system void *held* without merit.

In Bank.

Mandamus by the La Mesa, Lemon Grove & Spring Valley Irrigation District against John H. Halley, President of its Board of Directors, and another as its Secretary. Peremptory writ to issue.

See, also, 235 P. 999.

Crouch & Sanders, of San Diego, for petitioner.

Sweet, Stearns & Forward, of San Diego, for respondents.

Flint & MacKay and Arthur R. Smiley, all of Los Angeles, amici curiæ.

RICHARDS, J. The petitioner herein seeks a writ of mandate directed to the respondents herein in their capacity, respectively, of president and secretary of the petitioner, an irrigation district, commanding the said respondents in their foregoing capacity to forthwith sign and attest certain bonds and coupons of said irrigation district as designated in its said application for said writ. The facts set forth in said application as the basis thereof substantially show that the petitioner is, and for some period prior to the filing of said application was, an irrigation district duly organized and existing as such under the laws of the state of California, and that the respondents were and are the duly elected, qualified, and acting officers thereof; that on April 5, 1924, one Ed Fletcher, sole surviving partner of a certain copartnership doing business under the firm name and style of the Cuyamaca Water Company, gave to the petitioner herein an option to purchase a certain water system then and theretofore owned by said copartnership on and along the San Diego river in the county of San Diego, state of California, for the sum of $1,100,000; that the petitioner duly accepted said option, and thereafter, and by an order of the board of directors of said petitioner, duly authorized and taken pursuant to a petition of the requisite number of the qualified electors within said irrigation district requesting the same, a special election was called, to be held within said irrigation district on the 7th day of November, 1924, at which election there was to be submitted to the electors of said district the question as to whether or not bonds of said district should be issued in the sum of $2,500,000 in par value for the purpose of acquiring said water system of said Cuyamaca Water Company, and also of acquiring waters, water rights, reservoir sites, and other property for the use and purposes of said district in order to enable it to carry out and comply with the provisions of the California Irrigation District Act (St. 1897, p. 254) under which it was organized, and any other act supplementary thereto authorizing such districts to acquire property and construct works. That said election was thereafter duly and regularly held on the 7th day of November, 1924, at which said election a majority of the said qualified electors of said district voted in favor of the issuance of such bonds. Copies of said order and call of said bond election and of the notice thereof and of the propositions submitted thereat and of the vote of the electors of said district voting at said election and of the canvass showing the result thereof are attached as exhibits to said application. That thereafter, and on November 10, 1924, the board of directors of said district, by resolution duly passed and adopted, provided and directed that in conformity with the Constitution and laws of the state of California and of the proceedings theretofore had and taken by said district, and pursuant to the said bond election thus held in conformity therewith, a bonded indebtedness of said district be created in the principal sum of $2,500,000, and that in evidence thereof bonds of said district be issued in and to the extent of said sum consisting of 2,500 bonds of the denomination of $1,000 each, and in the form specified by law. That thereafter the said board of directors of said district, pursuant to the proceedings theretofore had, caused 2,500 bonds of said district in said amount and in due form to be prepared and presented to the respondents herein as the president and secretary, respectively, of said irrigation district for their, and each of their, respective signatures and attestation, and requested said officials to so sign and attest the same and the interest coupons attached thereto, but that the said respondents, as said officials of said district, respectively have refused and continued to refuse to sign or attest said bonds or any of them or the interest coupons attached thereto or any of them. Following these averments the petitioner presents certain alleged urgent reasons for the presentation of its said application to this court, and prays for the issuance of said writ. The petitioner herein did not in its said application undertake to set forth or enlighten this court as to the reasons proffered by the respondents herein for their and each of their refusal to sign and attest said bonds, but, notwithstanding the defect in their said application in that regard, an alternative writ of mandate was issued and made returnable before this court at a later date. In response to said alternative writ of mandate the respondents herein appeared and presented their and each of their return to said writ, wherein they purported to set forth fully the facts and reasons upon which their and each of their refusal to sign

and attest said bonds was predicated, and by so doing eked out the deficiencies of the petitioner's application in that regard. In their said return to said writ the respondents set forth the fact that the petitioner was organized on the 1st day of November, 1913, under the provisions of an act of the Legislature approved March 31, 1897, providing for the organization of irrigation districts and under the various acts amendatory thereof up to and including the date of its said organization. That under the terms of said prior acts certain provisions and requirements were specified relating to the vote of the qualified electors within the boundaries of each irrigation district, whereby its organization was to be accomplished and the benefits and burdens attendant upon and following such organization were defined. The respondents aver that by virtue of such organization of said irrigation district, under the terms of said original and amendatory acts of the Legislature as they existed at the date thereof, a contract was created by operation of law between the state of California and the persons whose property was affected by the creation and organization of said irrigation district, under the terms and conditions of which the property owners of said district consented to the imposition upon themselves and their lands of such burdens in the way of bond issues as were to be resolved upon, voted, and issued in the manner provided by the aforesaid acts of the Legislature as the same existed at the date of the said organization of said irrigation district, and not otherwise. The respondents proceed to aver that, since the organization of said district, the Legislature has adopted various acts amendatory of the aforesaid acts in existence at the time of the formation of said district, by the terms of which numerous changes have been made in the manner and method by which irrigation districts may issue bonds; and particularly has changed the provisions of section 30 of said original act in the respect that said original section provided that, as a prerequisite to the calling of a special election to determine the question as to whether or not bonds should issue, a petition by a majority of the holders of title representing a majority in value of the lands in said district according to the equalized assessment roll thereof was required; whereas, by the change or changes made in said original section by said subsequent acts or amendments thereof, a petition signed by 500 electors residing within said district and including the holders of title representing 20 per cent. in value of said lands instead of a majority in value thereof, as provided in said former act, was required. In addition to this alleged radical change in this particular section of the law as it read at the date of the organization of said district, the respondents set forth numerous other changes in the law affecting the issuance of bonds within such districts and also affecting the manner and method of the sale of such bonds and the provisions to be made for the payment thereof. The respondents also point out other changes effected by said subsequent legislation relating to the working methods of such irrigation districts differing materially from those contemplated by said prior acts in force at the time of the organization of said district, all of which the respondents aver were effected without the consent or knowledge of the landowners within said district, and all of which were in violation of the aforesaid contract alleged to have been created between the state of California and the said landowners of said district by the organization of said district under such pre-existing laws. The respondents further aver that the bonds of said district which were voted to be issued as alleged in the petition herein, were purported to be voted for and authorized under such later statutes and under the changed terms and conditions created thereby, and hence have been voted for, authorized, and attempted to be issued in violation of said contract, and are void, and that therefore the respondents have acted properly in their refusal to sign or attest said bonds or the coupons attached thereto, for the additional reason that said later enacted laws, under which said bonds have been attempted to be voted for and issued, are not only in violation of said contract, but are also in violation of the provisions of the federal Constitution, which prohibit any state from enacting laws impairing the obligations of contracts; and also of the provisions of said Constitution and of the state Constitution forbidding the taking of private property without due process of law.

The respondents set forth in their return as another and further reason why they and each of them were and are justified in their refusal to sign and attest said bonds the following facts: They aver that theretofore, and on the 14th day of May, 1914, an election was duly and regularly called and held within said irrigation district at which there was submitted to the qualified electors thereof the question as to whether bonds of said district to the amount of $1,232,500 should be issued for the purpose of acquiring water, water rights, and other property, constructing necessary irrigation canals and works, and otherwise carrying out the purposes of said district and the provisions of the act under which the same was organized. That said election was called and held, and said proposed bond issue submitted to said electors of said district under a certain plan prepared by the hydraulic engineer of said district, and which contemplated the utilization of a certain underground storage basin lying at the lower end of El Cajon Valley in the county of San Diego by sinking wells and by the installation of pumping plants at said point; and also contemplated the building of a dam and the creation of a storage reservoir in the gravel beds of said region at a sufficient eleva-

tion to enable the consumers of water within said district to be supplied with gravity water. That said election was called and held in the manner provided by section 30 of the Irrigation District Act, as the same stood at the time of such election, and resulted in the favorable vote of the requisite number of the electors of said district upon the issuance of said bonds. That thereafter, and pursuant to said election, the board of directors of said district caused bonds of said district in said amount of $1,232,500 to be prepared and signed by the proper officers thereof, and that thereafter there were sold and disposed of during the years 1914, 1915, and 1916 of said bonds the amount of $66,000 in par value thereof and no more, which latter amount of said bonds, with the exception of $10,000 in par value thereof redeemed by said district, are now outstanding in the hands of bona fide purchasers thereof. That the proceeds of said bonds so sold and disposed of were used by said district for the purpose of carrying out the plans and work provided for in the said engineer's report, but that the remainder of said authorized issue of such bonds amounting to the sum of $1,166,500 in par value thereof remained in the custody of said district available for the uses for which the same were voted, but not availed of by their sale or disposition therefor. That thereafter, and while said bonds so remained unsold and undisposed of by said district, the board of directors of said district, purporting to act under sections 106, 107, and 108 of said Irrigation Act, called and held an election of the qualified electors of said district for the purpose of the election of directors thereat, and also for the purpose of voting upon a proposition to destroy all of said remaining unsold bonds. The respondents proceed to set forth a number of respects in which said election was irregular and not in conformity with law, and then proceed to aver that at said election the votes of the qualified electors voting thereat were unanimously in favor of the destruction of said bonds; and that thereafter and pursuant to said election and on the 7th and 8th days of March, 1923, the directors of said district destroyed said unissued bonds. The respondents aver that said proceedings for the destruction of said bonds, and which were consummated in the destruction thereof, were wholly irregular, insufficient, and void, and without authorization by the voters of said district, but that the same was accomplished at a time when the directors of said district had abandoned the plan of water development set forth in the report of the said hydraulic engineer of said district, upon the basis of which said first bond election had been called, and had for some years previous thereto been and then were purchasing water for the use of the inhabitants of said district from the Cuyamaca Water Company. The respondents aver that these bonds are still existing and valid obligations of the district, notwithstanding their attempted revocation and destruction, and that as such the sum represented in their par value is still available for the purposes for which the new bond issue has been voted, and hence that the issuance of said new bonds was unnecessary, and for that reason improper, and that respondents were and are justified in their refusal to sign and attest the same.

The respondents, as a further return to said alternative writ and additional reason for their refusal to comply with its mandate, allege that the option referred to in the petitioner's application providing for the purchase of the Cuyamaca Water Company's system to be paid for through the issue and sale of the bonds in question contains a provision by the terms and agreements of which the petitioner, if such option is exercised, is to sell and transmit to the Cuyamaca Water Company water at the fixed rate of 9 cents per 1,000 gallons to be used in furnishing water for domestic uses to the inhabitants of the city of East San Diego and certain other communities lying outside of the boundaries of said irrigation district; and this, the respondents aver, the district has no legal authority to do or agree to do, and hence said option is in that regard ultra vires and void as beyond the power of said irrigation district to perform, and hence that the portion of said bond issue providing the amount of money necessary for the exercise of said option and the fulfillment of the terms and conditions thereof would be illegal and the bonds issued and to be sold therefore void. Wherefore the respondents pray that the alternative writ issued herein be dismissed and the permanent writ sought herein be denied.

[1] To the foregoing return of the respondents herein the petitioner rests its response upon a demurrer, and by so doing admits the averments of fact embraced therein. We shall therefore take up the legal questions involved in the application for said writ and the response thereto in the order of their presentation. The first contention of the respondents herein is that, since the petitioner herein was organized as an irrigation district in the year 1913 by a vote of the electors therein acting under the provisions of the irrigation district act of 1897 and the acts amendatory thereto in existence at the date of its said organization, the organization of said district by that means thereunder constituted a contract between the state and the individual property owners, who as such electors voted to thus create said irrigation district, the obligations of which could not be changed or impaired by subsequent legislation. In making this contention the respondents chiefly rely upon the case of Merchants' Nat. Bank of San Diego v. Escondido Irrigation District, 144 Cal. 329, 77 P. 937. That was a case wherein the plaintiff was the trustee in two deeds of trust executed by the

directors of the defendant, an irrigation district, as security for two series of bond issues, and which purported to convey to the trustee the whole water system of the district as well as all of the other properties thereof. This trust deed was given under the supposed authority of section 17 of the Wright Act, as amended March 11, 1893 (Stats. 1893, p. 175). The original act under which the said irrigation district was organized contained no such grant of powers to the directors of such districts, their powers thereunder being expressly confined to the issuance of bonds payable out of revenues derivable from annual assessments upon the real property within the district. Stats. 1887, pp. 29–45. The court held the provision in said original act thus limiting the powers of the board of directors of such corporation was in the nature of a contract between the state and the individual property owners of said district who had organized it pursuant to its limitations upon the powers of directors and which could not be changed by said subsequent legislation so as to lay the particular liability and burden upon their property. While the conclusion was, we think, correct as applied to the facts of that particular case, it is being attempted by the respondents herein to give to its language an application far beyond the intendment of the court in that decision. It was not our intention in that case to hold that, as to the general powers of irrigation districts, or as to the methods of their management and conduct, or as to the method or manner of issuing bonds for the purpose of carrying on the work of said districts or fulfilling the purposes of their organization, such districts were to be limited or the people or property owners within the same confined to the precise terms of the statutes in force at the time of the organization thereof. Indeed, in later cases, and with respect to public agencies and utilities of the same general character as irrigation districts, the courts of this state have laid down a different rule. In the case of Spurrier v. Neumiller, 37 Cal. App. 683, 174 P. 338, the question involved was that of the power of the Legislature to amend the Reclamation District Act (St. 1911, p. 639) so as to change the method of collecting assessments from that existing under the statutes in force at the time of the organization of the district, and to otherwise alter the procedure incident to the operation thereof. The court in that case adopted the broad principle enunciated by the Supreme Court of the United States in the case of Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 24 S. Ct. 107, 48 L. Ed. 229, wherein it was stated that—

"The broad ground in a case like this is that, in view of the subject-matter, the Legislature is not making promises, but framing a scheme of public revenue and public improvement. In announcing its policy and providing for carrying it out it may open a chance for benefits to those who comply with its conditions, but it does not address them, and therefore it makes no promise to them. It simply indicates a course of conduct to be pursued, until circumstances or its views of policy change. It would be quite intolerable if parties not expressly addressed were to be allowed to set up a contract on the strength of their interest in and action on the faith of a statute, merely because their interest was obvious and their action likely, on the face of the law."

In the case of Fallbrook Irrigation District v. Bradley, 164 U. S. 112, 17 S. Ct. 56, 41 L. Ed. 369, the Supreme Court of the United States further declared that—

"The formation of irrigation districts is accomplished by proceedings so closely analogous to those prescribed for the formation of swamp-land reclamation districts that the decisions with respect to the latter are authority as to the former."

[2, 3] The close similarity between those public or state agencies, which are denominated irrigation districts, and those other, and to a larger degree similarly empowered and conducted, public or state agencies, which are denominated municipal corporations, being thus established and declared, the general principles which are applicable to the one should also be susceptible of application to the other; and these general principles, in so far as they have relation to the legislative control over the organization, management, conduct, and manner and method of creating and of liquidating their obligations, have so frequently been expounded as to render any extended comment upon the many cases defining and applying the same unnecessary in relation to the instant case. These general principles have been thus broadly and tersely stated in 6 Ruling Case Law, at section 337 thereof, under the title Constitutional Law, as follows:

"In determining whether a statute affecting a municipal corporation operates as an impairment of the obligation of a contract, regard must be had to the distinction between the rights of such a corporation in its public or governmental capacity and its private rights. So far as a municipality is an agency of government, it has no rights or powers which, as between it and the state, the legislature may not modify or abrogate at pleasure. Neither the charter of a municipal corporation, nor any legislative act regulating the use of property held by it for governmental or public purposes, is a contract within the meaning of the federal constitution," citing many cases.

[4] In so far as any language employed in the case of Merchants' National Bank, etc., v. Escondido, etc., supra, would seem to be in conflict with these later authorities, it must be deemed to be overruled. The respondents herein, however, make the contention that this court, in the recent case of Peery v. City of Los Angeles, 187 Cal. 753, 203 P. 992, 19 A. L. R. 1044, has approved in its broadest application the doctrine which

the respondents insist was declared in that decision; but an examination of the later case will disclose that the doctrine that the Legislature may not change the law governing the issue and terms of disposition of bonds by cities was given application to a condition wherein certain bonds of the city of Los Angeles had already been voted and issued prior to the making of a change in the law permitting such bonds to be disposed of below par in contravention of the terms of the law in existence at the time of the election, whereby the electors voted to issue and sell the bonds of the city at par and not otherwise. It is clear that no such question is presented in the instant case, and nothing said therein can be interpreted as warranting the application of the doctrine applicable to the particular facts of the earlier case to the situation presented in the case at bar. There are certain particular contentions urged by the respondents in their assault upon the subsequent legislation as affecting an irrigation district coming into being under an earlier state of the law, as, for example, the respondents aver that the law was changed as to the amount in value of land to be represented by the electors voting upon the question as to the issuance of bonds, and that such change in the law constituted a violation of the alleged contract between the owners of such lands and the state created in the organization of said districts under the earlier state of the law. In the case of In re Madera Irrigation District, 92 Cal. 296, 320, 28 P. 272, 675, 14 L. R. A. 755, 27 Am. St. Rep. 106, it was, however, held that the question as to the proportion of land to be held by those imposing by their vote a burden upon the owners of the lands within the district was a matter purely addressed to the discretion of the Legislature in the first instance; and, if so, then the change in the law in that regard would be, as was said in that case, "but an incident and not of the essence of the matter," and the same may be said of the various other changes in the law having relation to the manner and method of levying and collecting assessments for the payment of the principal and interest of the bonds of the district and of the fixation and collection of tolls and charges for the use of the water thereof. These are all matters which the Legislature may change and adjust at will with relation to these public agencies, at least until such time as definite private rights have been acquired and become vested under a prior state of the law. None such have thus far been shown to exist in so far as this first contention of the respondents is concerned and we are therefore of the opinion that there is no merit in their said contention.

[5] The second contention which the respondents make is based upon the showing made in their said return to the alternative writ issued herein to the effect that there had been a prior issue of bonds voted for by said district to the amount in par value of $1,232,500, of which but $66,000 worth in par value had actually been issued and sold, and that as to said unissued bonds the electors of the district had voted to revoke and destroy the same under the provisions of sections 106, 107, and 108 of the Irrigation District Act, but which vote and the election at which the same was authorized was for certain reasons assigned by the respondents irregular and void, and hence said unissued bonds have continued to be and are validly voted and existing bonds of said district and available as such for sale and for the application of their proceeds to the purposes for which the present bond issue is sought, and hence that such present bond issue is unnecessary and the respondents are therefore justified in their refusal to sign and attest said bonds presently sought to be issued and sold. Section 106 of the Irrigation District Act (Stats. 1897, pp. 254–286) provides as follows:

"Whenever there remains in the hands of the board of directors of any irrigation district heretofore organized, or organized under the provisions of this Act, after the completion of its ditch system, and the payment of all demands against such district, any bonds voted to be issued by said district, but not sold, and not necessary to be sold for the raising of funds for the use of such district, said board of directors may call a special election for the purpose of voting upon a proposition to destroy said unsold bonds, or so many of them as may be deemed best, or may submit such proposition at a general election."

It would seem from a reading of this section of said act that, as a prerequisite to the exercise of the power given to the board of directors of an irrigation district to call an election for the purpose of voting upon a proposition to destroy unsold bonds, the said board of directors must have made a finding to the fact of the "completion of its ditch system and the payment of all demands against such district," and also that the bonds voted to be issued by said district, but not sold, were "not necessary to be sold for the use of said district." Upon the hearing had upon the return on the alternative writ issued herein it was stipulated that the board of directors did in fact make an oral finding as to the foregoing facts at the time of the issuance of its call for said election. It is the contention of the respondents, first, that said oral findings would not be sufficient; and, second, that such findings, even if sufficient in form, would not be in accord with the facts. As to the first of these contentions it has been decided that the findings of bodies of this character as to the existence of particular facts upon which their orders are to be predicated need not be in writing, unless the statute so expressly requires. Chase v. Trout, 146 Cal. 350–356,

80 P. 81. As to the second of said contentions, if we are to assume that the said findings of the board of directors would not, in the absence of fraud, be conclusive upon these respondents as the merely administrative officials of the district, and this we do not decide, it seems clear to us that the respondents herein have alleged themselves out of court, since it affirmatively appears upon the face of their said return that the original bond issue was voted for the purpose, in a large part at least, for the development of a water system according to plans of the then engineer of the district, and that the said irrigation district, after the expenditure of the sum of $66,000 of the money derived from the sale of a corresponding portion of the said first bond issue for the purposes and in furtherance of the project for which said bonds were thus voted, definitely abandoned the same, for the reason that such plans for the provision of a water and ditch system proved to be impractical, and proceeded to provide a water and ditch system for the uses of said district from other sources and to supply the same to the inhabitants thereof for irrigation and domestic uses through a distributing system owned and maintained by the Cuyamaca Water Company under a contract for the acquisition and distribution of said water with the latter. It thus appears that, while the plans for a water supply and ditch system for the development of which said earlier issue of bonds was voted had been long since abandoned as apparently impractical, the said irrigation district did in fact have a complete water and ditch system for the distribution and use of water at the date when it was so found by the board of directors thereof and when said board directed that an election be called and held for the purpose of voting upon the question of the revocation and destruction of said bonds. These affirmative averments on the part of the respondents place the matter in a position wherein we are disposed to hold that the findings of the board to the effect that the ditch system of the district had so far reached completion that the bonds formerly voted to be issued by the district, but not sold, were no longer necessary to be sold for the raising of money for use of said district for the purposes for which such unused bonds had been voted cannot be held by us to be contrary to the fact. It would thus sufficiently appear that the purposes for which such bonds were issued, in so far as practical, had been subserved, and that said bonds under the plans for the carrying into effect of which they had been voted could not be made available for the later developed purposes for which the new issue of bonds was to be required.

[6] It would be altogether too narrow an interpretation of section 106 of the Irrigation District Act to hold that, when bonds have been voted for the construction of a ditch system for an irrigation district, and have been partially devoted to that purpose, and when the plans for such construction have been found to be impractical and have been abandoned, and when the district has by contract or otherwise provided itself and its inhabitants with another and complete ditch system, it may not in good faith revoke and destroy its unissued remainder of such bonds by acting in accordance with the procedure outlined in sections 106, 107, and 108 of the Irrigation District Act. With regard to the averments of the respondents' return to the effect that the election ordered and held in said district in attempted conformity with these sections of said act was irregular in certain designated respects, it was stipulated at the hearing upon the return to said alternative writ that the said election was called and held in substantial compliance with the provisions of sections 107 and 108 of said act. It seems to be conceded, however, that there were certain irregularities in the conduct of said election, as, for instance, that the notice of said election did not contain a number of the matters required to be set forth therein by the terms of section 107 of the act; and also that the proposition as printed on the ballot was not precisely in the form prescribed by said section. If, however, the board of directors of the district had, as we have interpreted its stipulated findings, properly determined that the basic facts for the calling and holding of such an election existed, it had acquired jurisdiction to call and hold the same; and, this being so, and said section 107 having provided that "such election shall be held in the same manner as other elections held under the provisions of this act," it would seem to follow that whatever departures there may have been from the precise directions of said section would constitute mere irregularities in the calling and conduct of the same. By reference to section 30 of said act which provides the procedure for calling and holding bond elections, we find practically the same procedure as that provided for in section 107 of the act. By the terms of section 30 of said act it is provided that—

"No informalities in conducting such election shall invalidate the same, if the election shall have been otherwise fairly conducted."

By the terms of section 71 of said act, which has reference to the institution and trial of actions contesting the validity of bond elections, it is provided that—

"The court hearing any of the contests herein provided for, in inquiring into the regularity, legality, or correctness of such proceedings, must disregard any error, irregularity, or omission which does not affect the substantial rights of the parties to said action or procéeding."

The foregoing sections of said act received the careful consideration of this court in the

case of Imperial Land Co. v. Imperial Irrigation District, 173 Cal. 660, 161 P. 113, and were therein held to be adequate to foreclose an attack upon a proceeding based upon mere irregularities or upon a failure to comply with statutory requirements which the Legislature might in the first instance have failed to enact.

[7] It is therefore evident, both from the absence of any averment or showing of the respondents to the contrary, but also from their stipulation, as well as from the fact that at said election the electors who voted thereat voted unanimously in favor of the destruction of said bonds, that no substantial rights of the said district or of the property owners or electors thereof were injuriously affected by any of the alleged irregularities in the calling or holding of said election or by the destruction of said bonds which was effectuated as a result thereof.

[8] The final contention which the respondents make is that the provision in the option agreement by which the water supply and ditch system of the Cuyamaca Water Company is to be acquired through the medium of the recently voted bond issue, to the effect that the district, if such option is exercised, is to sell to the said company a sufficient quantity of water to enable it to supply water to certain regions outside of the boundaries of the irrigation district, is a void provision, and hence that the entire option is void, and thus forms no sufficient basis for the issuance of the bonds in question, and that they are therefore justified in refusing to sign or attest the same. This contention has no merit. Hewitt v. Pleasant Valley Irrigation Dist., 124 Cal. 186, 56 P. 893; South Pasadena v. Pasadena Land & Water Co., 152 Cal. 579, 93 P. 490; Byington v. Sacramento Valley, etc., Co., 170 Cal. 124, 148 P. 791.

It is our conclusion from the foregoing considerations that the respondents herein have failed to show any sufficient justification for their and each of their failure and refusal to sign and attest the bonds in question and the coupons attached thereto, and that the peremptory writ should issue as prayed for. It is so ordered.

We concur: LAWLOR, J.: SHENK, J.; SEAWELL, J.; LENNON, J.; and WASTE, J.

197 Cal. 70

SHEEHAN v. BOARD OF POLICE COM'RS OF CITY AND COUNTY OF SAN FRANCISCO. (S. F. 11574.)

(Supreme Court of California. Sept. 19, 1925. Rehearing Denied Oct. 19, 1925.)

1. Municipal corporations ⊜187—Determination of board of police commissioners whether disability of pensioned officer has ceased has no legal effect.

San Francisco Charter, art. 8, c. 10, § 3, relating to police pensions, gives board of police commissioners, sitting as trustees of pension fund, power to determine in first instance whether disability of officer pensioned has ceased, but such determination is only an indication of board's course of action and has no legal effect whatever.

2. Municipal corporations ⊜187 — Pensioned policeman entitled to judicial determination of question whether disability ceased.

Under San Francisco charter, relative to police pensions, a policeman has a vested right to retain place on retired list and have pension continue until disabilities have ceased, and is entitled to a judicial determination by a competent court of facts upon which it is claimed right has ceased.

3. Municipal corporations ⊜187 — Pensioned policeman's conduct to board of police commissioners held not contemptuous.

In mandamus to prevent removal from pension list, unassailed finding that petitioner objected to jurisdiction of board of police commissioners and refused to be examined, unless his doctor was present, *held* not to show that petitioner's conduct was contemptuous.

4. Mandamus ⊜13—Pensioned policeman need not exhaust remedies within police department to prevent removal from pension list before appeal to courts.

In mandamus to prevent removal from pension list, petitioner need not exhaust remedies within police department before appeal to courts, board of police commissioners having no judicial authority.

5. Appeal and error ⊜1050(1)—Evidence ⊜571(1)—Testimony of physician, as to competency of disabled policeman to do police duty, entitled to some weight, and not prejudicial, where other testimony of physical condition.

In an action to determine whether disabilities of pensioned policeman had ceased, testimony of a skilled physician, who had attended him as to his competency to perform police duty, was entitled to some weight, and was not prejudicial to defendants, where physician's testimony was not the only evidence before the court of policeman's physical condition.

6. Municipal corporations ⊜181 — Board of police commissioners in pension hearings have only ministerial powers.

Board of police commissioners under San Francisco charter, relating to police pensions, when acting to determine whether disability of officer has ceased, so as to require his removal from pension list, have only ministerial powers and no judicial powers.

7. Municipal corporations ⊜187—Charge of policeman's "insubordination" held without foundation.

Since board of police commissioners was without jurisdiction to judicially determine whether disability of pensioned policeman had ceased, charge of "insubordination" in such proceedings was without foundation, such charge requiring refusal to obey some order which superior officer is entitled to give and entitled to have obeyed.

[Ed. Note.—For other definitions, see Words and Phrases, Second Series, Insubordination.]

In Bank.

Appeal from Superior Court, City and County of San Francisco; James M. Troutt, Judge.

Petition by James F. Sheehan against the Board of Police Commissioners of the City and County of San Francisco, for writs of mandate to compel defendants to refrain from declaring his disability terminated, and restoring him to duty as a police officer. From a judgment granting the writs, defendants appeal. Affirmed.

See, also, 188 Cal. 525, 206 P. 70.

Rehearing denied; SEAWELL and SHENK, JJ., dissenting.

George Lull, City Atty., and Charles S. Perry, Asst. City Atty., both of San Francisco, for appellants.

Chas. J. Heggerty and Peter F. Dunne, both of San Francisco, for respondent.

HOUSER, Justice pro tem. A petition for hearing of the appeal herein, after a decision thereon by Division 1 of the First Appellate District of the District Court of Appeal, was granted by this court. Further consideration of the questions presented by the appellants and the petitioners has led to the conclusion that that part of the opinion of the District Court of Appeal, as prepared by Mr. Justice

St. Sure of that court (hereinafter quoted), correctly expresses, in all essential particulars, the views of this court with reference thereto. It is as follows:

"Petitioner obtained writs of mandate and prohibition against defendants, as the board of police commissioners of the city and county of San Francisco, and as the board of police relief and pension fund commissioners of the police department of said city and county, and also against the members of said board of police commissioners, also against said members as trustees of the police relief and pension fund. It was decreed that the action taken by defendants as trustees of the police relief and pension fund, and as a board of police pension fund commissioners, finding that the disability of petitioner had ceased, and that his pension shall cease; that he be removed from the pension roll; that he be restored to service and report to the 'acting chief of police' for active duty, were a deprivation of petitioner's vested right, and were void. And it was further decreed that the findings be set aside; that petitioner be restored to the pension roll, and that the pension to which he is entitled be paid to him; that petitioner recover his costs in the sum of $11.50, and for damages sustained by him in being deprived of the payment of his pension from November 15, 1920, he be allowed legal interest on the amount of the pension due and to become due until the same be paid to him. The judgment directed that a peremptory writ of mandate issue requiring defendants to perform the matters decreed. It was also adjudged that defendants be prohibited from proceeding to hear the charge now pending before them for insubordination, or any charge against petitioner based upon the alleged claim that the disability of petitioner had ceased. Defendants appeal from the judgment.

"Petitioner was appointed a member of the police department September 20, 1895, with rank of patrolman. On August 1, 1899, he became physically disabled while in the performance of duty. While breaking a horse to saddle for the police department the horse shied, reared, and fell backward and upon petitioner, who received injuries about the head and body resulting in total deafness in the right ear and injuries to his brain which superinduced epileptic convulsions. He was retired on a pension of $50 per month to be paid during his life and to cease on his death. The San Francisco charter (article 8, c. 10, § 3) provides that in case his disability shall cease his pension shall cease. In January, 1904, petitioner was arbitrarily removed from the pension roll and was ordered to report for active duty, failing which he was dismissed from the police department. Litigation to annul such proceedings was then commenced and was finally terminated by the decision of this court June 3, 1920. See Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, 190 P. 51, and its companion case, 47 Cal. App. 793, 190 P. 55. The remittitur was certified to the clerk of the court below, and on July 6, 1920, the defendants were served with the peremptory writ of mandate. Defendants met as the board of pension fund commissioners on that date, spread the writ on the minutes, restored petitioner to the pension roll in accordance with the writ, and immediately adopted a resolution ordering him to appear before two physicians of the pension board 'for examination as to whether the physical disability upon which he was retired on October 6, 1903, has ceased.' He was excused from appearing on this occasion, but later he was directed to appear before the board on September 27, 'for the purpose of enabling the board to determine whether or not the disability, because of which he was retired on pension, has ceased, and whether or not he should be restored to service in the rank occupied by him at the time of his retirement.' The matter was continued by consent from time to time until November 15, 1920, when petitioner appeared before the board, and certain proceedings were had to be hereinafter mentioned.

"Petitioner applied to the superior court for a writ of mandate, and also for a writ of prohibition. After issue joined, trial was had with the result noted in the first paragraph of this opinion.

"Defendants contend that this case is a direct challenge of the power of the board of police commissioners to try a member of the department, and say that two simple questions are presented for decision as follows:

" '1. Does the charter of San Francisco give the power to the board of police commissioners, sitting as trustees of the compensation fund, to determine in the first instance whether or not a pensioner's disability has ceased?

" '2. Can a police officer, charged with an offense against the rules of the department, openly defy the board, refuse to be tried, and prevent his trial by a writ of prohibition?'

[1] "(1) The charter commits the administration of the pension fund to the board of police commissioners sitting as trustees of the pension fund. The authority of the board is found in chapter 10, art. 8, of the charter relating to police relief and pension fund, and defendants argue that section 3 thereof gives to the board the power to inquire into petitioner's condition in a case where it is believed that a pensioner's disability has ceased. What defendants are really contending for is the right of the board of police commissioners, sitting as trustees of the pension fund, to exercise judicial powers. This question was fully and completely answered by the Supreme Court in the case of French v. Cook, 173 Cal. 126, 160 P. 411, and by this court in Sheehan v. Board of Police Commissioners, 47 Cal. App. 29, 190 P. 51, involved in the instant proceeding. In French v. Cook, the Supreme Court points out that there is no provision in the present charter of San Francisco confiding to the board of police commissioners, acting in any of its capacities, the power to finally determine any question of fact in connection with such a pension. Sheehan v. Board of Police Commissioners, supra, at page 35, 190 P. 54. 'The board is apparently in the same position,' says the Supreme Court, in French v. Cook, supra, 'with relation to such matter as is any officer required by law to do a prescribed act in a certain contingency, where no certain method is provided by law for the ascertainment of the facts. Under such circumstances, it may often be true that there is uncertainty or dispute as to the facts, but in such a case the only resort of the officer is such investigation as he may be able to himself make for the purpose of determining his own course of action. His determination as to the facts, however, is not effectual for any other purpose.

If not satisfied as to the evidence of the essential facts he may refuse to act until required to do so by the judgment of some tribunal invested with the power to finally determine such controversy, but before such tribunal any conclusion to which he may have come on the facts has no legal force whatever. The sole question there is whether the facts are in reality such as to require the performance of the act, and this altogether regardless of the officer's conclusion as to the facts. The party having a vested right in the performance of the act, if the facts are as claimed by him, has also the right to have his claim as to the facts judicially determined. The functions of the board in such a matter as this are really ministerial only, and come under the same principle as would apply in the case of county or city auditor, in so far as any finality to his conclusions are concerned. * * * As we read the charter, it gives no judicial function whatever to the board in such a matter as this, confers no authority to hear and determine a controversy in a judicial sense.'

"The foregoing language of the Supreme Court is quite clear, and further discussion seems futile, but answering categorically the first question propounded by defendants, we may say that we are of the opinion that the San Francisco charter gives the power to the board of police commissioners, sitting as trustees of the pension fund, to determine in the first instance whether or not the pensioner's disability has ceased. Such determination, however, is not judicial in character, has no legal force whatever as such, and amounts to nothing more than an indication of the board's course of action in the premises.

[2] "(2) In answering defendant's second question, we have in mind that petitioner has a vested right to retain his place upon the retired list, and to have his pension continued until his disabilities shall have ceased. Sheehan v. Board of Police Commissioners, supra, at page 34. One having such a vested right is entitled to a judicial determination by a court of competent jurisdiction of the facts upon which it is claimed the right has ceased.

[3, 4] "Defendants charge that petitioner defied the board, and characterize his conduct as contemptuous. Unassailed findings of the trial court show that 'the petitioner appeared before said board of police pension fund commissioners and informed and stated to said board that his disability still existed, and had not ceased, and that he objected to said board hearing or determining said matter on the ground that said board had no jurisdiction to hear or determine said matters; that he objected to being examined by any doctor, unless his own doctor, Dr. John Gallwey, was present; that he consented to being examined by Dr. Shumate, one of respondents who was a practicing physician, and that he was willing to submit to an examination at which Dr. John Gallwey was present, and wished to have Dr. Gallwey present; that except as aforesaid, he refused to submit himself for an examination.' Then followed a colloquy between petitioner and the president of the board, after which the former was excused from the hearing. There is nothing in the record showing defiance or contemptuous conduct on the part of petitioner. He simply stated and maintained, as was his privilege in the preservation of his rights, that he objected to the board hearing or determining the matter on the ground that it was without jurisdiction. Defendants' contention that petitioner must first exhaust his remedies within the police department falls with the holding in French v. Cook, supra, that 'to hold in accord with this claim in this connection would be, as we read the charter, to hold that any official authorized and required by law to do a prescribed act upon a prescribed contingency where no method is provided for the ascertainment of the facts, is invested with the power to judicially determine the facts, and that his conclusion is a judicial determination as to the facts. Such has never been declared to be the law.'

"That an attempt was made at a judicial determination of the matter by the board is shown by the following quotation from defendant's brief:

" 'The petitioner was regularly cited before the board, he was present in person, and was represented by counsel. The findings show that all the steps were regularly taken and the board found upon the evidence taken. A resolution was adopted by the board, sitting as trustees of the pension fund, and also by the board, sitting as police commissioners, so that there can be no question of the capacity in which they acted. By this resolution it was declared that the disability of petitioner had ceased, and he was ordered to report to the chief of police for active duty. Having failed to so report, he was regularly cited for insubordination, and his trial proceeded precisely as provided by the charter.'

"The findings of the trial court are quite lengthy and contain, not only a complete account of proceedings had before the police boards, but particularly detail the facts upon which the trial court based its conclusions. The trial court found, among other things, 'that petitioner has never recovered from his said injuries, incapacity, and disability since he was originally retired from said department and placed upon said pension roll, and that his physical capacity and ability to perform any service in said department as patrolman or otherwise has never improved; he has never recovered from his injuries originally sustained by him and his said disability has progressively since increased, and has never ceased and now exists and is permanent.' None of the findings are attacked, and all are supported by the evidence.

[5] "Reversal is urged upon the ground that the trial court permitted petitioner's physician to testify as to the competency of petitioner to perform police duty. The evidence shows that the physician had been attending petitioner since 1903; that petitioner was suffering from a condition affecting his nervous system and giving rise to epileptic seizures; that these attacks were directly traceable to the head injury which petitioner sustained at the time of the accident, and which occasioned his retirement. Over the objection of defendants, the trial court permitted the witness to give his opinion as to the competency of petitioner to perform police duty. The physician based his opinion upon facts personally observed by him, which facts were stated by him on his direct and cross examination. The physician witness was admittedly skilled in the science of pathology, and by reason of his knowledge in such matters, and because of the facts within his personal knowledge regarding petitioner's condition, he was able to give the trial court an

opinion which might be entitled to some weight. Lemley v. Doak Gas Engine Co., 40 Cal. App. 146, 152, 180 P. 671. We do not think that defendants were prejudiced by the ruling of the trial court in admitting this evidence, for the physician's testimony was not the only evidence before the court as to petitioner's physical condition. Petitioner himself testified that the disability for which he was retired still exists, and that he has suffered from recurring epileptic seizures without warning. Defendants offered no evidence.

[6] "The cases of French v. Cook, supra, and Sheehan v. Board of Police Commissioners, supra, definitely settle the question of the powers of the defendants, when acting in a situation such as is presented by the facts of this case. Briefly stated, the law is, that the defendants, acting in any capacity, have no judicial powers; that such powers as they have are ministerial only. The writ of mandate was properly granted.

[7] "As the board was without jurisdiction to judicially determine the question as to whether or not petitioner's incapacity had ceased, it follows that the charge of insubordination was without foundation. Insubordination can rightfully be predicated only upon the refusal to obey some order, which a superior officer is entitled to give, and entitled to have obeyed. Garvin v. Chambers (Cal. Sup.) 232 P. 696."

For the reasons stated in the foregoing opinion, it is ordered that the judgment referred to therein be, and the same is, affirmed.

We concur: LAWLOR, Acting C. J.; LENNON, J.; WASTE, J.; SHENK, J.; RICHARDS, J.

---

197 Cal. 103

LOS ANGELES TRUST & SAVINGS BANK v. WARD et al. (L. A. 7906.)

(Supreme Court of California. Sept. 24, 1925. Rehearing Denied Oct. 22, 1925.)

1. Interpleader ⊂=35 — Interpleader in action to determine rights of parties to escrow agreement cannot recover attorney's fees.

Holder of escrow agreement, who brought action of interpleader to determine rights of parties, after their failure to agree, could not recover attorney's fees, since under Code Civ. Proc. § 386, attorney's fees are not expressly allowed on interpleader, and section 1021, providing that attorney's fees should be left to agreement, unless stipulated by statute, is conclusive.

2. Interpleader ⊂=35—Holder of escrow agreement cannot recover attorney's fees for action brought to determine rights of parties to agreement.

Holder of an agreement in escrow, who had to bring action to determine rights of parties thereto, after their failure to agree, could not recover attorney's fees under Civ. Code, § 2273, providing that trustee may recover necessary expenses, since section 2250 limits it to express trusts only.

In Bank.

Appeal from Superior Court, Los Angeles County; Carlos S. Hardy, Judge.

Action of interpleader by the Los Angeles Trust & Savings Bank against Shirley C. Ward and others, the Grand Avenue Company being brought in as assignee of defendant Walter H. Fisher, wherein defendants cross-complained. From a judgment for plaintiff on its interpleader, it appeals as affording insufficient relief, and from a judgment for defendant Shirley C. Ward on his cross-complaint against Walter H. Fisher and the Grand Avenue Company, they appeal, but such appeal was later dismissed. Affirmed on plaintiff's appeal.

Rehearing denied; LENNON, J., dissenting. MYERS, C. J., deeming himself disqualified, not participating.

O'Melveny, Millikin, Tuller & Macneil, W. K. Tuller, and John O'Melveny, all of Los Angeles, for appellant Los Angeles Trust & Savings Bank.

Joseph Musgrove, of Los Angeles, for appellants Fisher and Grand Ave. Co.

Chandler P. Ward, of Los Angeles, for respondents Ward.

F. A. Stephenson, of Los Angeles, for respondent Gilman.

LAWLOR, Acting C. J. This is an action of interpleader. The defendant Shirley C. Ward was lessee of certain premises situated in the city of Los Angeles under a lease from the owner, Delia Gilman. The premises were sublet by said defendant to the defendant Walter H. Fisher. Subsequently, by written agreement of the two named defendants, the plaintiff was made escrow holder of a certain agreement dated August 19, 1918, entered into and executed in duplicate by them. This agreement modified in certain particulars the rights and obligations of the parties thereto in and to the premises referred to above. By the terms of the escrow agreement, the plaintiff was instructed, upon the faithful performance by defendant Walter H. Fisher of the conditions of said agreement of August 19, 1918, and of the escrow agreement executed by both parties, to deliver to said Walter H. Fisher one of such instruments and the other to the defendant Shirley C. Ward; but, should Walter H. Fisher fail to fully and faithfully perform all of the conditions and covenants of said agreements, then and in that event the plaintiff, as escrow holder, was to remove the signatures from said instruments, mark the same "Canceled" and return them to the defendant Shirley C. Ward.

Thereafter, and before any delivery of the instruments had been made, it was insisted by the defendant Shirley C. Ward that the defendant Walter H. Fisher had failed to comply with the conditions precedent to a

delivery of the instrument of August 19, 1918, wherefore he demanded that said instrument be marked "Canceled" and returned to him. On the other hand, Walter H. Fisher claimed that he had fully and faithfully performed all of the conditions precedent to a delivery, and demanded delivery of the instrument in accordance with the terms of the escrow agreement. Plaintiff, being unable to determine which of the conflicting claims was the correct one, commenced this action of interpleader.

The Grand Avenue Company was brought into the action as assignee of the defendant Walter H. Fisher's interests. Plaintiff had judgment upon its complaint in interpleader against the defendants. Judgment went for Shirley C. Ward on his cross-complaint against the cross-defendants Walter H. Fisher and the Grand Avenue Company, and the appeal of the latter was later dismissed. The trial court allowed the plaintiff its court costs, but refused its prayer for attorneys' fees in the matter. Thereupon this appeal was instituted to secure an order directing the trial court to modify its judgment by allowing appellant a reasonable attorneys' fee. As stated by the appellant:

"This appeal involves only one question, namely, the right of appellant to be reimbursed for its attorneys' fees reasonably and necessarily incurred in the bringing and prosecution of this action. * * *"

Two theories are advanced by the appellant, under either of which, it is contended, it is entitled to recover the reasonable attorneys' fees in the prosecution of this action. By the first of these theories it is urged that the privileges and duties of an escrow holder are closely analogous to those of a trustee of an express trust and that, under the provisions of section 2273, Civil Code—

"A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. * * *"

Authorities of this and other states are cited, which contain declarations to the effect that the duties of an escrow holder resemble those of a trustee, in that the res is held for a particular purpose and is to be delivered only upon the happening of a specified act or event. It is contended that—

"These authorities are sufficient, we trust, to establish the proposition that the bank was holding as trustee of an express trust, and that therefore, by virtue of the specific statute above cited, * * * is entitled to be reimbursed for the expenses necessarily incurred by it in bringing and prosecuting this action. One of these necessary expenses was, of course, a reasonable compensation to its attorneys for the legal services necessarily performed."

The second theory of appellant suggests that—

"Entirely aside from the question whether plaintiff is entitled to this reimbursement as a technical trustee, it is so entitled under general principles."

Hereunder numerous authorities of outside jurisdictions are quoted from, wherein it is held that a plaintiff in an interpleader action is entitled to the reasonable attorneys' fees incurred therein.

By way of reply to the appellant's first theory of recovery, the respondents urge that the cases cited thereunder by appellant merely declare a similarity exists between the duties of a trustee and an escrow holder, but do not state that this similarity exists as to their respective rights. It is then contended that—

"If there be any doubt in the mind of the court that, by calling an escrow holder for hire a 'trustee,' it can recover attorneys' fees out of the funds in its hands, whether the same be incurred in performance or in violation of the terms of the trust, we submit that reference to section 1021 of the Code of Civil Procedure should eliminate this doubt. This section specifically covers the question of attorneys' fees and applies as well to trustees as to escrow holders and individuals in their private capacities."

In answer to appellant's second theory, the respondents state that—

"Attorneys' fees are not statutory 'costs' and are not recoverable as such. Brooks v. Forington, 117 Cal. 219, 221 [48 P. 1073]. They can only be recovered when provided for by contract or by statute. Civil Code [Code of Civil Procedure?] § 1021. Our statute provides for the recovery of attorneys' fees by the plaintiff in certain enumerated cases, but an action in interpleader is not named among these cases."

It is then asserted, in effect, that the existence of section 1021, Code of Civil Procedure, precludes the application of the principle announced by the authorities from other states cited by appellant.

Section 1021 of the Code of Civil Procedure provides:

"The measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to costs and disbursements, as hereinafter provided."

In 7 Cal. Jur., at page 286, § 27, it is said:

"The general rule is that attorney's fees are not recoverable by a successful party to an action either at law or in equity; except in the instances where they are expressly allowed by statute."

Again, in Miller v. Kehoe, 107 Cal. 340, 343, 40 P. 485, the rule is declared to be that counsel fees are not recoverable by a successful party in an action either at law or in equity, except in the enumerated instances where they are expressly allowed by statute.

Other authorities to the same effect are Williams v. MacDougall, 39 Cal. 80, 85; Bates v. County of Santa Barbara, 90 Cal. 543, 548, 27 P. 438; Salmina v. Juri, 96 Cal. 418, 420, 31 P. 365; Commercial Savings Bank v. Hornberger, 140 Cal. 16, 22, 73 P. 625; City Investment Co. v. Pringle, 49 Cal. App. 353, 355, 193 P. 504.

[1] Interpleader is not one of those actions where counsel fees are "expressly allowed by statute" (Code Civ. Proc. § 386), and, in view of the plain import of the provisions of section 1021, Code of Civil Procedure, we are of the opinion that a plaintiff in such an action is not entitled to be compensated for the attorneys' fees incurred in the prosecution thereof. In announcing this rule we are not unmindful of the numerous authorities of other jurisdictions, cited by appellant to the effect that a plaintiff in an interpleader action may recover reasonable counsel fees. It may be added, however, that there appears to be a decided conflict on this point among the authorities. But, in this state, section 1021, Code of Civil Procedure, is conclusive upon the point and expressly leaves the question of counsel fees to the agreement of the parties, where not provided for by statute.

[2] It having been determined that a plaintiff in an interpleader action is not entitled to counsel fees, it becomes necessary to decide whether or not appellant is entitled to such fees as a "trustee" within the meaning of section 2273, Civil Code.

In 10 Ruling Case Law, p. 633, § 15, it is stated that—

"In a broad sense, every depositary of an escrow is the agent of both parties. For the purpose of making delivery upon the performance of the conditions he is no less the agent of the grantee than the agent of the grantor. Strictly speaking, however, the depositary is not an agent at all, but rather the trustee of an express trust, with duties to perform for each of the parties, and which neither can forbid without the consent of the other. * * *"

The foregoing quotation is taken almost verbatim from Seibel v. Higham, 216 Mo. 121, 132, 115 S. W. 987, 990 (129 Am. St. Rep. 502), cited by appellant. An examination of that case discloses that the court had in mind, when it made the above declaration, the situation where the escrow holder is to deliver the instrument to the grantee upon the grantor's death and the court goes on to say that, if the escrow holder was said to be merely the agent of the grantor, in such a case, "his agency would cease on the grantor's death, and he would have no authority to receive the purchase money from the grantee and deliver the deed."

A similar statement is found in 10 Cal. Jur. p. 587, § 11, where it is said that—

"The duties of the depositary are those of an agent, and as such he acts for both parties to the escrow. He is, however, more than a mere agent, especially where a deed is deposited in escrow with him to be delivered to the grantee *upon the death of the grantor*, for, if he were merely an agent, the death of the grantor would terminate his agency and authority to deliver. By the creation of such an escrow he becomes the trustee of the grantee, with the duty of holding the deed in his possession until the death of the grantor, whereupon he must deliver it to the grantee. He likewise, as trustee for the grantor, is charged with the duty of withholding the deed from the grantee and thus preserving for the grantor a life estate in the property. If the transaction is lacking in some of the elements necessary to create a valid escrow, as, for example, where a deed has been delivered to the depositary without an agreement by the grantee to purchase and pay the purchase price, the depositary does not become the agent of the grantee but only of the grantor and as such his authority is revoked by the death of the grantor. After the creation of an escrow, the grantor may instruct the depositary to deliver the deed to the grantee upon conditions contrary to the original escrow conditions. Thereupon the depositary becomes and acts as the agent of the grantor and not as the agent of the grantee. There is nothing, however, in the status of the depositary which makes it a violation of the duties he owes to the parties to the escrow if he becomes the purchaser of the escrowed property. He then takes, of course, subject to the conditions of the escrow." (Italics added.)

It is readily apparent from each of these quotations that the escrow holder is referred to as a "trustee" only in those instances where he is to deliver a deed to the grantee upon the death of the grantor, and he is so regarded merely to preclude the termination of his authority upon the grantor's death; in all other cases an escrow holder is referred to as the "agent" of the parties. This reasoning would also apply to Estate of Cornelius, 151 Cal. 550, 552, 91 P. 329, 330, cited by appellant, where it is declared:

"Upon the facts stated, the deed became an executed conveyance upon the delivery to Bartholomew for the grantees. He was thereafter holding for them as their trustee, and for the grantor as her trustee. His duty to her was to withhold it from the grantees during her lifetime, and thus preserve to her, in effect, a life estate in the property. His duty to the grantees was to hold the deed in his possession until her death and then deliver it to them. * * *"

Here again the escrow holder is referred to as a "trustee," so that his authority may be held to survive the death of the grantor and thus validate a subsequent delivery to the grantee. However, it cannot be said that this case is authority for the proposition that an escrow holder is a "trustee" in any sense other than to make delivery after the death of the grantor, notwithstanding that in many instances the terms "agent" and "trustee" are used interchangeably. Though, as indicated, an escrow holder has at times been referred to as a "trustee," in most instances

he is looked upon as the mere agent of the parties. In 21 Cor. Jur. p. 878, § 24, it is stated:

"Until the escrow contract has been made, the depositary has no rights or authority enforceable at law, but, when it has been made and the instrument deposited, he becomes the agent of both parties, and the death of a party prior to the performance of the condition does not affect the depositary's obligation to perform the duties imposed upon him by the escrow contract. When the condition upon which the instrument is to take effect *is performed*, the depositary becomes a mere agent or trustee of the grantee and his possession is equivalent to possession by the grantee." (Italics added.)

It is apparent from this quotation that an escrow holder is regarded as an "agent," and that he is called a "trustee" only where the condition has been performed; the grantee then being entitled to delivery, the capacity of the escrow holder is, in effect, changed, and he becomes a trustee of the instrument for the grantee.

Therefore, conceding that there may be some similarity between the duties of an escrow holder and those of a trustee, nevertheless, we do not think this would render applicable the provisions of section 2273, Civil Code, wherein it is declared:

"A trustee is entitled to the repayment, out of the trust property, of all expenses actually and properly incurred by him in the performance of his trust. He is entitled to the repayment of even unlawful expenditures, if they were productive of actual benefit of the estate."

This section, it is true, lays down the rule of law applicable to trustees generally, but, in our opinion, section 2250, Civil Code, being a part of the same chapter as section 2273, confines the rule to express trustees. Section 2250 reads:

"The provisions of this chapter apply only to express trusts, created for the benefit of another than the trustor, and in which the title to the trust property is vested in the trustee; not including, however, those of executors, administrators, and guardians, as such."

It cannot be maintained that an escrow holder is an express trustee within the meaning of the provisions of these sections of the Civil Code. It would seem that he is designated as a "trustee" for purposes of convenience to avoid a lapse of his authority upon the death of the grantor.

Having concluded that an escrow holder is not an "express trustee" within the meaning of that term as found in sections 2250 and 2273, Civil Code, it becomes unnecessary to consider the case of Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L. R. A. (N. S.) 275, wherein it is held that a trustee is entitled to reimbursement for counsel fees necessarily expended in the conduct of an action properly brought.

Our conclusion also renders unnecessary any discussion of respondents' contention that—

"The record is utterly destitute of proof of the reasonable value of the services rendered by the appellant, as well as the nature and extent of the services and the time devoted thereto."

The judgment appealed from is affirmed.

We concur: WASTE, J.; SHENK, J.; RICHARDS, J.; LENNON, J.; SEAWELL, J.; HOUSER, Justice pro tem.

---

197 Cal. 112

STREHLOW et al. v. MOTHORN.
(S. F. 11569.)

(Supreme Court of California. Sept. 25, 1925.)

1. New trial ⊜116(2)—Statute fixing time when power of court to pass on motion for new trial shall expire construed.

In view of the history and mode of enactment of Code Civ. Proc. § 660, providing that power of court to pass on motion for new trial shall expire within two months after the verdict of jury or service on the moving party of notice of entry of judgment, *held* that the intent of the Legislature was that the definite act of service of notice of entry of judgment on opposing party was required to fix the time when power of court to pass upon motion should begin to run.

2. Exceptions, bill of ⊜41(5)—As affecting time for filing bill of exceptions, service of notice of entry of judgment required to start time running within which trial court could pass on motion for new trial.

Where defendant filed motion for new trial, but no service of notice of entry of judgment was served on defendant, the time within which trial court was required to pass on the motion under Code Civ. Proc. § 660, did not begin to run until notice was actually served as affecting time for filing bill of exceptions provided by section 650, waiver not being enough.

In Bank.

Appeal from Superior Court, Sonoma County; H. L. Preston, Judge.

Action by William Strehlow and others against Pressley Mothorn. Judgment for plaintiffs, and defendant appeals. Motion by plaintiff to strike bill of exceptions from transcript. Motion denied.

R. M. F. Soto, of San Francisco, for appellant.

A. W. Hollingsworth and W. F. Cowan, both of Santa Rosa, for respondents.

RICHARDS, J. The plaintiffs and respondents move the court for an order striking out the bill of exceptions contained in the transcript on appeal herein upon the ground

that it was served and presented for settlement to the trial court too late. The record herein discloses that this was an action for an injunction with damages; that the findings of fact and conclusions of law of the trial court were filed on September 5, 1922, and that the judgment of said court based thereon was also filed and entered on that day; that no notice of the entry of said judgment was ever served upon the defendant. On September 13, 1922, the defendant applied to the trial court for and obtained an order staying execution. On September 14, 1922, the defendant served his notice of intention to move for a new trial. On September 18, 1922, he served upon the plaintiff and filed his notice of appeal from the judgment wherein he recited that he "appeals to the Supreme Court of the state of California from the final judgment in said action given in favor of the plaintiffs and against said defendant, entered on the 5th day of September, 1922, and from the whole of said final judgment." On May 7, 1923, the trial court made and entered its formal order after a hearing thereon denying the defendant's motion for a new trial. Thereafter the defendant obtained by order of court or by stipulation between the parties additional time within which to prepare and serve his bill of exceptions, in each of which stipulations, however, the plaintiffs through their counsel stated that they objected, and at all times would object, to the settlement or allowance of any bill of exceptions to be used by the defendant on his appeal from the judgment, upon the ground that the same were not presented within the time limited by section 650 of the Code of Civil Procedure. The plaintiffs also, and on October 18, 1923, served upon the defendant and filed with the court a notice of their said objection in the same words and effect; and also in proposing their amendments to the defendant's proposed bill of exceptions reserved the same objection; and they also, upon the hearing upon and settlement of said bill of exceptions, made and reserved the same objection. The trial court, however, overruled said objection and allowed and settled said bill of exceptions and the same as thus allowed and settled became with the said several objections thereto a part of the transcript on appeal thereafter prepared and filed herein.

The basis of the motion of plaintiffs and respondents to have said bill of exceptions stricken from the files and disregarded upon this appeal is this: That the defendant, by his act in moving for and obtaining from the trial court on September 13, 1922, an order "that execution upon the judgment herein be stayed five days from the date hereof," and also by his action in serving and filing on September 18, 1922, his notice of appeal to this court "from the final judgment in said action * * * entered on the 5th day of September, 1922, and from the whole of said final judgment," had thereby waived notice of entry of said judgment; that by virtue of such waiver thus appearing upon the records and files of said trial court no other or further notice of the entry of said judgment was required to be served upon the defendant in order to set in motion the running of the statutory time within which, under section 650 of the Code of Civil Procedure, the said defendant must have prepared and served his bill of exceptions, and also the time within which, under section 660 of the same Code, the trial court must have determined the defendant's motion for a new trial.

The respondent cites numerous cases wherein it has been decided that the party to an action desiring to move for a new trial or take an appeal may waive his statutory right to notice of the decision or of the entry of judgment by doing some act which caused it to appear upon the records and files of the trial court that such party had actual knowledge of the fact of the filing of the decision of the court or of the entry of its judgment, and that in such cases formal and written notice of the court's action was not necessary to be served upon such party in order to start the running of the time within which he must exercise his statutory rights in presenting his motion for a new trial or to take and present a record upon appeal. As, for example, it has been held by this court in the case of Gardner v. Stare, 135 Cal. 118, 67 P. 5, that a party by applying to the court for and by obtaining a stay of execution upon the judgment thereby waived his right under section 659 of the Code of Civil Procedure to receive the "notice of decision" provided for in said section of the Code. In the case of Fiske v. Gosbey, 168 Cal. 334, 143 P. 611, it was held upon the authority of Estate of Keating, 158 Cal. 113, 110 P. 109, that the filing of a notice of appeal from a judgment or order is conclusive evidence that the appellant knew of such judgment or order so as to set in motion the time within which he must give the notice to the clerk for the preparation of the transcript required by section 953a of the Code of Civil Procedure. In the case of Hughes v. De Mund (Cal. Sup.) 233 P. 94, it was held that the service and filing by a defendant of a notice of appeal from a judgment dispensed with necessity of the notice of entry of judgment or, in case of a pending motion for a new trial, of the notice of decision denying said motion so as to set the time running within which the party otherwise entitled to such notices under section 650 of the Code of Civil Procedure must prepare and serve his bill of exceptions. The foregoing decisions rest upon a long line of earlier cases to the same effect. It is to be observed, however, that the question presented by this motion is not as to whether the appellant herein, by his affirmative action in applying for a stay of execution or in serving and filing his notice of appeal from the

judgment, has waived his statutory right to notice of the entry of said judgment, but the question here presented is as to when the power of the superior court to pass upon the motion for a new trial herein expired under the provisions of the closing clause of section 660 of the Code of Civil Procedure, which now reads as follows:

"The power of the court to pass on motion for new trial shall expire within two months after the verdict of the jury or service on the moving party of notice of the entry of the judgment. If such motion is not determined within said two months, the effect shall be a denial of the motion without further order of the court."

[1] The foregoing limitations upon the power of trial courts in the matter of considering and disposing of motions for new trial were added to said section of the Code by the Legislature of 1915. Stats. 1915, p. 202. The section as then amended provided for a period of three months "after the verdict of the jury or service on the moving party of notice of the decision of the court" within which the power of the court must be exercised in passing upon the motion for a new trial; and it was further therein provided that "if such motion is not determined within said three months, the effect shall be a denial of the motion without further order of the court." In the case of Moore v. Strayer, 175 Cal. 171, 165 P. 530, the interpretation of the foregoing amendment to section 660 of the Code of Civil Procedure came directly before this court in a case wherein it was contended upon motion to dismiss an appeal that the appellants, by serving and filing their notice of intention to move for a new trial, without waiting for service of notice of the decision of the court, had thereby set in motion the running of the time within which the trial court had power to determine said motion, and that said motion, not having been determined by the court within said time, had been denied by operation of law upon a date more than 30 days prior to the filing of the notice of appeal. This court, however, rejected this contention, and in so doing laid emphasis upon the language of said amendment to the section requiring "service on the moving party of notice of the decision of the court." In so doing this court proceeded to say:

"If the rights of the party appealing were alone to be considered, the giving of the notice of intention might, as to him, be construed as a waiver of service of notice of decision, but the provision relates to the power of the court, jurisdiction of which to pass upon the motion is divested only by the service of notice of decision followed by the lapse of a period of three months, during which it is empowered to act on the motion for a new trial."

[2] The Legislature of 1917 (Stats. 1917, p. 240) amended the foregoing amendment to said section by substituting the words "notice of the entry of the judgment" in place of the words "notice of the decision of the court," and the Legislature of 1923 (Stats. 1923, p. 233) further amended the same by shortening the time within which the power of the trial court to pass upon motions for new trial must be exercised from "three months" to two months. In making said latter amendment the Legislature re-enacted the section with the interpretation which this court had theretofore placed upon it. If a reason is to be sought for the employment by the Legislature of the explicit language of its first amendment to section 660 of the Code of Civil Procedure made in 1915, designating "service of notice of the decision," and of its later amendment thereto requiring "service of notice of the entry of judgment" as the definite act which should fix the date when the power of the court to pass upon a motion for a new trial should begin to run and also the date when such power should terminate, it might be found in the apparent desire of the framers of both amendments to do away with all uncertainty as to the power and jurisdiction of trial courts in the premises. However this may be, we are constrained to hold that the intent of the Legislature, as expressed in the explicit terms of the statute, must be given effect. In the absence from the record in the instant case of any showing of service of notice of the entry of judgment, the time within which the trial court was required to pass upon the motion for a new trial had not begun to run at the time of the submission of said motion for a new trial, and had not expired, when, on May 7, 1923, the court made and entered its order denying the same. It is conceded that, if the respondents' said objection was not well taken the appellant within the time allowed by law, by the order of court and by the stipulation of the parties, prepared and presented his bill of exceptions which is now sought to be stricken from the transcript on appeal. It follows that the reiterated objections of the respondents to the presentation and settlement of said bill of exceptions were without avail, and that their present motion to strike out the same must be denied. It is so ordered.

We concur: LAWLOR, J., Acting C. J.; SHENK, J.; SEAWELL, J.; LENNON, J.; WASTE, J.; and HOUSER, Justice pro tem.

74 Cal. App. 147

DE MATEI et al. v. SUPERIOR COURT IN AND FOR LAKE COUNTY et al.
(Civ. 3006.)

(District Court of Appeal, Third District, California. Aug. 20, 1925. Hearing Denied by Supreme Court Oct. 19, 1925.)

1. Certiorari ⟹29—Mere error in decision of court having jurisdiction not reviewable.

A court having lawful cognizance of a case, its decision, even if erroneous, is within its jurisdiction, and so is not reviewable by certiorari, a writ going only to the question of jurisdiction.

2. Certiorari ⟹28(2)—Appeal by defendants from default judgment of justice gave superior court jurisdiction of them.

Even if justice court had not acquired jurisdiction of defendants, they, by taking appeal from default judgment of the justice to superior court, submitted themselves to jurisdiction of superior court, so that its decision of affirmance was not without jurisdiction, relative to review by certiorari.

3. Certiorari ⟹64(2)—Attack on jurisdiction confined to that of court to which writ is directed, though its decision was on appeal.

On certiorari to annul judgment of superior court affirming on appeal justice's default judgment, attack on jurisdiction over defendants cannot extend to the justice court, but must be limited to the superior court; and this irrespective of whether defendants' appearance in justice court was general or special.

Petition by Thomas De Matei and another for writ of review to the Superior Court in and for Lake County, M. S. Sayre, Judge, to annul a judgment of affirmance on appeal from justice's court. Peremptory writ denied.

Joseph C. Meyerstein and Frank P. Webster, both of San Francisco, for petitioners.

W. H. Hazell, of Lakeport, for respondents.

HART, J. Application for a writ of review to have annulled and set aside a certain judgment of the respondent court affirming the judgment of the justice's court of township No. 4, in the county of Lake, in favor of C. E. Colwell and against the petitioners and one George A. Disselmeyer, in an action in which the first named was plaintiff and the three last named were defendants. Some of the proceedings which took place in the said justice's court in said action and those which took place in the respondent court are accurately set forth in the petition filed herein as follows:

"On the 27th day of January, 1925, one C. E. Colwell filed in the justice's court of No. 4 township, county of Lake, a complaint against your petitioners and one George A. Disselmeyer for goods sold and delivered. A copy of said complaint and summons issued thereon were served on one of your petitioners on the 2d day of February, 1925, at the city and county of San Francisco, state of California. The complaint contained no allegation that any of the defendants were residents of the county of Lake, at any time, nor that the defendants, or either of them, contracted in writing to perform an obligation at a particular place (Lake county). In due time your petitioner specially appeared in the said justice's court by motion, supported by an affidavit, for the sole purpose of quashing the service of the summons upon your petitioners, for the reason that your petitioners have not at any time resided in the county of Lake, and that said action was not one brought against defendants who have contracted in writing to perform an obligation at a particular place, and that therefore the court had no jurisdiction of the person of these defendants. The justice's court denied the motion, and, your petitioners declining to proceed further, judgment by default was entered against them. From said judgment, in due time, your petitioners presented their appeal to the superior court of the state of California, in and for the county of Lake, upon questions of law. The superior court of the county of Lake affirmed the said judgment of the justice's court."

The petitioners here claim, as they allege in their petition, that, in affirming the judgment of the said justice's court in said action, the respondent court acted in excess of its jurisdiction.

The plaintiff in said action, C. E. Colwell, filed and noticed a motion to dismiss the appeal on the ground, among others, that the purported undertaking on appeal was insufficient to support the appeal.

The learned trial judge, in a written opinion, which is incorporated into and brought up with the record constituting the return to the order to show cause issued herein by this court, declared that, while the point that the undertaking was in law wholly insufficient as such an instrument was well taken, he preferred to review and dispose of the appeal on its merits, and so affirmed the judgment upon the theory and the conclusion that it sufficiently appeared upon the face of the record in the action that the defendant Disselmeyer, at the time the action was brought and service of process was made upon him, was a resident of the county of Lake.

The specific contention of the petitioners is that the justice's court from which the appeal was taken did not obtain jurisdiction of their persons, and that, inasmuch as such jurisdiction is not made affirmatively to appear by or from the proceedings before said court, and that such jurisdiction in the justice's court cannot be presumed, since the rule is that no presumption can be indulged in favor or support of such jurisdiction, there was upon the record no other alternative left to the respondent court but to reverse the judgment.

[1] Admittedly the justice's court had jurisdiction of the subject-matter of the action, and it is equally true that if the respondent court acquired jurisdiction of the appeal any

errors which it might have committed in disposing thereof cannot be reviewed through or by means of a jurisdictional writ. This is elementary. As the cases put the proposition, when a tribunal or board exercising judicial functions has lawful cognizance of a case or proceeding, it has the jurisdiction (not the right, as it has been carelessly stated), to make error as well as not to do so. This statement simply means that, as above stated, error thus committed is not subject to review by a higher court through the agency of a writ whose sole and only purpose is to determine the question whether the judicial act done and objected to was within the lawful jurisdiction of the tribunal to do.

[2] In the present case, even if, in point of fact, it be true, as is the claim, that the justice's court never acquired jurisdiction of the persons of the petitioners, the latter certainly submitted themselves or their persons to the jurisdiction of the respondent court by the very act of taking the appeal from the judgment of the justice's court. If this were not true, there would be presented the very novel and, indeed, absurd, situation in which the superior court, in the exercise of its appellate jurisdiction in the case, would be limited to the doing of one or two things, viz.: Reverse the judgment or dismiss the action. In truth, the necessary assumption of the petitioners herein is that the superior court has jurisdiction to reverse the judgment, but is without jurisdiction to affirm it, the practical effect of which position is that, in such a situation as is presented here, the appellant would have it in his power to control the discretion of the superior court in the decision of the appeal. Or, as one of our cases has well interpreted a like position taken by the appellant on an appeal from the justice's court to the superior court, he thus was asking the Supreme Court to restrain the superior court "from trying (and determining) the appeal which he was prosecuting." Sanborn v. Superior Court, 60 Cal. 425.

[3] But it is well settled, at least in this state, that the writ of certiorari will not lie "to review the judgment of a justice's court after appeal taken and determined in the Superior Court." Olcese v. Superior Court, 156 Cal. 82, 86, 103 P. 317. In that case, an attempt was made to have reviewed by certiorari a judgment of the superior court affirming the judgment of the justice's court in an action sounding in contract, in which the complaint failed to show that the contract was not in writing, the contention being that the petitioner, who was a resident of a county other than that in which the action was brought, could not legally be served with summons unless the contract was shown to be in writing, and that, for that reason, the justice's court never acquired jurisdiction of the person of the defendant. The Supreme Court gave an extended consideration to the question whether the writ of review may be used for the purpose of reviewing a judgment of a justice's court after an appeal to and the determination thereof by the superior court by directing the writ to the latter court. It was held therein that the defendant in the justice's court, by taking an appeal to the superior court, submitted his person to the jurisdiction of said court; that said court, being one of general jurisdiction and empowered to pass upon the law and the facts of the case, its determination thereof was res adjudicata and operated as an estoppel. It is further stated in that case that an appeal from a justice's court is tantamount to a writ of error, and that to sanction the review of the decision of the superior court on the appeal would in effect amount to the entertainment of a second writ of error aimed at the judgment of the justice's court, a procedure which is, of course, not allowable. See, also, American Law Book Co. v. Superior Court, 164 Cal. 327, 128 P. 921; Albers v. Superior Court, 30 Cal. App. 772, 775, 159 P. 453; Bogmuda v. Young, 58 Cal. App. 19, 207 P. 915. Attention, however, is called to a distinction between the case of Olcese v. Superior Court and the present case in this: That in the former the appearance of the defendant in the justice's court was general, while in the present case the appearance of the defendants in the justice's court was special, or for the single purpose of challenging the authority of said court to proceed with the hearing of the case, or to attempt to entertain jurisdiction thereof on the ground that it (justice's court) had never acquired jurisdiction of their persons. But this distinction does not in the slightest degree detract from the force of the proposition that, in taking the appeal, the petitioners as effectually submitted themselves or their persons to the jurisdiction of the superior court as if they had made a general appearance in the justice's court. In fact, as before stated, by taking the appeal they, in effect, asked the superior court, in the exercise of its appellate jurisdiction in said case, to relieve them from the effect of what they regarded as an illegal usurpation by the justice's court of jurisdiction of their persons, and, in doing this, they, by the very logic of the situation, submitted themselves to the lawful cognizance of said court for all the essential purposes of the appeal. But the identical point has previously been made and the validity thereof denied. In American Law Book Co. v. Superior Court, supra, the point now in hand, as well as others pertinent to the consideration of the ultimate question submitted for decision herein, is interestingly discussed and disposed of. We refer to that case and others cited in the opinion as decisive of the point adversely to the position of the petitioners thereon.

The order to show cause is discharged, and the application for a peremptory writ denied.

I concur: FINCH, P. J.

74 Cal. App. 159

OGDEN v. BOARD OF TRUSTEES OF CITY OF COLTON et al. (Civ. 5175.)

(District Court of Appeal, Second District, Division 1, California. Aug. 21, 1925.)

Prohibition ⟸3(3)—District Court of Appeal will not issue original writ, where superior court had denied writ.

Where petitioner applied in superior court, for writ of prohibition directed to board of trustees of municipality to prevent them from calling a recall election, and writ was denied, District Court of Appeal will not issue it on a duplicate petition filed therein to invoke its original jurisdiction in such matter, as Court of Appeal had appellate jurisdiction of denial of writ if it had been invoked.

Application for writ of prohibition by George W. Ogden, against the Board of Trustees of the City of Colton and others. Writ denied.

See, also, 239 P. 855.

D. A. Rothrock, of Colton, for petitioner.

CONREY, P. J. By petition filed herein on the 18th day of August, 1925, petitioner applied for a writ of prohibition, to be directed to the board of trustees of the city of Colton and the members of said board, to prevent them from calling a recall election against petitioner and Walter H. Evans as members of said board of trustees.

It was alleged by petitioner that, by reason of certain defects in the recall petition, and by reason of certain other matters in connection therewith, the board was without jurisdiction to call or hold such recall election, but that nevertheless the said board, unless prohibited from so doing, would, at its meeting on the evening of August 19, 1925, proceed to call said recall election.

It was further stated in the petition that on August 17, 1925, the petitioner presented to the superior court in and for the county of San Bernardino a petition similar in form and substance to the petition herein, but that said court denied said petition.

The petition herein having been presented by counsel for petitioner and considered by the court, an order was made on August 19, 1925, denying the application. By reason of the necessity for an immediate disposition of the matter, the order was made in advance of a written opinion or statement of grounds of the decision. In conformity with the desire of counsel, we make that statement now.

It is a long-established rule that, where a proceeding of this nature has been instituted in a superior court and the writ denied, this court will not issue the writ on a duplicate petition filed here for the purpose of invoking the original jurisdiction of this court in such matter.

"Under the Constitution of this state, this court has appellate jurisdiction in prohibition, and, while it also has original jurisdiction in such proceedings, it will not exercise the same where the petitioner possesses the right of appeal from a judgment had in the court where the original proceeding was commenced." Matter of Application of Burt for Writ of Prohibition, 17 Cal. App. 309, 119 P. 674; Wood v. Board of Fire Commissioners, 50 Cal. App. 593, 195 P. 739.

It is contrary to the policy of the law and to the principles of orderly procedure, that a party who has invoked the jurisdiction of one court and who has a right of appeal to a higher court, should be permitted to substitute for such appeal a second and like application to the higher court as a court of original jurisdiction. If such repeated applications were recognized, it would follow, on the same principle, that, on denial of the application made to this court, the dissatisfied petitioner could immediately be permitted to apply to the Supreme Court and perhaps obtain from that court the original writ which he desires, instead of applying to the Supreme Court in due course for a rehearing of this present proceeding. We think that it is not to be permitted that a litigant should thus experiment with the several courts in respect to their concurrent original jurisdiction.

In view of the opinion held by us on the point above stated, the petition was denied without regard to its possible merits in other respects.

I concur: CURTIS, J.

74 Cal. App. 161

OGDEN v. BOARD OF TRUSTEES OF CITY OF COLTON et al. (Civ. 5178.)

(District Court of Appeal, Second District, Division 1, California. Aug. 21, 1925.)

Certiorari ⟸25—Held not to lie to annul certificate of city clerk certifying to sufficiency of petition for recall election.

Certiorari as writ of review *held* not to lie to annul a certificate made by city clerk certifying to sufficiency of petition, under Deering's Gen. Laws (1923 Ed.) Act 5620, approved Jan. 2, 1912, for recall of members of city board of trustees, since act of clerk is not judicial in character.

Application for writ of certiorari by George W. Ogden against the Board of Trustees of the City of Colton and others. Writ denied.

D. A. Rothrock, of Colton, for petitioner.

CONREY, P. J. This is an application for a writ of certiorari, whereby petitioner seeks to annul a certificate made by the city clerk of the city of Colton, certifying to the suffi-

ciency of a petition for the recall of George W. Ogden and Walter H. Evans as members of the board of trustees of said city, which city is a municipal corporation of the sixth class. The parties to this proceeding are identical with those named in Civil No. 5175, 239 P. 855, except that the city clerk is named as an additional party herein. The petitioner in No. 5175 applied for a writ of prohibition to prevent the board of trustees from calling the proposed recall election. It was alleged in both petitions that, unless prevented by order of this court, the board of trustees, at its meeting on August 19, 1925, would proceed to call said recall election.

In said case No. 5175, this court, on the morning of August 19th, denied the petition, for reasons which appear in the opinion in that case this day filed. Thereupon, and on the same day, the petitioner filed his petition for writ of certiorari to be issued herein, and thereby sought to obtain, not only a review of the certificate made by the city clerk, but incidentally to obtain forthwith, as a part of said writ of review, an order restraining the board of trustees from proceeding with the recall election. The urgency for immediate action on the petition was such that, in compliance with the desire of the applicant for immediate action, we made our order herein on that day. The petition was denied. In accordance with our assurance to counsel at that time, we make this statement of the case and of the grounds of decision:

The first ten paragraphs of the petition herein are identical with the petition for prohibition in said case No. 5175. The additional paragraphs 11 and 12 in some respects differ from the other petition. In so far as the facts alleged in the present petition apply only to the question of the right to a writ of prohibition, we consider them governed by our disposition of said case No. 5175. It is only necessary to deal with this petition as one praying for a writ of review, to be directed to the city clerk for the purpose of determining whether he has exceeded his jurisdiction in the exercise of some function of a judicial nature.

Proceedings for the recall of municipal officers are directly authorized and defined by "An act to provide for the recall of elective officers of incorporated cities and towns," approved January 2, 1912. Deering's Gen. Laws (1923 Ed.) Act 5620.

In Wright v. Engram, 186 Cal. 659, 201 P. 788, the Supreme Court had before it an application for a writ of certiorari to review the action of the defendant as city clerk of the city of Redding, in determining that a petition filed in the office of said clerk for the recall of certain trustees of said city was sufficient to authorize a recall election as provided in the same statute under which the present recall proceedings have been instituted. The court held that the action required of the clerk by that act is not judicial in character, and that consequently certiorari would not lie to review his decision. Upon that sole ground the application for the writ was denied. With that definite authority before us, we could not do otherwise than deny the petition for a like writ in this case.

I concur: CURTIS, J.

74 Cal. App. 152

MARKART v. ZEIMER et al. (Civ. 2938.)

(District Court of Appeal, Third District, California. Aug. 20, 1925.)

1. Appeal and error ⇐84(1)—Judgment of court of review affirming, reversing, or modifying judgment on appeal is "final judgment."

Judgment of court of review affirming, reversing, or modifying judgment on appeal is "final judgment" referred to in Code Civ. Proc. § 963, whether it be final judgment or interlocutory judgment or decree.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Final Decree or Judgment.]

2. Appeal and error ⇐119—Order on motion to strike cost bill on appeal is appealable.

Order on motion to strike cost bill on appeal, under Code Civ. Proc. § 1034, is appealable order.

3. Costs ⇐195—Proceeding for taxing of costs collateral to judgment in procurement of which costs were incurred.

Proceeding for taxing of costs involves matter growing out of, but collateral or ancillary to, the particular judgment in the procurement of which in action in which judgment was rendered such costs were incurred.

4. Appeal and error ⇐119—Entitled to remedy for review of order taxing costs on appeal.

Where party is dissatisfied with costs taxed on appeal reversing judgment, he is entitled to remedy for review of order taxing same, as provided in Code Civ. Proc. § 963.

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Joseph Markart against Irving S. Zeimer and another. Judgment for plaintiff was reversed. On motion to dismiss appeal from order denying motion to strike out costs on appeal. Motion denied.

Sawyer & Sawyer, of San Francisco, for appellant.

George F. McNoble, of Stockton, and Hartley F. Peart, of San Francisco, for respondents.

HART, J. Motion to dismiss appeal from a certain order made by the court below.

The plaintiff sued the defendants, who are physicians and surgeons, for damages for in-

juries alleged to have been directly produced by their negligence, while they were engaged in the performance of a surgical operation upon his person. The cause was tried by a jury, and verdict and judgment in favor of the plaintiff followed. In due time, defendants took an appeal from said judgment, and subsequently said appeal was heard and considered by this court, with the result that the judgment was reversed and the cause remanded to the court below for a new trial. Markart v. Zeimer & Heppner (Cal. App.) 227 P. 683. The remittitur therein, having been, in due legal time, transmitted by the clerk of this court to the clerk of the court below, was duly filed in the office of the county clerk of the county of San Joaquin, on the 19th day of July, 1924. Thereafter, and on the 16th day of August, 1924, the defendants caused to be filed in the office of the clerk of the court below a memorandum of their costs and disbursements on appeal in said action; that, on said 16th day of August, 1924, notice of the filing of said memorandum or bill of costs and disbursements was served on the counsel for the plaintiff, in the city and county of San Francisco, and on said 16th day of August said counsel for plaintiff, in writing, accepted service of said notice.

On the 29th day of August, 1924, the counsel for the plaintiff served notice on defendants or their counsel, to the effect that, on Monday, the 8th day of September, 1924, at 1:30 p. m. of said day, they would move the court below "for an order striking out and from the files of this court defendants' memorandum of costs on appeal on file herein," on several different specified grounds. This notice of said motion was answered by the defendants by denials and certain affirmative allegations, and a prayer for a settlement of defendants' bill of costs as filed on the date above stated. As above stated, the motion was denied. The ground of the motion to dismiss this appeal is that the order from which the appeal purports to have been taken is not one of the special orders made after final judgment from which section 963 of the Code of Civil Procedure provides that an appeal will lie, inasmuch as (so the contention is) a judgment of an appellate court affirming, reversing, or modifying a judgment is not a final judgment, within the meaning of said section, which section, among other things, provides that an appeal may be taken from any special order made after final judgment.

Section 1027 of the Code of Civil Procedure provides that the prevailing party, on appeal, is entitled to his costs excepting when the judgment is modified. See, also, rule 23, Supreme and Appellate Courts. In this case, as seen, the judgment of the Appellate Court involved a straight reversal—that is to say, the judgment appealed from was not modified.

The proceeding in which the order from which the present appeal is taken is founded upon the provisions of section 1034 of the Code of Civil Procedure, which reads as follows:

"Whenever costs are awarded to a party by an appellate court, if he claims such costs, he must, within thirty days after the remittitur is filed with the clerk below, deliver to such clerk and serve upon the adverse party a memorandum of his costs, verified as prescribed by the preceding section. The party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after notice of filing of the bill of costs, as prescribed by the preceding section. After such costs have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment."

[1] It is not contended that the judgment of a court of review affirming, reversing, or modifying a judgment on appeal from a judgment of the superior court is not a final judgment. Indeed, no such contention or claim could logically be urged, for, obviously, a judgment by such court is final in the strictest sense, and this is true, of course, whether the judgment appealed from and affirmed, reversed, or modified, be a final judgment or only an interlocutory judgment or decree. The contention is, as we have seen, that the judgment of a court of review is not the "final judgment" referred to by section 963 of the Code of Civil Procedure, providing that from any special order made after "final judgment" an appeal will lie, and that, therefore, in order that he may have the action of the trial court refusing to strike from the files the defendants' memorandum of costs on appeal reviewed, the plaintiff must do so by an appeal from some judgment in the case.

[2] It is settled that an order on a motion to retax a cost bill, made after the rendition of a final judgment by the superior court, is appealable. It was recently so declared by the Supreme Court, speaking through Mr. Justice Seawell, in Hennessy v. Superior Court, etc., 194 Cal. 368, 228 P. 862, citing Dooly v. Norton, 41 Cal. 439; Empire Gold Min. Co. v. Bonanza, etc., Min. Co., 67 Cal. 406, 7 P. 810; Yorba v. Dobner, 90 Cal. 337, 27 P. 185; Linforth v. S. F. Gas, etc., Co., 9 Cal. App. 434, 99 P. 716; Quitzow v. Perrin, 120 Cal. 255, 52 P. 632; Elledge v. Superior Court, 131 Cal. 279, 63 P. 360. It may be suggested that, while it is true that the order from which the appeal here is taken is not, strictly speaking, based on a motion to tax costs, but is founded on a motion to strike the cost bill from the files, yet, in its general purpose and effect, it amounts to the same thing. In fact, the application upon which the order appealed from herein is based has been treated as amounting to the same proceeding as a motion to tax or retax costs. See Stafford v. Hill, 63 Cal. App. 15, 217 P. 766, and Arrow Garage Co. v. Kikugawa (Cal. App.) 231 P. 571. The posi-

tion of the movent herein, however, is based principally on the opinion in the case of In re Kling, 48 Cal. App. 741, 192 P. 453. In that case the order appealed from was founded on an application to retax, strike out, and disallow the respondent's bill for costs on appeal, the proceeding to retax and disallow having evidently been inaugurated under the provisions of section 1034 of the Code of Civil Procedure, supra. It is said in the Kling Case:

"To entitle a party to appeal directly from an order of this character, it must, as provided by section 963 of the Code of Civil Procedure, appear that the same was made after final judgment rendered in the case wherein allowance of costs is sought. Crane v. Forth, 95 Cal. 88, 30 P. 193; Empire Co. v. Bonanza Co., 67 Cal. 406, 7 P. 810. As stated, the judgment of disbarment was, on appeal, reversed for insufficiency of the evidence to justify the findings implied therein. The effect of such reversal was to remand the case for a new trial. Ryan v. Tomlinson, 39 Cal. 639; Falkner v. Hendy, 107 Cal. 49, 40 P. 21, 386. By such action the parties, until a new trial was had or other disposition made of the case, were in precisely the same position as if a trial thereof had never been had. Sharp v. Miller, 66 Cal. 98, 4 P. 1065. Hence, for the reason that at the time of the making of the order no final judgment had been rendered in the case, the order is not appealable. A review thereof can be had only upon an appeal from the judgment. Lasky v. Davis, 33 Cal. 677; Stevenson v. Smith, 28 Cal. 105, 87 Am. Dec. 107; Empire Co. v. Bonanza Co., supra."

[3, 4] It will be noticed that the court in the Kling Case makes no reference to section 1034 of the Code of Civil Procedure, and it is highly probable that that section was not called to the attention of the court in that case. At all events, however, we cannot agree with the conclusion announced in said case. We have not been able to persuade ourselves that it harmonizes either with the language or the intent of section 1034 of the Code of Civil Procedure. The proceeding for the taxing of costs involves a matter growing out of, but collateral or ancillary to, the particular judgment in the procurement of which in the action in which the judgment is rendered such costs are incurred. It is true that the costs incurred by reason of the action and the trial thereof may become a part of the judgment rendered therein, and in such case the matter of the taxing of the costs is reviewable on an appeal from such judgment, but this does not mean that it may not be reviewed on appeal from the order taxing or disallowing the costs. Conceivable contingencies preventing a review of such order on an appeal from the judgment might arise. For instance, it might happen that the court, either for proper or erroneous reasons, may refuse to entertain the application for the taxing of costs, until after the appeal from the judgment has been taken, or circumstances might exist which would justify delay in determining the motion, until after an appeal had been taken from the judgment. In either case, it could not reasonably be contended that an appeal from the order taxing such costs would not lie.

The case of Hennessy v. Superior Court, supra, is very similar to the one first supposed, and, as stated above, the Supreme Court held that the order taxing or refusing to tax costs was appealable as a special order made after final judgment within the meaning and intent of section 963 of the Code of Civil Procedure. As pointed out, and as is obvious, the matter of taxing costs involves a proceeding ancillary to the particular judgment in the securing of which such costs have been incurred, and, while it is true that costs allowed on appeal to the prevailing party on appeal are an essential part of the judgment on appeal, it certainly would not for a moment be supposed that, to obtain a review of the action of the court in taxing costs on appeal, an appeal from the judgment on appeal would lie. Nor would the order be reviewable upon an appeal from any judgment which might be rendered on a retrial of the case for the obvious reason that such costs would have no more relation to, or connection with, a judgment so obtained than they would have to a judgment rendered in an action between different parties or involving different issues. Besides, it might happen that plaintiff, on a retrial, would again obtain judgment against the defendants, and in such case, if the position of the movant were well founded, the party entitled to such costs would suffer a denial of the right to have the order reviewed at all. None of these obviously absurd propositions is made, even impliedly, by the learned counsel, nor are they suggested or hinted at in the Kling Case, the opinion in which was written by a jurist of recognized ability. They are only suggested here to illustrate the proposition that an appeal from an order taxing costs on appeal and allowed by the Appellate Court would wholly be denied to an aggrieved party dissatisfied with the taxing of such costs, if it were necessary to hold that a judgment of the Appellate Court was not a final judgment within the meaning or intent of section 963 of the Code of Civil Procedure. But, after all, upon the Code sections themselves may the determination of the controversy rest.

Section 963 does not expressly restrict its operation as to appeals from special orders after final judgments to those made after final judgments of the superior court. The language in that particular is general and reasonably applicable to any special order made after the rendition of any final judgment, and, as we have before suggested, and as is plainly true, a judgment by an appellate court in any case cannot be viewed as anything other than a final judgment. It will be noted that section 1034 fixes the time from

the date of the filing of the remittitur in the office of the clerk of the court below within which the prevailing party on appeal must file his memorandum of costs on appeal at 30 days, and provides that, after such costs are ascertained and determined or have been taxed, or the time for taxing the same has expired, execution may issue therefor as upon a judgment. It further provides that the party dissatisfied with the costs claimed may move to have the same taxed in the same manner and within a like time after notice of filing of the bill of costs, "as prescribed by the preceding section" (1033), which applies to the matter of costs incurred in the trial of the action. There can be no doubt that the last-mentioned provisions of section 1034 themselves clearly indicate that it was the legislative intent that the party dissatisfied with such costs, as taxed, should be entitled to a remedy for a review of the order taxing the same as provided by section 963 of the Code of Civil Procedure.

The motion to dismiss is denied.

I concur: FINCH, P. J.

---

74 Cal. App. 226

In re STUHLDREHER'S ESTATE.

LEMON et al. v. STUHLDREHER.

(Civ. 5186.)

(District Court of Appeal, First District, Division 2, California. Aug. 26, 1925.)

1. Executors and administrators ⟹283—Refusal of court to order part payment of claims against estate or determine priorities was within its discretion.

Where it was shown to the court that liquidated assets of estate were not sufficient to pay all claims, but there were unliquidated assets of speculative and uncertain value, it was not an abuse of discretion to refuse to determine, before all the assets were marshaled, whether personal injury judgment was a preferred claim or to make part payment of claims.

2. Stipulations ⟹3—Stipulation of counsel to permit court to determine priorities of claim and make part payment is of no effect.

Filing of a stipulation by counsel for estate and claimant, permitting court to determine priority of claim and to make partial payment of claims, is of no effect, since power of court is determined by statute, and cannot be increased or decreased by stipulation.

Appeal from Superior Court, Santa Barbara County; S. E. Crow, Judge.

In the matter of the estate of Jack Stuhldreher, deceased. Application by Blanche E. Lemon and another against Esther M. Stuhldreher, administratrix of the estate of Jack Stuhldreher, deceased, to have judgment declared preferred claim. From an order denying the application, plaintiffs appeal. Affirmed.

Fred A. Shaeffer, of Santa Maria, for appellants.

A. B. Bigler, of Santa Maria, for respondent.

STURTEVANT, J. On August 26, 1920, Harland B. Lemon was employed by Jack Stuhldreher in his vulcanizing shop at Santa Maria, Cal. A gasoline explosion occurred, which set fire to the shop and burned the employee and his employer. The employee died of his injuries on the same day. The employer died the next day. Such proceedings were had that Esther M. Stuhldreher, the wife of the employer, was duly appointed administratrix of his estate. Blanche E. Lemon, the surviving wife of the employee, took such proceedings that the Industrial Accident Commission thereafter made its findings and award in favor of the surviving wife and Harland B. Lemon, her minor child, in the sum of $4,495.50. A certified copy of said award was filed with the county clerk of Santa Barbara county, and a judgment was entered thereon. On proceedings duly had and taken, the Industrial Accident Commission converted said award into a lump sum, $4,058.34, payable forthwith. A certified copy of its order was filed with the county clerk, and a judgment in accordance therewith was duly entered.

Such proceedings were had that on the 15th day of October, 1923, Esther M. Stuhldreher, as administratrix of the estate of Jack Stuhldreher, filed in the matter of the said estate a petition for partial payment to creditors. In that petition she asked permission to pay $1,000 out of the assets of the estate to the creditor or creditors entitled thereto. In her petition she alleged that the funeral bills and expenses of last illness and all family allowance had been paid; that the fees of the administratrix and the fees of attorneys for ordinary and extraordinary services had not been paid; that the administratrix had rendered her second account, and that there was cash on hand amounting to $3,670, and that the remaining assets of the estate were speculative and of uncertain value; that a statement of the claims of all the creditors was filed with the first account, and that the total amount of said claims was $9,829.19, and that said estate is insolvent; that the time for filing claims has expired, and that no other claims than those last mentioned have been filed; that, deducting payments made, there was due on the allowed claims $8,025.29; that, in addition to said sum, there is on file the amended judgment hereinabove referred to; that the said judgment was rendered after the death of Jack Stuhldreher, and that

Blanche E. Lemon and Harland B. Lemon claimed that said judgment is a preferred claim against the estate of Jack Stuhldreher, deceased, subject only to the expenses of administration; that there are no other preferred claims, and that, if said judgment is paid, there will be no funds left with which to pay any of said claims other than said judgment creditors; that the said Blanche E. Lemon et al. are entitled to have their rights as preferred creditors determined, and that $1,000, but no greater sum, can safely be paid. Then follows a prayer that a judgment and order be made determining the priority of the judgment and the respective claims and the proportion to which each creditor is entitled and that not to exceed $1,000 be ordered paid. The petition was filed October 15, 1923.

The record shows that the petition was served October 13, 1923, on Fred A. Shaeffer, attorney for Blanche E. Lemon and Harland B. Lemon, Jr., but it does not show that any notice of the hearing of the petition was given, nor the nature of the notice, if any, and it does not show that any objection to the petition was made in writing or orally, and it does not show what proof, if any, was adduced at the hearing, and, although the petition recited that the administratrix had rendered her second account, the record does not show when said second account was rendered, heard, settled, or what action was taken thereon, or whether any notice of the hearing of said account was given or otherwise.

On July 7, 1924, the attorneys for the administratrix and the attorney for Blanche E. Lemon et al. filed a stipulation:

"That the court may determine the priority, if any, of the said Blanche E. Lemon and Harland B. Lemon, Jr., whether or not the said Blanche E. Lemon and Harland B. Lemon, Jr., have a preferred claim based on the award of the Industrial Accident Commission of the state of California, and direct that the payment not to exceed the sum of $1,000 be ordered paid as prayed for in said petition, said payment to be made to the various creditors in accordance with law following the court's determination on the question of priority, it being the intention of this stipulation that the court need not determine the pro rata to which each creditor is entitled at this time."

The record contains a reporter's transcript. That transcript purports to set forth the proceedings that occurred on Monday, November 25, 1923. A reading thereof discloses that the subject-matter before the court was the settling of the second account and the consideration of a petition for the allowance of attorney fees. Nothing is contained therein with reference to the "petition for partial payment to creditors."

On the 7th day of July, 1924, the trial court made an order as follows:

"The petition of Blanche E. Lemon and Harland B. Lemon, Jr., alleged preferred creditors of the above-entitled estate to have distributed to them the sum of $1,000, as preferred creditors, having heretofore been submitted to the court for consideration and decision, and the court having duly considered the same and being fully advised in the premises, now renders its decision thereon from the bench, and orders that said petition be, and the same is hereby, denied. Let an order be prepared accordingly."

On the 21st day of July, 1924, Blanche E. Lemon and Harland B. Lemon, Jr., contestants and appellants, served a notice of appeal on the attorneys for the administratrix and filed the same. In that notice of appeal they recited that they appealed from an order allowing attorney fees and also from the order quoted above.

In their briefs, counsel do not present any matters of or concerning the allowing of attorney fees, but they confine their briefs solely to the ruling of the court with reference to the making of partial payments to creditors. Except as hereinabove stated, no part of the record is contained in the transcript.

[1] We must assume, until the contrary appears, that the judicial record before us correctly determines and sets forth the rights of the parties. When the petition was before the trial court, it appeared to the trial court that there was on hand the sum of $3,670; that there were some other assets of a speculative and uncertain value that had not been liquidated; that the claims proved and allowed and unpaid amounted to $8,025.29; and that there was in addition thereto outstanding and unpaid a judgment in the sum of $4,058.34. Under these circumstances, if no other facts appeared, the record presents a case where it was peculiarly proper that the court should make no order with reference to the payment of the claims preferred or otherwise, or any part thereof, but, on the other hand, that it should await the time when all of the assets had been marshalled. Estate of Smith, 122 Cal. 462, 55 P. 249. The utmost that the record shows is that the trial court exercised its discretion by refusing to determine whether the judgment was a preferred claim or was not a preferred claim. Certainly nothing appears in the record showing that it abused its discretion.

[2] In their briefs, counsel refer to the stipulation. The filing of the paper was an idle act. The power of the court flowed from the statute, and could neither be increased nor diminished by the stipulation of counsel.

We find no error in the record.

The order is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

74 Cal. App. 269

KNOX v. TRIGONIA OIL CO. OF CALIFORNIA. (Civ. 5190.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1925.)

1. Account stated ⟸3—Held to exclude idea of moneys mentioned being contingent debt.

Account stated for commissions on sale *held* to show that the moneys mentioned had become an existing debt, and so exclude the idea of debt being contingent, though providing for payment in installments as vendor was paid.

2. Account stated ⟸9—Held to imply promise to pay.

An account stated *held* to imply a promise to pay, which is all that is necessary.

Appeal from Superior Court, City and County of San Francisco; E. N. Rector, Judge.

Action by William G. Knox against the Trigonia Oil Company of California. Judgment for plaintiff, and defendant appeals. Affirmed.

O. C. Wilson and W. F. Russell, both of San Francisco, for appellant.

James M. Thomas and Daniel H. Knox, both of San Francisco, for respondent.

STURTEVANT, J. The plaintiff commenced an action to recover moneys alleged to be due on a stated account. The defendant answered, a trial was had before the court sitting without a jury, judgment went for the plaintiff, and the defendant has appealed. The appellant contends that the debt was contingent, and that on a contingent debt one may not predicate a stated account. The vice in this position is in the assumption that the debt was contingent. It was not.

Prior to the month of July, 1920, some oil lands on the border between Santa Clara and Santa Cruz counties were owned by one Spiegleman. At that time Percy McCabe claimed to have a lease on the lands. Frank Rose, manager of Trigonia Oil & Gas Company, a corporation formed under the laws of Oregon, came to California and opened negotiations for the purchase of said oil lands. For a consideration of $5,000, McCabe agreed to stand aside and allow Rose to conduct his negotiations directly with Spiegleman. As a result of the negotiations, Rose was given such a contract that the Trigonia Oil Company of California was formed, and Spiegleman transferred the property to the corporation under an executory contract which called for certain deferred payments. On July 8, 1921, the defendant executed an indenture in writing, including the following passage:

"728 Phelan Building, San Francisco, Cal.
"July 8—21.

"Trigonia Oil Company of California, Dr., To Percy McCabe $3,500, and James Lester $1,500; Total $5,000.

"For commission assumed on sale of Spiegleman lease, Santa Clara county, at $32,500—commission $5,000, payable in proportion as Spiegleman or Continental Oil & Refining Company is paid. Trigonia Company has paid to date to Spiegleman or Continental Oil & Refining Company $8,500.

Amount now due on account of commission	$1,307 90
Paid to McCabe on account $100.....	
Paid to Lester on account $250.....	350 00
Balance	$ 957 90
7—11—21. Paid this date on account.....	250 00
Balance accrued and due.....	$ 707 90

"Balance unaccrued, $3,692.10, or $133.85 per $1,000 on $24,000 unpaid on the lease July 8, 1921.

"Received from the Trigonia Oil Company of California check No. 141 for $250.00 in payment of the above account. Percy McCabe.

"Please receipt and return to Trigonia Oil Company of California, 728 Phelan Bldg., San Francisco, Cal."

[1] A mere inspection of the writing shows that the moneys mentioned, $5,000, had become an existing debt. That debt, however, was made payable to McCabe at such times and in such amounts as should be in proportion to the moneys that were thereafter paid to Spiegleman on his deferred payments. Under these circumstances it is unnecessary to go into the consideration of cases dealing with contingent debts.

[2] The appellant also contends that there was no proof of an agreement to pay, and that such an agreement is an essential element in such an action. In making this contention the appellant is correct, if he means that there must be at least an implied promise to pay. In making the writing above quoted, it is perfectly clear that there was the implied promise to pay. An actual express agreement to pay is not necessary. Mayberry v. Cook, 121 Cal. 588, 54 P. 95; 1 C. J. p. 697, § 301.

We find no error in the record.

The judgment is affirmed.

We concur: LANGDON, P. J.; NOURSE, J.

⟸For other cases see same topic and KEY-NUMBER in all Key-Numbered Digests and Indexes

74 Cal. App. 272

JOHNSTON v. JONES, Sheriff of Sacramento County. (Civ. 3012.)

(District Court of Appeal, Third District, California. Aug. 27, 1925.)

Appeal and error ⊜479(1)—Writ of supersedeas will not be granted to stay execution of writ of mandate pending appeal.

Perfecting of appeal being sufficient without undertaking to stay execution of judgment directing issuance of writ of mandate, under Code Civ. Proc. § 949, petition for writ of supersedeas, staying enforcement of writ pending appeal, will be denied without prejudice; there being no presumption that trial court will proceed in disregard of plain provisions of statute and construction thereof by Supreme Court.

Application of Ellis W. Jones, Sheriff of Sacramento County, for a writ of supersedeas staying enforcement of writ of mandate, pending appeal from judgment against him in mandamus proceedings by Catherine M. Johnston. Writ denied without prejudice.

Ralph H. Lewis and Berkeley B. Blake, both of Sacramento, for petitioner.

Thomas B. Leeper, of Sacramento, for respondent.

PER CURIAM. This is an application by the defendant for a writ of supersedeas staying the enforcement, pending appeal, of a writ of mandate issued by the trial court, commanding the defendant to release certain "attachments or garnishments * * * served or levied by him," as sheriff, in an action by one Hille against the plaintiff herein.

The petition alleges that the defendant has regularly appealed to this court from the judgment entered against him in the mandamus proceeding; that, notwithstanding such appeal, the plaintiff has threatened to and will apply to the trial court "for an order adjudging appellant guilty of contempt of court in the event that he refuses to release the said attachment in accordance with the said writ of mandate; and appellant is informed and believes and therefore alleges that said court * * * will entertain the said motion * * * to have appellant adjudged guilty of contempt of court."

It is clear that the perfecting of an appeal, without an undertaking, is sufficient to stay execution of a judgment directing the issuance of a writ of mandate. Code Civ. Proc. § 949; People v. Jackson, 190 Cal. 257, 262, 212 P. 4; People v. Laine, 177 Cal. 742, 745, 171 P. 941; Wolf v. Gall, 174 Cal. 140, 142, 162 P. 115. It is not to be presumed, in the absence of a stronger showing than here made, that the trial court will proceed in disregard of the plain provisions of the statute and the construction thereof by the Supreme Court.

The petition is denied without prejudice.

197 Cal. 117

COHEN et al. v. MARSHALL (two cases). (L. A. 7919.)

(Supreme Court of California. Sept. 28, 1925.)

1. Chattel mortgages ⟸255—Mortgagee may bring action on note secured by mortgage without first foreclosing mortgage.

In action to recover on notes secured by mortgage on crop of peas, which had been destroyed without fault of mortgagee, and on other crops to be grown before 1923, which other crops were planted in December, 1922, and could not possibly mature before year 1923, *held* that, in view of Civ. Code § 3532, mortgagee could bring action on note without foreclosing mortgage, notwithstanding Code Civ. Proc. § 726.

2. Chattel mortgages ⟸255—Evidence held sufficient to support finding that mortgaged property was destroyed without fault of mortgagee.

In action to recover on note secured by mortgage on pea crop, evidence *held* to support finding that all the crop described in mortgage was destroyed without any fault of the mortgagee, thereby giving mortgagee right to maintain simple action against maker of note.

3. Chattel mortgages ⟸255—Refusal to permit amendment of answer to show clause in mortgage was inserted after signing was proper.

Refusal to permit defendant, in action on notes secured by mortgage, to amend answer

to show that clause in mortgage that mortgagee, on deeming himself insecure, might declare whole amount due had been inserted after mortgage was signed was proper, as it must be conclusively presumed that defendants had knowledge of the contents of their own pleadings.

In Bank.

Appeal from Superior Court, San Diego County; C. N. Andrews, Judge.

Actions by Isadore Cohen and Allen Rabin, doing business under the name of Cohen & Rabin, against Alice C. Marshall and another and against Percy W. Marshall and another. Judgments for plaintiffs, and defendants appeal. Affirmed.

Turner & Grainger and Richard A. Turner, all of Los Angeles, for appellants.

Shapiro & Shapiro, of Los Angeles, for respondents.

SEAWELL, J. By agreement the above-entitled causes were tried as one cause; it being stipulated by counsel in said causes that whatever evidence that should be produced therein might be considered and applied by the trial court with reference to the cause in or to which it should properly appear to be material or relevant.

The vital question presented by this appeal is whether the finding of the court to the effect that the security of the mortgagee, consisting of a crop of peas and such other crops as might be grown on certain described premises, had been destroyed without the fault of the mortgagee, thereby giving said mortgagee the right to maintain a simple action against the makers of the note, is supported by the evidence.

Defendants and appellants, husband and wife, owned an interest in several parcels of land situate in Oceanside and Carlsbad districts, respectively, county of San Diego. Said lands were adaptable to the raising of early peas for the market. Appellants were in need of financial assistance to enable them to plant said lands to peas and market the crop. Cohen, Mann & Kahn, Incorporated, with its place of business at the city of Los Angeles, was engaged in handling, buying, selling, and distributing fresh and green fruits and vegetables. On May 19, 1921, appellants entered into a contract with said corporation whereby it was appointed the sole and exclusive agent of appellants for selling and distributing all peas grown by them for the seasons 1921 and 1922. Said corporation was to do all things necessary to consummate said sales of peas in the market, and said appellants were to cultivate and raise the crops. Appellants specifically covenanted to plant to peas 100 acres known as the Russ property, situate at Oceanside. Said corporation was to receive 15 per cent. as commissions on all gross sales delivered to said agent for shipment and distribution. A pooling plan was also a part of the agreement. Said corporation agreed to advance to appellants, as a loan, $30 per acre for each acre planted to peas. One thousand dollars was to be paid upon signing the agreement; $1,000 at the time the acreage was ready to be planted; and the remaining $1,000—making $3,000 in all—at the time the acreage showed an 80 per cent. stand. All advances, such as crating charges, acreage advancements, commissions, and other specified charges were to have priority over all other charges or expenses. The corporation guaranteed 6 cents per pound for all peas received and accepted by it until March, 1922.

On August 29, 1921, a larger sum had been advanced by said corporation than it had agreed to advance. It was thereupon agreed between said parties that a much larger acreage than that originally agreed upon should be planted to peas. The enlarged and revised plan brought into the transaction a $12,000 promissory note executed by appellants in favor of said corporation to secure past, present, and future advancements made and to be made by said corporation to appellants, the payment of which note was secured by a mortgage on the crop.

Said agreement of August 19, 1921, by which an increased area was to be planted to peas and the need of increased financial assistance was provided for, was but an amplification of the purposes of the parties expressed in the agreement of May 19, 1921. On the day of the execution of the agreement dated August 19, 1921, Mr. and Mrs. Marshall, appellants, executed a promissory note, by the terms of which they jointly and severally agreed to pay to the order of Cohen, Mann & Kahn on or after two years from the date thereof the sum of $12,000. It contained the usual provisional clause for attorney's fees. The crop mortgage agreement provided that the payment of the note was secured thereby. It assigned to said corporation, in the language of the instrument, the following crops:

"The crops of peas, barley, and in fact every kind and nature of crop or crops now being, standing, and growing and to be grown *up to the 1923 season* upon that certain piece or parcel of land, * * *" etc. (Italics supplied.)

The acreage was described as follows: 120 acres known as the Russ land; 80 acres known as the Cary tract; 25 acres known as the McMiels add. The mortgage agreement contained the following provision:

"If at any time the mortgagee deems the security herein insufficient to secure the payment of the moneys advanced herein, then mortgagee may at its option declare the whole of said advances immediately due and payable, and shall be entitled to a judgment against the mortgagors for any deficiency which may arise."

Appellants being unable to obtain credit for fertilizing material necessary to the production of said crop of peas, Cohen, Mann &

Kahn obtained for them a credit with the Pacific Growers' Exchange whereby they were enabled to purchase said material at a cost of $5,070. As a guarantee of the payment of a portion of said debt, Cohen, Mann & Kahn assigned to the Pacific Growers' Exchange an interest in and to said crop contract, and indorsed the promissory note of appellant executed to said Pacific Growers' Exchange in the sum of $5,070, with liability limited to three-quarters of the amount of said indebtedness, to wit, $3,802.50. It was further agreed between Cohen, Mann & Kahn and Pacific Growers' Exchange that, if the proceeds from the first crop of peas was not sufficient to reimburse the former for all moneys advanced to appellants, the note which they had guaranteed should be extended by Pacific Growers' Exchange for a period of six months, and, if necessary, for successive periods of six months until the expiration of the term of the mortgage.

On November 26, 1921, Cohen & Rabin, with the written consent of appellants, and a number of other growers, became the successor of Cohen, Mann & Kahn in all contracts and agreements made by said appellants and said other growers with Cohen, Mann & Kahn, and all right, title, and interest therein was transferred to respondents. We think there is no doubt as to the sufficiency of the considerations that induced the parties to execute the several instruments upon which the action is based.

The complaints were filed January 25, 1922, and attachments were issued thereon and levied upon appellants' property. The causes of action came on for trial April 20, 1923. Judgment went for plaintiffs (respondents) in both cases. In the first for the sum of $7,585.31 and in the second action for the sum of $3,824.33, aggregating $11,409.64, including interest. The claim of $3,802.50, on account of respondents' guarantee for the payment of the Pacific Growers' Exchange note, was not allowed by the court because it had not been paid by respondents. In each action plaintiffs were allowed attorney's fees in the sum of $250, and that amount was included in each of said judgments.

A number of specifications as to the insufficiency of the evidence to support the findings are made. The failure of the court to find on material issues raised by the answers is also assigned as reversible error. The numerous specifications of error may be reduced to a few important questions which will later be noticed.

It is true that crops other than the pea crop were mentioned in the second agreements of the parties as furnishing a part of the security, but there is not the slightest doubt that the parties regarded the pea crop as furnishing the security for said advancements, as it was the central and primary object in the minds of all the parties to the contract. The first agreement specified the exact acreage and the particular lands that were to be planted to peas, and no other kinds of crops were mentioned. While the second agreement mentioned barley and such other crops as might be grown, the evidence shows conclusively that the advancements were made for the planting and cultivation of peas. Much of the moneys expended were expended in leveling, checking, and putting the ground in the condition required for the cultivation of peas.

After the execution and delivery of said note in the sum of $12,000, it continued to be the practice of the parties herein, following the practice that had obtained before its execution, to evidence such advancements made by respondents to appellants by the execution of a promissory note by the latter bearing the date, amount, and rate of interest of each advancement as and when made. The effect of this is that the aggregate amount of indebtedness, with a few exceptions, is shown by a number of separate promissory notes. This, it is contended, was done for convenience and to avoid subsequent disputes as to the amounts advanced.

[1] The complaints allege the destruction of the security by protracted and excessive rains and by aphis pest, without any fault of respondents. This allegation was denied by appellants, and it was contended below, and urged here, that, if it be granted that the pea crop was destroyed, there may have been, and as a fact there were, other crops actually planted on the parcels of land described in the mortgage contract before the expiration of 1922, which crops constituted partial, if not full, security for all advancements made, and therefore, said actions not having been brought to foreclose the mortgage in compliance with the provisions of section 726, Code of Civil Procedure, the right to maintain a personal action against the makers of said note was lost. So much of section 726, Code of Civil Procedure, as is applicable here provides:

"There can be but one action for the recovery of any debt, or the enforcement of any right secured by mortgage upon real or personal property, which action must be in accordance with the provisions of this chapter."

It is the settled law, however, that in case of a failure or destruction of the security, without the fault of the mortgagee, the mortgagee will not be restricted to a procedure which manifestly must prove to be vain and idle. Section 3532, Civil Code; Republic Truck Sales Co. v. Peak, 194 Cal. 515, 229 P. 331; Toby v. Oregon Pacific R. R. Co., 98 Cal. 490, 33 P. 550; Otto v. Long, 127 Cal. 471, 59 P. 895; Savings Bank v. Central Market, 122 Cal. 28, 54 P. 273; Martin v. Becker, 169 Cal. 301, 146 P. 665, Ann. Cas. 1916D, 171; 18 Cal. Jur., sec. 533, p. 249.

[2] The insufficiency of the evidence to support the finding that "all of the said crop de-

scribed in said mortgage was entirely destroyed by rain and aphis without any act of the plaintiffs or the person to whom the security was given" is not open to serious question. The pea season in the Oceanside and Carlsbad districts begins about the middle of November of each year, and concludes the following spring. Shipments began in the year 1921, on the 29th day of November, and were discontinued January 10, 1922. During the latter part of December, 1921, and the fore part of January, 1922, the rainfall in the districts in which the crops were growing was excessive and protracted. By the middle of January, as described by two or three witnesses called by respondents, the vines had fallen to the ground, the roots were water-soaked and injured, the blossoms had dropped from the vines, and the fields were literally alive with a pest known as aphis, and covered with the honey that said pest spreads. The vines had the appearance of being dead or in a dying condition, and the entire crop was absolutely unmarketable. Some evidence was offered by appellants which tended to show that a part of the crop could have been saved or salvaged had respondents advanced the sum of $600, which request was made of it by appellants, but respondents refused to grant it. This issue, however, was found against the appellants by the trial court. Another contention made by appellants is that on the day the suits were filed there was growing upon said premises a crop of barley consisting of about 15 acres. Respondents and the witnesses called by them testified that they had made repeated visits to said premises, and had thoroughly inspected the same, and there were no other crops growing thereon, except a small truck garden and a few tomato vines that were of no consequence. The 15 acres above mentioned were "undeveloped land," and the value of said barley crop above the cost of harvesting, if anything, was not stated. It was probably inconsequential. But, however this may be, it would seem that appellants received the benefit of the crop.

We think there is no merit in the position taken by appellants that certain crops of barley or oats sown in December, 1922, were a part of the mortgaged property. This crop or other crops so planted would not mature until several months after the beginning of 1923, and were not included in the agreements of the parties as part of the mortgage security. This is made clear by an inspection of the contracts and an examination of the evidence. No lien upon those crops was within the contemplation of the contracting parties. The mortgage is confined to the "crop or crops now being, standing and growing and to be grown up to the season 1923." Of course, crops planted in December, 1922, would not mature by January 1, 1923. Only crops that could reasonably be expected to mature and be ready to be gathered before January, 1923, were intended to be, or were, as a matter of fact, subject to the mortgage lien.

The rule of law announced in Arques v. Wasson, 51 Cal. 620, 21 Am. Rep. 718, and other cases, as to the potential existence of crops not sown at the time a mortgage is given upon them, has no application to the issue involved here. We recognize the rule of law as there stated. The contract in the instant case, considered with reference to the evidence, shows that the case is entirely without the rule announced in Arques v. Wasson, supra. There is also evidence in the instant case to the effect that appellant Percy W. Marshall declared, early in January, 1922, that he would not sow or plant any other or further crops.

[3] Clearly the trial court did not abuse its discretion by refusing leave to appellants to amend their answers during the trial of the cause by setting up specific denials to the effect that the mortgage, when signed by them, did not contain the clause and provision that, if at any time the mortgagee should deem the security insufficient to secure the moneys advanced by it, said mortgagee reserved the right at its option to declare the whole of said advancements immediately due and payable, and would be entitled to a judgment against the mortgagors for any deficiency which might be shown to exist. At the time the request to amend was made it was contended that said clause had been surreptitiously inserted in the mortgage contract after it had been executed and before it was offered for record. This motion was made months after the signing of said contract. The clause now challenged as not having been a provision of the contract as signed not only appeared in the mortgage as pleaded by respondents as an exhibit, but it was also specifically set out and stressed in the body of the complaint. Moreover, it was also pleaded by appellants in their answers by way of an exhibit in precisely the same language as it appears in the original instrument and in said complaints. The fact that said clause had been typed into the mortgage by way of interlineation by the use of a typewriting machine of different pattern than the one that had been used in preparing the body of the mortgage was not such a circumstance as to arouse the suspicions of the trial court in the face of the fact that other interlineations, corrections, and insertions which were not questioned had been similarly made apparently by the use of the same typewriting machine. The circumstances attending this particular point are such that it must be conclusively presumed that appellants had knowledge of the contents of the pleadings, especially of their own. The court committed no abuse of discretion by its ruling.

Every defense that appellants urge before this court was made an issue at the trial, and a finding was thereupon made in the court be-

low. Appellants were denied no right that they would have been entitled to had the action been one in form to foreclose the mortgage rather than a simple action on the note. The allegations of fraud and bad faith on the part of respondents and the alleged damages flowing therefrom were fully presented and determined, as were all disputed questions arising out of said controversy. To reverse the cases under such circumstances, in the absence of a showing of resultant injury, would be sacrificing the substance of the actions to an empty form of law.

The evidence being sufficient to sustain the findings of the trial court, the judgment in each case is affirmed.

We concur: HOUSER, Justice pro tem.; LAWLOR J., Acting C. J.; RICHARDS, J.; SHENK, J.; WASTE, J.; LENNON, J.

---

197 Cal. 224

JEFFORDS et al. v. YOUNG et al. (L. A. 8069.)

(Supreme Court of California. Oct. 1, 1925.)

1. Appeal and error ⟹553(2), 612(2)—Review on appeal of any matters except those appearing on face of judgment roll must be made by bill of exceptions or reporter's transcript.

Any matters other than those appearing on face of judgment roll to be reviewed on appeal must be presented by bill of exceptions or reporter's transcript, as clerk's transcript is incompetent to authenticate for purpose of review on appeal any portion of record other than judgment roll and notice of appeal.

2. Appeal and error ⟹523(2)—Affidavits to be used on appeal from order after judgment must be incorporated in bill of exceptions or reporter's transcript.

Supporting papers on appeal from order of judgment predicated on affidavit must be incorporated in bill of exceptions, settled, certified, and signed by trial judge, or in reporter's transcript settled and certified by trial judge.

3. Appeal and error ⟹662(1)—On affirmative showing in clerk's transcript that affidavits supporting motion were not on file motion will be denied.

Where, in appeal under Code Civ. Proc. § 953a et seq., clerk's transcript affirmatively showed that no affidavits in support of motion based on affidavits were on file, order of lower court denying motion will be affirmed.

4. New trial ⟹137—Motion for new trial denied when grounds are not specified in notice of motion.

If motion to set aside judgment and for new trial is intended as motion for new trial, under Code Civ. Proc. § 656 et seq., it will be denied where no grounds are designated in notice of motion as provided in sections 657 and 659.

5. Appeal and error ⟹766—Judgment may be affirmed on motion, where appellant fails to present proper brief.

Where appellant, relying on typewritten transcript, fails to print in his brief or supplement thereto sufficient of record to justify reversal of the judgment or order appealed from, judgment may be affirmed on motion under 1923 amendment to Code Civ. Proc. § 953c.

In Bank.

Appeal from Superior Court, Imperial County; Franklin J. Cole, Judge.

Action by C. D. Jeffords and another, a copartnership in business under the firm name and style of the Jeffords-Schoenmann Company, against Thomas I. Young and others. From a judgment for defendants, and an order denying plaintiffs' motion for order setting aside judgment, and for a new trial, plaintiffs appeal. Affirmed.

John A. Berry and Wilbur Randall, both of El Centro, for appellants.

Ault & Anderson, of Calexico, for respondents.

MYERS, C. J. Plaintiffs appeal herein from a judgment in favor of defendants and from an order made subsequent to judgment, denying plaintiffs' motion for an order setting aside the judgment and for a new trial. The action is a suit to quiet title. The complaint is in the conventional form of a complaint to quiet title under section 738, Code of Civil Procedure. It alleges the ownership and possession of plaintiffs of the premises described in the complaint; that the defendants claim an estate or interest therein; that the claims of the defendants are without right, and prays that the defendants be required to set forth the nature of their respective claims; that it be decreed that the plaintiffs are the owners of the property; that their title be quieted; and that defendants be enjoined from asserting any title thereto. The defendants Young answered, disclaiming any interest or estate in the property and were dismissed from the action. There was no error in this. Code Civ. Proc. § 739. The defendant Lorenz answered, denying the allegations of plaintiffs' ownership of the premises and affirmatively alleging ownership in himself and praying for a decree adjudging his title therein. The cause came on for trial October 25, 1923, pursuant to due notice of the time and place of trial. Counsel who then represented plaintiffs appeared without his clients and moved to dismiss the action, which motion was denied. Thereupon the trial proceeded. Counsel for plaintiffs neither produced nor offered any evidence tending to support the allegations of the complaint. Counsel for defendant

Lorenz produced oral and documentary evidence tending to establish title in him. Findings of fact and conclusions of law in regular form and responsive to all of the issues framed by the pleadings, together with judgment adjudging title to the premises in the defendant Lorenz, were signed and filed. At the oral argument upon the hearing before this court counsel for appellants expressly conceded that the appeal from the judgment herein is without legal merit, for the reason that there was no evidence upon which the court could have given judgment for the plaintiffs.

The record upon this appeal was prepared pursuant to the provisions of section 953a et seq., Code of Civil Procedure, and consists of typewritten clerk's and reporter's transcripts. It appears from the clerk's transcript herein that on the 14th day of December, 1923, plaintiffs moved the court for an order setting aside the judgment and for a new trial, which motion was denied. The notice of motion signed by counsel for plaintiffs and directed to counsel for defendants was as follows:

"Gentlemen: Take notice that upon the affidavits of Hedley Richmond and Dr. L. C. House, copies of which are herewith served upon you, and upon the pleadings and proceedings on file in said action, the undersigned will, on the 14th day of December, 1923, at 10:00 o'clock a. m. of that day at the courthouse in the city of El Centro, California, move the court for an order setting aside the judgment in this action and for a new trial herein upon the grounds set out in the affidavits hereto attached."

[1-3] It will be noted that no grounds of the motion were stated in the notice, which recited that the motion would be made "upon the grounds set out in the affidavits hereto attached." It does not appear that such or any affidavits were attached. In fact, it does not appear that such or any affidavits were presented or filed in connection with this motion. In so far as we are able to ascertain from the clerk's transcript, it indicates affirmatively that no such affidavits were presented or filed in support of this motion or at any time, except in connection with and in support of a subsequent motion which was presented on January 10, 1924. This court has repeatedly held that the clerk's transcript is incompetent to authenticate for the purpose of a review upon appeal any portion of the record other than the judgment roll and notice of appeal. 2 Cal. Juris. p. 633. If any matters other than such as appear upon the face of the judgment roll are sought to be reviewed upon appeal, the record thereof must be presented either by a bill of exceptions or by a reporter's transcript. Bell v. Brigance, 194 Cal. 445, 229 P. 27; Martin v. Pac. G. & E. Co. (Cal. Sup.), 234 P. 321. In the case of an appeal from an order after judgment predicated upon affidavits the supporting papers to be entitled to consideration upon appeal must either (1) be incorporated in a bill of exceptions settled, certified, and signed by the trial judge, certifying that such papers were used at the hearing upon such motion, or (2) they must be incorporated in a reporter's transcript settled and certified in like manner by the trial judge. The clerk's transcript indicates merely that certain papers were filed in his office and the date of their filing. It does not indicate, and the clerk is not competent to certify for purposes of review upon appeal, what papers were presented to and considered by the trial judge in support of or in opposition to a given motion. However, in the present case, as noted above, the clerk's transcript does indicate affirmatively that no affidavits were on file which could have been used in support of the motion at the hearing on December 14, 1923. The order denying that motion must therefore be affirmed.

Thereafter, and on January 10, 1924, plaintiffs by leave of court renewed their motion to set aside the judgment and grant a new trial. Upon this occasion they specified in their notice six grounds upon which the motion would be made, and supported the same by affidavits served and filed therewith. Upon the showing there made the learned trial judge might well have granted the relief prayed for under section 473, Code of Civil Procedure, upon the ground of excusable neglect. However this may be, he did not do so, but denied the motion. No appeal was taken from this order, and we are, therefore without jurisdiction to review it. The only notice of appeal which appears in the record was filed January 7, 1924, and is directed solely at the judgment and the order of December 14, 1923.

[4] We have assumed that the motion of December 14, 1923, was not a motion for new trial under section 656 et seq., Code of Civil Procedure, but was a motion for relief under section 473, Code of Civil Procedure, and that the order denying it was therefore appealable as a special order after final judgment. If it be assumed to have been intended as an ordinary motion for new trial, the order denying it would be reviewable upon the appeal from the judgment. So regarded, it must be held to have been properly denied, for the reason that no grounds were designated in the notice of motion (Code Civ. Proc. §§ 659, 657), and for the further reason that no showing was made in support thereof. The motion of January 10, 1924, cannot be regarded as a motion for new trial under section 656 et seq., Code of Civil Procedure, because appellants had then lost their right to proceed under those sections by lapse of time.

No contention has been made in behalf of appellants herein, either in their brief or at the oral argument, that the court erred in

denying their motion to dismiss the action. That question, therefore, is not before us.

[5] Perhaps it should be further pointed out for the information of members of the bar that respondent herein would have been entitled to an order affirming the judgment and order appealed from, upon motion, if he had made such motion in this court. This for the reason that appellants have wholly failed to print any portion of the record in their brief or in a supplement thereto. Not a word of the pleadings, findings, judgment, order, or testimony is to be found in appellants' brief as is expressly required by section 953c, Code of Civil Procedure. It has been reiterated approximately 100 times in the decisions of this court and of the District Courts of Appeal that it is incumbent upon an appellant who relies upon a typewritten transcript to print in his brief or in a printed supplement thereto sufficient of the record to justify a reversal of the judgment or order appealed from. 2 Cal. Juris. 643 et seq. Furthermore, as we pointed out some months ago (Estate of Berry [Cal. Sup.] 233 P. 330), since the 1923 amendment to the section last cited, an appellant who fails to do this incurs thereby the risk that the order or judgment appealed from may be affirmed upon motion. In the present case, however, respondent made no such motion. On the contrary, he printed as a supplement to his own brief substantially the entire record upon this appeal. For this reason, and for the further reason that appellants seem (from the statements in their brief) to have been the victims of a most unusual combination of unfortunate accidents, we have given consideration to the merits of their appeal.

Upon the record before us we are impelled to the conclusion that the judgment and order appealed from must be affirmed, and it is so ordered.

We concur: LAWLOR, J.; SEAWELL, J.; WASTE, J.; LENNON, J.; RICHARDS, J.

Mr. Justice SHENK, being disqualified, did not participate in the decision.

---

197 Cal. 132

PERRY et al. v. SIMEONE et al. (S. F. 11069.)

(Supreme Court of California. Sept. 28, 1925. Rehearing Denied Oct. 26, 1925.)

1. Evidence ⟸14—No judicial notice that 15 year old girl is incompetent to drive automobile.

Court cannot take judicial notice, as matter of common knowledge, that 15 year old girl is incompetent to drive an automobile, especially in view of St. 1923, p. 532, § 63, prohibiting issuance of operator's license to any one under 14.

2. Parent and child ⟸13(1)—Parents held not liable for death caused by minor daughter's negligent operation of automobile.

Parents, without knowledge that 15 year old daughter, driving their automobile with their passive permission, had ever been careless in operation thereof, *held* not liable for death of another automobilist in collision, due to her negligence, where they had signed no application by her for license to operate automobile, so as to render them jointly liable with her under Motor Vehicle Act, § 24, as amended by St. 1919, p. 223.

In Bank.

Appeal from Superior Court, Santa Clara County; F. B. Brown, Judge.

Action by Ella M. Perry and others against Louise Simeone and others. Judgment for plaintiffs, and defendants appeal. Affirmed as to named defendant, and reversed as to other defendants.

Leland H. Walker and O. H. Speciale, both of San Jose, for appellants.

Clark, Nichols & Eltse, of Berkeley, for respondents.

HOUSER, Justice pro tem. The controversy involved in this appeal arose out of a collision between two automobiles—one of which was driven by plaintiffs' decedent, and the other by defendant Louise Simeone—and which collision resulted in the death of plaintiffs' decedent, and on account of which death judgment was rendered against all the defendants in the sum of $15,000.

Defendant Louise Simeone is the daughter of the other defendants. At the time the accident occurred, the daughter was of the age of 15 years. She was not accompanied by either of her parents—the evidence being that they were absent from their home and knew nothing of the accident until after its occurrence—nor had they or either of them given express consent to their daughter to operate the automobile, which was the property of the father, L. Simeone. However, the evidence was sufficient to justify the inference that the daughter had at least passive permission to use the automobile.

The fact of the negligent operation of the automobile by the daughter at the time the accident occurred, and the further fact that such negligence was the proximate cause of the injury which resulted in the death of plaintiffs' decedent, are admitted by the appellants. While there was some evidence to the effect that on two or three occasions the daughter had been known to drive the automobile in a presumably careless manner, there was nothing to show that either of the parents ever had any knowledge of such alleged, or any, carelessness on the part of the daughter, but, to the contrary, that from their personal observation the daughter, when permitted by the parents to drive the

automobile, had always done so in a prudent manner.

There is no claim on the part of respondents that the relationship of agency existed between the parents and the daughter in the matter of the operation of the automobile at the time the accident occurred. The lack of knowledge on the part of the parents of any actual incompetency of the daughter to drive the automobile by reason of her careless operation thereof being shown, the principal question, and in fact the turning point involved in the appeal, is whether or not the parents of a 15 year old daughter, who permit such daughter to operate an automobile, are liable for any damages caused by the negligent operation of the automobile by the daughter.

[1] The effect of respondents' contention in this regard is that the court should take judicial notice of the fact that a girl of 15 years of age cannot possibly be competent to operate an automobile. By way of authority on the subject, the nearest approach thereto which has come to the attention of the court is an opinion of the Texas Court of Civil Appeals (Allen v. Bland, 168 S. W. 35), wherein that court held that a father must be held to have known that a boy of the age of 11 years, weighing 85 pounds, when intrusted with an unusually heavy and high-powered automobile, driving the same alone upon the public streets, would be "inclined to be venturesome," and "that danger necessarily attended his use of the car under such conditions." There was in that case, however, direct evidence of the boy's incompetence or recklessness, and the Texas court concluded that "very little evidence along this line was necessary to sustain plaintiff's case."

It is urged by respondents that, because the state has seen fit to make a girl a minor until she reaches the age of 18 years, it should follow that, she being in law rendered incapable of governing herself until she becomes of that age, by the same token she is also unfit to operate an automobile up to that time. Following the same reasoning, a young man would not be legally qualified to drive an automobile until he reached the age of 21 years. If legislative enactments are to be looked to as evidence of the common knowledge, the provision in section 63 of the California Vehicle Act of 1923 (Stats. 1923, pp. 517, 532), prescribing the minimum age limit for operators and chauffeurs and providing that "an operator's license shall not be issued to any person under the age of 14 years * * *" must be regarded as a declaration that persons of the age of 15 years may be competent to operate motor vehicles.

While in matters requiring deliberation in thought it may not be seriously questioned that persons of mature age may be better qualified to pass judgment than those who have not reached their majority, it may not be so clear that on occasions demanding quick decision and rapid action the younger person does not excel the latter and have a distinct advantage in that respect. Skillful driving of an automobile approaches an art. It may be acquired by some persons who are particularly adapted to it within a comparatively short time, and by others, of whatever age or intelligence, apparently without reference to the earnestness or the attention or the time devoted thereto, it is an impossibility. A person habitually careless, or one of a preoccupied disposition, is unlikely to become careful or attentive when placed in charge as a driver of an automobile. The slightest inattention at a critical moment is apt to result in disaster. While, after long practice, the driving of an automobile may become more or less mechanical, nevertheless, alertness is imperatively demanded in order that danger may be timely noticed and threatened injury may be avoided. Accidents usually happen in the "twinkling of an eye." In an emergency a quick mind and co-ordinating suppleness of muscle are more valuable as a preventive of injury than a deliberate brain and an enfeebled body. The former characteristics belong especially to youth. Generally speaking, a girl of 15 years, while perhaps not possessing them in their fullness and perfection, is at least quite as likely to be endowed therewith as the average individual of mature or of middle age. So that, from a standpoint of "judicial notice," as contended by respondents, the claimed incompetency of the daughter of the elder defendants (solely because of the age of the daughter) to drive an automobile cannot be said to have indisputable existence as a matter of common knowledge.

[2] Nor does the law comport with the claimed liability of the parents. It has long been considered as a settled general principle that the parent is not liable for the torts of his minor child. It is only by direct statutory provision that the rule is relaxed or modified. An example thereof may be found in section 24 of the Motor Vehicle Act (Stats. 1915, pp. 397, 411, as amended by Stats. 1919, pp. 191, 223), where it is provided:

"* * * That it shall be unlawful for any person to cause or knowingly to permit his or her child, ward or employee to operate or drive a motor vehicle upon the public highway whether as a chauffeur or operator, without having first obtained such license as is hereinbefore specified; provided, that the application to the department of a minor to operate or drive a motor vehicle whether as chauffeur or operator, shall not be granted by the department unless the parent or parents having the custody of such applicant or the guardian of such applicant shall have joined in said application by signing the same; and provided, further, that any negligence of a minor, so licensed, in operating or driving a motor vehicle upon the public highway, whether as chauffeur or operator, shall be imputed to the person or persons

who shall have signed the application of such minor for said license, which person or persons shall be jointly and severally liable with such minor for any damages caused by such negligence."

In the case of Buelke v. Levenstadt, 190 Cal. 684, 214 P. 42, relied upon by respondents to establish the liability of the parents of the minor daughter herein, an uncle of the minor had signed the minor's application for a license to operate an automobile. Under the provisions of the statute, one who stood "in loco parentis" to a minor, and who signed the application as "father," was held liable for the negligent operation by the minor of the automobile. And in Rocca v. Steinmetz, 61 Cal. App. 102, 214 P. 257, the ruling is that (syllabus):

"An owner of an automobile who permits his son to use it, with knowledge that his son is a careless and reckless driver, is guilty of negligence, and liable for damage caused by the son in the operation of the machine."

Those cases, however, are distinguishable from the instant case. The former case depended upon the application of a statute which expressly deviated from the general rule as to the nonliability of the parent, and made the parent liable if he had signed the minor's application for a license to operate an automobile. No such fact is connected with the instant case. The minor daughter was not driving the automobile as a licensed operator, but was driving it in defiance of the terms of the statute, and hence came under the conditions of the general rule affecting the nonliability of parents for the torts of their children. In the latter case, the parent, with full knowledge on his part of the fact that the son was a careless and reckless driver, permitted him to use the automobile. In the case at bar, the parents had no knowledge of the fact (assuming it to be true) that the daughter was or ever had been careless in the operation of the automobile. Indeed, as heretofore stated, their only knowledge and observation of the daughter's habits in that regard were that the daughter drove the car in a prudent and careful manner.

In the case first cited (Buelke v. Lavenstadt, 190 Cal. 684, 689, 214 P. 42, 44), in speaking of the possible liability of a parent for the negligent operation by his minor child of an automobile, the court said:

"In the case of an injury by an automobile, the liability rests not alone upon the fact of ownership, but upon the combined negligence of the driver in the operation of the automobile, and of the owner in intrusting the machine to an incompetent driver. Berry on Automobiles (2d Ed.) § 603; Parker v. Wilson, 179 Ala. 361, 371, 60 So. 150, 43 L. R. A. (N. S.) 87."

And in the second case the matter is thus presented by the court:

"It is the claim of respondent that no such liability [of the parent] is shown, and he thinks the situation is covered by this question: 'May a father, who owns an automobile, be held liable in an action for damage resulting from personal injuries simply and solely because he loaned his automobile to an adult son, who took the same for a pleasure ride, there being no business relation between father and son, in connection with the ride that resulted disastrously?' He answers the question in the negative, and in support thereof he cites Spence v. Fisher, 184 Cal. 209 [14 A. L. R. 1083, 193 P. 255]. If the case were as thus presented by respondent, we should be compelled to agree with him in his conclusion."

Within very recent years it has been held by this court that, where no question of agency was involved, a father who was the owner of an automobile, but who was not personally negligent in the matter of its use by his adult daughter, could not be held liable for damages sustained by third persons by reason of the negligent operation of the automobile by the daughter, even though the automobile was maintained by the father for the general convenience, use, and pleasure of the members of his family and was operated by such persons with the father's consent. Spence v. Fisher, 184 Cal. 209, 193 P. 255, 14 A. L. R. 1083. To the same effect is Idemoto v. Scheidecker, 193 Cal. 653, 226 P. 922. See, also, Hill v. Jacquemart, 55 Cal. App. 498, 203 P. 1021; Sanfilippo v. Lesser, 59 Cal. App. 86, 210 P. 44; Grillich v. Weinshenk, 64 Cal. App. 474, 222 P. 160. Another case which also has direct application to the facts herein is Arrelano v. Jorgensen, 52 Cal. App. 622, 199 P. 855, where, as here, the parents permitted their minor son to operate an automobile without his first having procured an operator's license so to do. It was there contended that the violation by the parents of the law heretofore quoted, requiring them to obtain a license for the minor to drive the automobile, should not operate as a release from liability. The court said that it was well settled that the act or omission constituting the violation of law must have contributed directly to the injury, or, however improper or illegal it may have been in the abstract, no action for damages could be founded upon it. And the ruling of the court, as summed up in the syllabus, was:

"The parents of a minor cannot be held liable for personal injuries received and damages to property sustained by reason of a collision of an automobile owned by such minor and negligently operated by him, from the mere fact that they knowingly permitted him to operate the machine without the license required by the Motor Vehicle Act of 1917 [St. 1917, p. 382], in the absence of any evidence causally connecting the absence of the license with the injuries."

For the foregoing reasons, and because of the authorities cited herein, it follows that,

so far as defendants L. Simeone and Rosalie Simeone, the parents of Louise Simeone, are concerned, the judgment should be reversed. Otherwise, and so far as concerns the defendant Louise Simeone, the judgment should be affirmed. It is so ordered.

We concur: LAWLOR, J., Acting C. J.; WASTE, J.; LENNON, J.; SEAWELL, J.; RICHARDS, J.; SHENK, J.

---

197 Cal. 139

HEMRY v. AMOS. (L. A. 8032.)

(Supreme Court of California. Sept. 28, 1925.)

1. Compromise and settlement ⟸2—Court may direct performance of compromise settlement on basis of which defendant's future acts were to be performed.

Where an agreement, made pending an accounting suit by principal against agent, was a compromise agreement, requiring defendant to perform future acts, and such agreement was pleaded in the accounting suit, equity court may direct performance of such acts as against contention that agreement was a mere accord, which, when not followed by satisfaction, was not a bar to accounting.

2. Covenants ⟸22—Agent's conveyance of land to principal equitably entitled thereto not construed as carrying covenant against incumbrances; "grant."

Conveyance of Florida lands by agents, holding bare legal title, to his principal, already entitled thereto in equity, cannot be construed as carrying with it a covenant against incumbrances, especially in view of law of Florida, according to which it must be interpreted; word "grant" not implying such covenant under law of that state.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Grant (In conveyancing).]

In Bank.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by F. L. Hemry against J. A. Amos. From a judgment for plaintiff in an unsatisfactory amount, he appeals. Modified, and affirmed as modified.

McNabb & Hodge and William Guthrie, all of San Bernardino, for appellant.

Daley & Byrne and W. E. Byrne, all of San Bernardino, for respondent.

RICHARDS, J. This appeal is by the plaintiff from a judgment in his favor in an action for an accounting, and is taken upon the judgment roll. The appellant makes two contentions: First, that the judgment is not supported by the pleadings, findings of fact, or conclusions of law, but is contrary thereto; second, that the trial court was in error in not allowing the plaintiff his costs upon a judgment in his favor. As to the latter point, the respondent admits that the trial court was in error and consents to a modification of the judgment in that regard. The sole question for discussion is therefore whether the judgment is supported by the pleadings, findings, and conclusions of law. The action, as we have seen, was for an accounting between the plaintiff as a principal and the defendant as his alleged agent in a considerable number of transactions involving the investment of the plaintiff's money and purchase, handling, and transfer of certain personal and real property extending over a period of years. The plaintiff alleged various acts of misconduct on the part of the defendant in relation to these properties, and demanded an accounting of the defendant's dealings with the plaintiff's said properties and the turning over of what remained of the same or their value to the plaintiff and for general relief. The defendant's original answer, while admitting the agency, denied specifically any acts of misconduct on his part, and put in issue practically all of the averments of the complaint involving his dealings with the plaintiff's several properties. The original complaint was filed on November 12, 1921. On November 14, 1921, the plaintiff and defendant met and entered into and executed a written agreement purporting to cover the matters in controversy between them. This agreement the defendant set forth in and made a part of his answer, and pleaded it as a bar to plaintiff's cause of action. Thereafter the plaintiff filed a supplemental complaint, wherein he alleged in substance that the defendant had taken advantage of his old age and inexperience in business and had, by fraudulent pretensions and representations, overreached him in the making and terms of said agreement of November 14, 1921, and that the plaintiff had, on February 10, 1922, rescinded the same. To this supplemental complaint the defendant presented and filed a supplemental answer and subsequent thereto several amendments thereto, denying its incriminatory averments, and alleging that said agreement of November 14, 1921, had been in certain essential respects performed by him, and was not subject to rescission. He also in these pleadings makes certain allegations with respect to the execution by himself and his wife of a certain deed to the plaintiff of certain lands in Florida in performance of said agreement, which lands were at the time thereof incumbered with a mortgage, and that it was not the intent of the parties to said agreement and to said deed, in execution of the terms thereof, that said lands should be by said deed conveyed free and clear of such incumbrance, but subject thereto; and that, under the laws of the state of Florida, where the lands cov-

ered by said deed were situate, such a conveyance did not carry with it a covenant against incumbrances.

After the issues had thus been made up, the court proceeded to try the cause before a jury, which rendered a general verdict in the plaintiff's favor for the sum of $20,000. Thereupon the defendant made a motion that the court disregard such verdict and proceed to make its findings of fact and conclusions of law and render its decision thereon. The court granted said motion, and set aside said verdict as contrary to law and excessive and unsupported by the evidence, and thereupon proceeded to make and file its findings of fact and conclusions of law. In so doing it dealt specifically, at great length, and with much detail, with the averments, admissions, and denials of the pleadings of the respective parties, and particularly with the agreement between them, executed on November 14, 1921, with respect to which the court held that the same was entered into by the plaintiff freely and with full knowledge of each and all of the transactions between the parties referred to therein and adjusted thereby, and was a valid and subsisting agreement, and constituted a full and complete settlement of the account between the parties thereto and to this litigation, that said agreement had as to the real property referred to therein been fully performed by the defendant, and that, by virtue of the terms thereof, there was due from the defendant to the plaintiff the sum of $4,165 and no more. Judgment was ordered and entered accordingly for said sum without costs, and, from said judgment, the plaintiff prosecutes this appeal.

[1] The main contention of the appellant upon this appeal is that the agreement entered into between the parties hereto upon November 14, 1921, was in the nature of an accord, and that, since certain of the agreements therein to be performed by the defendant had not been performed, and said accord not having been by reason thereof accompanied or followed by a satisfaction, the said agreement was thereby rendered wholly ineffectual, and ought not therefore to have been considered or enforced by the trial court as constituting a compromise and settlement of the account between the parties. The appellant cites numerous cases to the effect that an accord, when not accompanied or followed by a satisfaction, is ineffectual as a bar to an action of this character. With these cases we have no quarrel, but the difficulty is with the appellant's contention that the agreement in question was in fact or in its essential nature an accord. An examination of said agreement convinces us that it was not an accord, but a compromise and settlement of the pending controversy between the parties, the terms and conditions of which were on the part of the defendant to be fully executed at some future time, but which was intended to be what the trial court found it to be, a present settlement of the account between the parties thereto upon the basis of which the future acts of the defendant were to be performed. Such being the nature of said agreement, it was the proper function of a court of equity to carry its provisions into effect by directing the performance thereof by the defendant, and this is what the court has done in the instant case. The case of Armstrong v. Sacramento Valley Railroad Company, 179 Cal. 648, 178 P. 516, is as to the principles involved precisely in point, and it and the authorities cited therein are made the basis of this decision.

[2] With respect to the conveyance by the defendant and his wife to plaintiff of certain lands situate in Florida, the trial court has found that the conveyance which said defendant was by the terms of said agreement to make to said plaintiff was merely a conveyance from an agent, holding the bare legal title, to his principal of lands which were already his in equity, and that such conveyance was not to be construed as carrying with it a covenant against incumbrances for this reason, as well as for the reason that, since it purported to convey the title to lands in Florida, it was to be interpreted according to the laws of the place where the lands were situated, wherein the use of the word "grant" in a deed did not imply a covenant against incumbrances. The case of Platner v. Vincent, 187 Cal. 443, 202 P. 655, is authority for this latter conclusion. It follows that, as to his main contention, the plaintiff's appeal is without merit. As to the matter of the allowance of costs in his favor by the trial court, the plaintiff, it is conceded, was entitled to such allowance, and the judgment herein should, without reversal, be modified in that regard.

It is therefore ordered that the trial court be, and it is hereby, directed to modify its judgment herein so as to provide for the recovery by the plaintiff of his costs, and, as thus modified, the judgment is affirmed.

We concur: HOUSER, Justice pro tem.; LAWLOR, J., Acting C. J.; WASTE, J.; SHENK, J.; SEAWELL, J.; LENNON, J.

197 Cal. 148

KEENA v. UNITED RAILROADS OF SAN FRANCISCO. (S. F. 10631.)

(Supreme Court of California. Sept. 28, 1925. Rehearing Denied Oct. 26, 1925.)

1. Appeal and error ⟸930(2)—Jury presumed to have followed court's instructions.

In considering questions of negligence charged against defendant in action for death of minor child, Supreme Court must presume that jury, in finding verdict against defendant, followed trial court's instructions not to do so, unless they found that defendant was guilty of negligence proximately causing injuries to child, and that neither latter nor its parents were contributorily negligent.

2. Appeal and error ⟸843(3)—Whether jury found defendant guilty of only one or more of several elements of negligence immaterial, if evidence sufficient to sustain verdict on any one.

Whether jury found appellant guilty of only one or more of several elements of negligence involved is immaterial on appeal, if there be sufficient evidence to sustain verdict on any one of such elements.

3. Appeal and error ⟸930(1)—Evidence tending to sustain verdict accepted as true, unless palpably false.

In passing on sufficiency of evidence, evidence must be so construed as to support verdict to extent that it is fairly susceptible of such construction, and, in case of conflict, that tending to sustain verdict must be accepted as true, unless inherently so improbable as to be palpably false.

4. Appeal and error ⟸996 — Negligence for jury, not reviewing court, where inferences may be drawn for or against it.

Where evidence of negligence consists of circumstances, from which inferences may be drawn for or against it, it is province of jury, not of reviewing court, to determine whether there was negligence.

5. Street railroads ⟸114(10)—Unlawful speed shown by evidence.

Testimony of two gripmen, not refuted by members of crew of car causing death, or any other witnesses, *held* sufficient to sustain verdict for plaintiff on issue as to operation of car at speed prohibited by municipal ordinance.

6. Street railroads ⟸117(7)—Whether effect of testimony as to speed was destroyed by absence of other evidence held for jury.

Whether effect of gripmen's testimony, as to operation of car at speed prohibited by ordinance, was totally destroyed by absence of evidence that gripman of car causing death saw decedent, when car was within two feet of him, and immediately applied brakes, *held* for jury.

7. Evidence ⟸586(3, 4) — Negative testimony as to signals held sufficient to sustain verdict for plaintiff.

Testimony of witnesses of accident, who were on sidewalk near street intersection, that they heard no bell rung or other warning given, as required by ordinance, *held* sufficient to sustain verdict for plaintiff, especially in absence of testimony that bell was rung or gong sounded.

8. Street railroads ⟸117(10)—Whether gripman, failed to look ahead held for jury.

Whether gripman, operating street car in the middle of the day on straight stretch of street without traffic in immediate vicinity, failed to look ahead, so as to observe what was before him, *held* for jury in action for death of child struck by car.

9. Street railroads ⟸114(21) — Inference gripman's negligence proximately caused death of child held warranted.

Evidence of any of several acts of negligence relied on in action for death of child struck by street car *held* to warrant inference that defendant's negligence proximately caused injuries and death; direct evidence of proximate cause being unnecessary, in view of Code Civ. Proc. §§ 1958, 1960.

10. Trial ⟸122—Conduct of plaintiff's counsel, in reference to defendant's failure to call witness, held improper.

Conduct of plaintiff's counsel, in stating that defendant's counsel might read testimony of absent witness at former trial, and examining defendant's counsel as to whether such witness was present in court on day before and had been discharged from defendant's employ, for stated purpose of showing willful suppression of evidence, *held* improper.

11. Evidence ⟸77(1)—Failure to call witness within party's power to produce does not amount to willful suppression of evidence.

When evidence tends to prove material fact imposing liability on party, and he refuses to produce evidence in his power to produce, which would overthrow case made, if not founded on fact, presumption arises that such evidence would operate to his prejudice and support adversary's case, but failure to call witness to so testify does not amount to willful suppression of evidence.

12. Appeal and error ⟸1060(1)—Attorney's references to defendant's failure to call witness as willful suppression of evidence held reversible error.

Misconduct of plaintiff's counsel in stating that defendant's counsel might read testimony of absent witness at last trial, and examining defendant's counsel as to presence of such witness in court on day before and his discharge from defendant's employ, for stated purpose of showing willful suppression of evidence, *held* reversible error, as prejudicially and materially affecting defendant's substantial rights, where evidence, though sufficiently substantial to support verdict for plaintiff, was very weak and unsatisfactory.

Lawlor, Acting C. J., and Seawell, J., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Michael J. Roche, Judge.

Action by Michael T. Keena against the United Railroads of San Francisco. Judg-

ment for plaintiff, and defendant appeals. Reversed.

Rehearing denied; LAWLOR and SEAWELL, JJ., dissenting.

Wm. M. Abbott and K. W. Cannon, both of San Francisco (Enid Childs, of San Francisco, of counsel), for appellant.

Daniel A. Ryan, of San Francisco, for respondent.

HOUSER, Justice pro tem. The opinion of the District Court of Appeal (prepared by Mr. Justice Knight) upon the several points involved in this appeal, with the exception of that part hereinafter indicated, is as follows:

"About 2 o'clock, on the afternoon of May 9, 1918, at the intersection of Castro and Nineteenth streets, in San Francisco, plaintiff's infant son, of the age of between 4 and 5 years, was struck by one of defendant's cable cars, and died as a result of the injuries sustained, for which a jury, in this action, awarded plaintiff damages. The defendant has appealed.

"In a previous trial plaintiff recovered a verdict, but upon appeal the judgment was reversed because the jury was erroneously instructed upon the subject of contributory negligence. Keena v. United Railroads, 57 Cal. App. 124, 207 P. 35.

"Respondent's cause of action is based upon the claim that, at the time of, and immediately preceding, the accident said cable car was being operated at an excessive rate of speed, in violation of the municipal ordinance limiting the speed of street cars to 15 miles an hour; that there was a failure to ring a bell or sound a gong as required by said ordinance; and that the gripman, who was operating said car, negligently failed to look ahead or observe what was before him on the street.

"Appellant's first contention, upon this appeal, is that there is no evidence whatever to establish any one of three elements of negligence above mentioned, and that even if there were, the essential and additional element of proximate cause is entirely missing from respondent's case.

"Nineteenth street extends in an easterly and westerly direction. Castro street intersects and runs at right angles therewith, and between Twentieth and Nineteenth streets it follows a straight course. The cable car in question descended on a 5 per cent. grade down Castro street and had reached the northerly crossing of Nineteenth street, when the child was struck. The accident was witnessed by five school girls, but none of them saw the boy until the car was within two feet of him; he was then on the strip of pavement, between the double tracks, walking backwards toward the approaching car. After being struck by the car, the child was dragged a distance of some 60 or 70 feet before the car was stopped. The parents of the child lived on the south side of Nineteenth street, a block and a half from the scene of the accident and when the mother last saw him prior to the accident he was playing unattended, on the north side of Nineteenth street opposite the family home.

[1-4] "In considering these questions of negligence, we must presume that the jury, in finding a verdict against the appellant, followed the instructions of the trial court to the effect that a verdict should not be rendered against appellant, unless the jury found that the appellant was guilty of such negligence as proximately caused the injuries to said child, and also found that there was no contributory negligence on the part of either of the parents of the child or the child. It is immaterial, however, so far as this appeal is concerned, whether the jury found appellant guilty of only one or more of the elements of negligence involved, if, in fact, there be sufficient evidence to sustain the verdict on any one of those elements. Furthermore, in passing upon the question of the insufficiency of the evidence, the evidence must be so construed as to support the verdict to the extent that it is fairly susceptible of such construction, and in all cases of conflict to accept as true that evidence which tends to sustain the verdict, unless it is inherently so improbable as to be palpably false. Gett v. Pacific Gas & Electric Co., 192 Cal. 621, 221 P. 376. And where the evidence of negligence consists of circumstances from which inferences may be drawn for or against it, it is the province of the jury to determine whether or not there was negligence. Benson v. Central P. R. R. Co., 98 Cal. 45, 32 P. 809, 33 P. 206; Schneider v. Market St. Ry. Co., 134 Cal. 482, 66 P. 734. In other words, the inferences to be drawn from proved facts must be drawn by the jury and not by the reviewing court. Alameda County v. Tieslau, 44 Cal. App. 332, 186 P. 398.

"We think the record before us reveals evidence, sufficiently substantial to support the verdict; that is, that there is evidence showing circumstances from which the jury might reasonably conclude that appellant was guilty of any one or all of the asserted acts of negligence, and that such negligence was the proximate cause of the injuries to the child.

[5] "As to evidence of the violation of the municipal ordinance which declares a limitation of speed of 15 miles an hour for street cars, it was shown that the speed of the cable by which this car was being operated was 9 miles an hour, and respondent produced as witnesses two gripmen who testified that a cable car traveling at the usual rate of speed of 9 miles an hour could be stopped within 6 feet after applying the brakes; that inasmuch as the car in question proceeded approximately 65 feet after striking the child and before it was stopped, that it must necessarily have been traveling in excess of 15 miles an hour; one gripman estimated the speed at 20 miles an hour and the other at 25 or 30 miles an hour. This testimony was not refuted by other witnesses, neither the members of the car crew nor any one else having given testimony upon this subject; consequently, aside from matters developed upon cross-examination of these two gripmen, theirs was the only evidence in the case bearing upon the question of speed, and was sufficient in itself, if believed by the jury, to sustain its verdict upon that issue. Schneider v. Market Street Ry. Co., supra.

[6] Appellant, however, attacks the sufficiency of said testimony upon the grounds that respondent assumed, in all questions put to said witnesses, that the gripman of this car saw the child when the car was within two feet of him and that the brakes were immediately applied. In this respect, appellant claims that

neither of those assumptions are warranted by the evidence, and argues that it is not permissible to assume, in the absence of all evidence, that the gripman saw or could have seen the child when the car was within two feet of him, and that even if he did, the suddenness of the emergency may have resulted in the intervention of two or three seconds between the appearance of the child and the application of the brakes; that traveling down a 5 per cent. grade at 15 miles per hour, or 22 feet a second, the car would cover nearly 66 feet in the slight interval before the brakes were applied. It is obvious, we think, from the evidence narrated that a substantial conflict is presented on this point, and, therefore, the question of whether the testimony of these two gripmen given on direct examination, as to the estimated rate of the speed of this car, should be accepted or whether the effect thereof was, as appellant argues, totally destroyed, were matters upon which the jury's determination is controlling.

[7] "Said municipal ordinance further provides that a bell or gong upon the car shall be rung or sounded, when approaching an intersecting street. The five school girls, who witnessed the accident, were on the sidewalk approximately 40 feet from the intersection where, if the ordinance had been complied with, the bell would have been sounded, and they testified that they heard no bell rung or any other warning given by the car. There were no witnesses produced to testify that the bell was rung or the gong sounded. Appellant contends that this negative testimony, even if admissible, cannot be said to rise to the dignity of substantial evidence sufficient, in and of itself, to support a finding that no bell was rung. In answer thereto it is sufficient to say that the weight to be given to negative testimony often arises in railroad and other accident cases where it is claimed that signals were not given, and that in such cases, the question is purely for the jury, and it has frequently been held that negative evidence of this character is sufficient to sustain a verdict (Jones on Evidence, [Horwitz] § 893, p. 400), even though it conflict with other evidence to the effect that a warning was actually given. Thompson v. Los Angeles Ry. Co., 165 Cal. 748, 134 P. 709.

[8] "The question of whether or not there was a failure on the part of the gripman to look ahead, so as to observe what was before him on the street, was also one for the jury. The evidence in this regard shows that the accident occurred in the middle of the day, about 2 o'clock in the afternoon, on a straight stretch of street, and where there was no traffic at the time in that immediate vicinity. Under those circumstances, we believe the jury might well conclude that the gripman failed in his duty, to observe the conditions of and the objects in the street ahead of him.

[9] "Regarding the issue of proximate cause, appellant contends that, even if it be conceded that the respondent has proved any one of the three acts of negligence relied upon, the evidence nevertheless fails to show that any of those acts contributed in any way to the death of respondent's child. There is no merit in this point. Manifestly, if appellant be guilty of the three elements of negligence above mentioned—and in view of the verdict in favor of the respondent, we must assume that it was—the jury was entitled to infer therefrom that such negligence proximately caused the injuries to and the subsequent death of said child. Direct evidence of proximate cause is not essential. The jury's finding may be founded upon an inference (Szopieray v. West Berkeley Express & Draying Co., 194 Cal. 106, 227 P. 720) which is defined to be 'a deduction which the reason of the jury makes from the facts proved.' Code of Civil Procedure, § 1958. The inference must, of course, be founded 'on a fact legally proved; and, on such a deduction from that fact as is warranted by a consideration of the usual propensities or passions of men, the particular propensities or passions of the person whose act is in question, the course of business, or the course of nature.' Code of Civil Procedure, § 1960; County of Alameda v. Tieslau, 44 Cal. App. 332, 186 P. 398.

The situation here is similar to the one presented in Szopieray v. West Berkeley Express & Draying Co., supra. There a child was injured in the street, apparently by being run over by some kind of vehicle. The defendant's truck, to which was attached two horses, had been left standing, with the horses unhitched, in violation of the municipal ordinance, in the street near the scene of the accident; but there were no eyewitnesses to the accident, and the defendant denied in its answer that the boy had in fact been injured by its horses and truck. Plaintiff's case rested entirely upon circumstantial evidence. The trial court refused to allow in evidence the municipal ordinance, which required horses standing on the public streets to be hitched, upon the theory that there was no proof offered to show that a violation of said ordinance had been the proximate cause of the injuries to said child, and a motion for a judgment of nonsuit was granted upon the ground that the plaintiff had failed to prove, as against the defendant, any negligent act. Upon appeal, the judgment of nonsuit was reversed. In reference to the circumstantial evidence the court said: 'It is true there is no direct evidence that the truck moved and that such movement was the cause of the injury. In our view, however, there is sufficient indirect evidence tending to show that the proximate cause of the accident was the passing of the truck over the child.' And concerning the inferences which may be drawn from facts proved the court held: 'While the proof must be sufficient to raise more than a mere conjecture or surmise that the fact is as alleged, yet, where the evidence is such that a rational, well-constructed mind can reasonably draw from it the conclusion that the fact exists, it is a sufficient answer to a motion for a nonsuit.' Regarding the admissibility of the municipal ordinance the opinion reads: 'It is claimed in respondent's brief it was not shown that the violation of the ordinance was the proximate cause of the accident. But, if the ordinance had been received in evidence, *it cannot be said the jury might not have found that the violation thereof contributed to the proximate cause of the injury.*' (Italics ours.) True, in the instant case the question of the sufficiency of the evidence arises upon the appeal from the judgment upon the merits after verdict for plaintiff, and not upon judgment of nonsuit, but the facts and the law come before us in substantially the same manner as if a judgment of nonsuit were involved, and consequently the same rule prevails. In conclusion upon this branch of the case, it may be further stated that the case at bar is much

stronger against this defendant than was the case against that defendant there, because here there is no question about the injuries to the child having been inflicted by the defendant.

[10] "The last contention made by appellant is, we think, the most serious one presented. It relates to the alleged misconduct of respondent's counsel. At the close of plaintiff's case, defendant called two witnesses and then rested, without calling the gripman who had operated the cable car at the time of the accident. Respondent's counsel, in the presence of the jury, then inquired of opposing counsel, 'Where is the car man?' to which appellant's counsel replied that he had no idea 'at the present time' and that he was not going to produce him. Respondent's counsel then said: 'He was in court yesterday.' This remark was assigned as misconduct and the jury, upon appellant's request, was instructed to disregard the same. Respondent's counsel then asked for and was granted a few minutes recess, after which the following colloquy took place: 'Mr. Ryan (counsel for respondent): Now, if your honor please, in reference to the gripman, since he is not called and not here to-day, and not in court at the present time, I will now consent that Mr. Partridge may read his testimony taken at the last trial. Mr. Partridge: I decline to do so, and it is not admissible, because the motorman is within the jurisdiction; and I assign the offer to read it as misconduct. The Court: Let the jury disregard the remarks of counsel on either side.' Thereafter, at the afternoon session the following proceedings occurred: 'Mr. Ryan: Well, will you take the stand, Mr. Partridge. * * * Q. You know Paul Joafus, the motorman? Mr. Partridge: I object to the question as incompetent, irrelevant, and immaterial. Mr. Ryan: It is preliminary, if your honor please. The Court: Objection sustained. Mr. Ryan: Q. And do you know that the— This is for the purpose of showing willful suppression, if your honor please, of evidence; that is the purpose of it. It is quite competent, I think. The Court: Proceed. Mr. Ryan: Q. I will ask you again, with his honor's permission, if you know Mr. Paul Joafus, the motorman who had charge of the car that ran into and killed the Keena boy? Mr. Partridge: I object to that as incompetent, irrelevant, and immaterial. Mr. Ryan: For the purpose of showing willful suppression. Mr. Partridge: Anybody has a right, if your honor please, to produce the witness in court. Mr. Ryan: I disagree with you, if your honor please. The Court: The court is prepared to rule. Objection is sustained. Mr. Ryan: Yes, your honor. Mr. Ryan: Do you know whether or not the gripman on that car was in the hallway here yesterday? Mr. Partridge: I object to that as incompetent, irrelevant, and immaterial. Mr. Ryan: This is for the same purpose, to show willful suppression, if your honor please. The Court: Objection sustained. Mr. Ryan: Did you discharge the witness? Mr. Partridge: I object to it upon the ground that it is incompetent, irrelevant, immaterial.' Respondent then called a Mr. Callahan as a witness, and proved by him that he had seen Joafus that morning, in a restaurant then being operated by Joafus, at Third and Bryant streets, San Francisco.

[11] "We think there can be little doubt of the impropriety of the course followed by respondent's counsel concerning the absence of this witness. Obviously there was no duty imposed upon appellant to call this or any other particular witness. McEwen v. New York Life Ins. Co., 187 Cal. 144, 201 P. 577. While the rule is well settled that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice and support the case of his adversary (Alloggi v. S. P. Co., 37 Cal. App. 72, 173 P. 1117), still the failure to call such witness does not amount to a willful suppression of evidence, as was strongly indicated by respondent's counsel in the instant case. Furthermore, counsel's conduct in persistently pursuing the inquiry and making said charges of willful suppression of evidence, while appellant's counsel was on the witness stand, after the court had repeatedly ruled that the subject of the inquiry was not proper, is clearly subject to criticism."

[12] Up to this point, in the opinion of the District Court of Appeal, we are in accord, at least, with the conclusions therein reached on the several principles of law as well as with the statement of the facts applicable hereto and involved in the action. It is as to the last question only in the case, that is to say, the effect of the misconduct of counsel for plaintiff with which this court is in disagreement with the final conclusion expressed thereon by the District Court of Appeal.

The evidence bearing upon the question of the legal responsibility of the defendant for the death of the infant son of the plaintiff was manifestly very weak and unsatisfactory. The verdict of the jury might well have been in favor of the defendant. Nevertheless, in itself and in the absence of prejudicial error "the record reveals evidence sufficiently substantial to support the verdict." What the verdict would have been without the suggestions of counsel for plaintiff is, of course, impossible of infallible ascertainment, but in view of the fact that the decision by the jury, resting, as it did, primarily upon indifferent evidence, may have been and in all probability was largely influenced and possibly absolutely controlled by the innuendoes speaking to the wrongdoing of the defendant in concealing facts which should have been placed by it within the knowledge of the jury, it is clearly unfair and unjust to the defendant that it be mulcted in damages where the misconduct by counsel for the plaintiff was presumably so large a factor in the verdict. Cavanagh v. Township of Riverside, 136 Mich. 660, 99 N. W. 876; Jordan v. Austin, 161 Ala. 585, 50 So. 70; Sanger v. McDonald, 82 Ark. 432, 102 S. W. 690; Sandberg v. Chicago Rys. Co., 191 Ill. App. 199; Gulf C. & S. F. Ry. Co. v. Sullivan (Tex.

Civ. App.) 178 S. W. 615; Devries v. Phillips, 63 N. C. 53; Bendetson v. Moody, 100 Mich. 553, 59 N. W. 252.

In the dissenting opinion of Justices Olney, Wilbur, and Lennon in the case of Lafargue v. United Railroads, 183 Cal. 720, 728, 192 P. 538, 541, where prejudicial misconduct was charged to the same attorney who represented plaintiff and who now represents respondent herein, it was aptly said:

"It seems to us that an entirely false quantity was injected into the case by plaintiff's counsel, over the repeated admonitions of the court, and that the false quantity so introduced was of a character so prejudicial to the defendant as to have prevented the jury from considering the case fairly upon its real merits. To sustain the verdict under these circumstances will, it seems to us, have the effect of encouraging similar conduct in other cases, when it should be discouraged strongly."

Judged from a reading of the record herein, and taking into consideration the fact that a recess of several hours was taken by the court between the announcement by counsel representing the defendant that it rested its case, and the reconvening of the trial court, the conduct of counsel for plaintiff in repeatedly charging the defendant with a "willful suppression of evidence" was not induced by any possible temperamental emotion of the attorney, or by reason of hasty action or untoward thoughtlessness on his part, but, to the contrary, was undoubtedly the result of premeditation and deliberation.

It will be observed that the misconduct consisted, not in a single utterance of the charge, but rather embraced iteration and reiteration thereof, and included hints, suggestions, and insinuations to such an extent that by no possibility could the meaning of counsel have been misinterpreted or misunderstood by the members of the jury. It is altogether too evident that the purpose of the accusation that evidence had been willfully suppressed by the defendant was none other than to bolster up a weak case by creating a prejudice against the defendant in the minds of the members of the jury. Such means of winning a lawsuit cannot be commended nor receive recognition and indorsement by this court, instituted and maintained, as it is, on the principle of administering justice.

The judgment is reversed solely on the ground that the misconduct of the attorney for plaintiff prejudicially and materially affected the substantial rights of the defendant and prevented it from having a fair trial.

We concur: WASTE, J.; RICHARDS, J.; LENNON, J.; SHENK, J.

LAWLOR, Acting C. J. I dissent. First, as to the merits of the assignment of misconduct, it may be true, as counsel for respondent apparently assumed, that, for strategic purposes, appellant kept the gripman in attendance on the trial during the presentation of respondent's case in chief in order to convey the impression he would be called to testify for appellant, when there was in fact no such intention. But even if this were so, such tactics would not constitute a suppression of evidence under the rule. Subdivisions 6 and 7, § 2061, Code Civ. Proc. The gripman had primary knowledge of the accident and, being an employee of appellant, perhaps the failure to make him a witness might have been the proper subject of comment in the argument to the jury on behalf of respondent, but not upon the theory of a suppression of evidence. Now, the only testimony offered by appellant was that of the father of the child that there was an 18x18 yard back of the family residence, which testimony was apparently offered to show contributory negligence on the part of respondent in allowing the child to play on the street; and the testimony of appellant's claims agent that the extrajudicial statements of a witness for respondent were contradictory of her testimony. It is plain, therefore, that neither of these items of testimony involved the principle laid down in section 2061, Code of Civil Procedure, and it must therefore be conceded that repeatedly charging appellant with having suppressed evidence, in disregard of the adverse rulings on the question, constituted misconduct.

This brings me to the further question whether, under the constitutional provision, such misconduct demands a reversal of the judgment. Two juries have found that respondent is entitled to recover. Twice the trial court has held the evidence was sufficient to sustain the verdicts. The District Court of Appeal and the majority opinion herein have declared the evidence is sufficient as matter of law to support the judgment. Due to an erroneous hypothetical instruction, which omitted the issue of contributory negligence, the first judgment was reversed. So that neither in the trial court nor on appeal has it ever been held that respondent is not entitled to recover.

It seems to me the probabilities are opposed to the theory that appellant was prejudiced by the misconduct. Both the trial court and the District Court of Appeal have held that the jury was not influenced against appellant by the incident. It is evident that this court is not in as favorable a position as the trial court to satisfactorily appraise the effect of the misconduct. The prompt action of the trial judge to avoid any injurious result indicates that something more than a perfunctory consideration was given to the misconduct of counsel. What was said in Lafargue v. United Railroads, 183 Cal. 720, 724, 192 P. 538, 540, is to my mind equally pertinent here:

"In doing this the court must be deemed to have concluded that no prejudice was suffered

by defendant by reason of any of the matters to which we have referred. Conceding some of the statements made by counsel, whatever the provocation thought by him to exist therefor, were improper, we are satisfied that this conclusion of the trial judge should not be disturbed by an appellate court. The trial judge is in a much better position than an appellate court to determine whether the verdict in a case is probably due wholly or in part to such alleged misconduct as we have here, and his conclusion in the matter should not be disturbed unless, under all the circumstances appearing, it is plainly wrong. This, we think, may not fairly be said here."

All presumptions are in favor of the regularity of the action of the court below. Prejudice is no longer presumed from error, but under the constitutional mandate the party complaining must assume the burden of satisfying the appellate court that to affirm the judgment would work a miscarriage of justice. This appellant has not done.

Formerly any departure from prescribed rules of evidence or procedure might be made the basis of a reversal, but now a miscarriage of justice must be established as a fact and in the process of determining the question the appellate court must examine the record and to some extent weigh the evidence and form conclusions upon its weight—a function heretofore reserved exclusively for the jury. It is not enough to argue that the jury may have been influenced by the misconduct to the prejudice of appellant; the showing must be such that an inference of injury finds clear support in the record on appeal. At most, the question here is involved in pure speculation. In my opinion it is more likely that if the persistent misconduct of counsel in opposition to the repeated rulings of the court sustaining appellant's objections influenced the jury at all, respondent and not appellant suffered thereby. I cannot escape the conviction that to hold otherwise is to impugn the jury system itself, for such a conclusion necessarily involves an assumption that the jury ignored the rulings of the court, and accepted the ipse dixit of counsel, who misconceived the law or may have resorted to partisan or improper methods in the effort to win his case. The probability is that the action of counsel was reprehended by the jury, for the court admonished them to "pay no attention to the remarks of counsel, and they will not be considered by the jury for any purpose in this case. It is not evidence. Let the jury disregard the remarks of counsel on either side." In its charge the court likewise instructed the jury "to distinguish carefully between the facts testified to by the witnesses and the statements made by the attorneys in their arguments. * * *"

If my estimate of the actual effect of counsel's misconduct is well founded, then a case of genuine hardship is presented. Respondent has lost his child. The accident occurred on May 9, 1918, more than seven years ago. The purpose of the reversal is to discipline counsel and discourage improper conduct in the trial of cases; but, unhappily, the effect is to penalize an innocent litigant. This is the second reversal in the case and a third trial should be avoided.

SEAWELL, J. (dissenting). I am in accord with the reasoning of Mr. Justice LAWLOR which leads to the conclusion that it is not probable that the conduct of counsel, as complained of, was so powerful in its effect as to overmaster the minds of the members of the jury and produce a result that would not have been produced but for the conduct assigned as prejudicial error. The main opinion seems to concede the question that there would have been an affirmance of the case but for the conduct as set out in the opinion. In the instant case, there seems to be no justification for the course taken by respondent's attorney. Appellant was under no legal obligation to call the gripman to the witness chair. The testimony of the gripman was equally available to both parties, and by the failure or refusal of either to exercise the right of making him a witness no room was left for complaint or criticism by either party. The situation did not present a case of suppression of evidence. Where an attorney in the trial of a cause does not exercise his right to examine a certain person as a witness, which person is available to either party, on the theory that his adversary will necessarily be forced to call such witness, and he will thereby gain such advantages as the rules of cross-examination afford, and thereafter finds himself disappointed by the failure of his adversary to call such witness, he will not be permitted to indulge in insinuations which may impugn the motives of his adversary who was acting fully within his legal right. Admitting improper conduct on the part of respondent's counsel, I am not prepared to say that it worked a miscarriage of justice.

The alleged misconduct of counsel in the trial of causes is frequently before this court for review. The orderly conduct of causes is so completely under the control of the trial judge that it ought not to be, except upon rare occasions, necessary to bring that issue to the attention of this court. In other words, ordinarily, it is within the power of the trial court to completely neutralize, by prompt and vigorous action, the prejudicial effect which it was the intention of the transgressor to produce. The admonition of the trial court, if firmly and promptly made, will, as a rule, so effectually remove all evil effects as to leave little reason to make the conduct of counsel a serious problem here. This should be done in every instance. If in the judgment of the trial court, however, this

was practically impossible of attainment, then, of course, a new trial should have been ordered. But the trial court did not so regard it. The facts of the instant case are such that the judgment of the superior court would have been sustainable under either view of the situation. For the reasons herein suggested, I am of the view that the judgment may properly be affirmed.

---

197 Cal. 143

STANDARD VARNISH WORKS et al. v. INDUSTRIAL ACCIDENT COMMISSION OF CALIFORNIA et al. (S. F. 11477.)

(Supreme Court of California. Sept. 28, 1925.)

1. Master and servant ⟸417(7)—Commission's finding on conflicting evidence conclusive.

Industrial Accident Commission's implied finding on conflicting evidence, that employment of one, for whose death compensation was awarded on basis of wages received at time of death, was permanent, is conclusive on Supreme Court, under St. 1917, p. 876, § 67, subd. c.

2. Master and servant ⟸386(1)—Award fixing anticipated earnings on basis of wages received at time of death held not error.

Award fixing anticipated annual earnings of minor employee at rate based on wages received by him at time of death in employment during school vacation *held* not erroneous, under St. 1917, p. 842, § 12, subd. a, under conflicting evidence as to whether he intended to return to school.

3. Master and servant ⟸386(1)—Amount of earnings used in support of minor employee deducted in fixing compensation for death.

Deduction of amount of earnings, used in support of minor employee in fixing award of compensation for his death to partial dependent, is proper and necessary.

4. Master and servant ⟸386(1)—Earnings from former employer may be considered in computing compensation for death.

Amount of average annual earnings devoted by deceased minor employee to support of his mother having been determined by deduction of amount of earnings used in his own support, employer and insurance carrier cannot complain because earnings from former employer were considered in computing amount of such contribution.

5. Master and servant ⟸386(1)—Earnings from dissimilar employments may be considered in computing compensation for death.

Under St. 1917, p. 840, § 9, subd. c (2), partial dependent of deceased minor employee is entitled to death benefit of three times annual amount devoted by deceased to support of such dependent, though two employments from which earnings were received during year were dissimilar.

6. Courts ⟸90(4)—Statutory construction not since changed by Legislature adhered to.

Legislature not having amended St. 1917, p. 840, § 9, subd. c (2), since its construction by the court as making amount devoted to dependent by deceased employee measure of award of compensation and imposing full burden on death-causing employment, court will not place different construction thereon.

In Bank.

Application by the Standard Varnish Works, employer, and the State Compensation Insurance Fund, insurer, for certiorari to review an award of compensation by the Industrial Accident Commission to Adeline Minderman, claimant, for the death of Richard W. Minderman, employee. Award affirmed.

Frank J. Creede, B. E. Pemberton, Thos. W. Slaven, all of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondent Industrial Accident Commission.

John R. Jones, of San Francisco, for respondent Minderman.

SHENK, J. The purpose of this proceeding is to annul an award of the Industrial Accident Commission. Richard W. Minderman, a minor of the age of 16 years, was employed on July 2, 1924, as assistant shipping clerk by the petitioner, Standard Varnish Works, a corporation. The petitioner, State Compensation Insurance Fund, is the insurance carrier. About three weeks after the employment began, the young man was killed in an elevator accident. It is conceded that the accident arose out of and in the course of the employment. At the time of his death, he was receiving wages from said corporation at the rate of $15 a week. During the period of said employment, he was and had been for more than a year prior thereto employed at night as a messenger by the Pacific Telephone & Telegraph Company. From the latter employment, he received an average of $33.93 a month and a small additional amount by way of tips. All of his earnings were turned over to his mother, Adeline Minderman, who used the same with other sources of family income for the general family living expenses, including the maintenance of the deceased. The members of the family at the time of the death of deceased were the mother, a brother, a sister, and himself, all contributing to the family income. The mother applied to the respondent commission for an award on account of partial dependency. After proceedings duly taken in that behalf, the commission found that the mother was partially dependent on the deceased for support, that the annual contribution of the deceased toward her support, after certain deductions, was $741, and made an award in her favor as a death benefit in the

sum of $2,123, payable in weekly installments of $9.26.

[1] Two points are made by the petitioners. It is first contended that the award was erroneous because the "average annual earnings" of the deceased were not arrived at as contemplated by the statute (section 12 [a], Stats. 1917, p. 842). It appears that the deceased had just completed his second year as a student at the Lick-Wilmerding High School in San Francisco. During his attendance at that school, he was working out of school hours for the telephone company. When the vacation period arrived in June, 1924, he sought and obtained employment with the petitioner, Standard Varnish Works. The respondent commission based the amount of its award on the wages received by the deceased at the time of his death, fixing the anticipated earnings of the minor for the year following at the rate of $15 a week. It is earnestly insisted that by the method thus employed the anticipated earnings were not correctly or properly measured, especially since the employment of the deceased, according to the petitioners' construction of the evidence, was for the vacation period only. Assuming, for the purposes of this case only, that the alleged temporary character of the employment might have significance in the commission's determination, it is enough to say that the evidence favorable to the respondents is susceptible of the construction that the employment would continue beyond the vacation period. True, there was evidence that the deceased intended to return to school after vacation, but there was also the testimony of the mother that the question of whether or not her son would relinquish his employment and return to school was undecided. It may fairly be said that there was a substantial conflict in the evidence as to whether the employment was temporary or permanent. The implied finding of the commission on that point is, therefore, conclusive on this court (section 67[c], Stats. 1917, p. 876).

[2] It is unnecessary to discuss at length the theory on which the commission fixed the earnings as of the time of the death of the deceased and the proper construction of the statute in that regard. That question was the subject of recent consideration by this court, and in reviewing prior determinations was decided adversely to the petitioners' contentions. Great Western Power Co. v. Ind. Acc. Comm. (Cal. Sup.) 238 P. 662. See, also, Spreckels Sugar Co. v. Ind. Acc. Comm., 186 Cal. 256, 199 P. 8; Great Western Power Co. v. Ind. Acc. Comm., 191 Cal. 724, 218 P. 1009; Market St. R. Co. v. Ind. Acc. Comm., 193 Cal. 178, 224 P. 95.

[3] The second contention is based on the fact that the evidence shows, without conflict, that while the deceased turned over his entire earnings to his mother a portion thereof was used for his own support. The record discloses that the commission took into consideration the proportion of the total earnings of the minor used in his own support and made deduction accordingly. In this case, the amount of the deduction happened to be approximately the amount that the young man was receiving from the telephone company. Under this state of the facts, it is insisted that, owing to the contribution of the total earnings of the deceased to a common fund, it was impossible to determine whether the earnings from the telephone company or the earnings from the Varnish Works were wholly used by the mother for her own support, and that the earnings from each source should have been taken into consideration with a proportional deduction from the amount of the award charged against the petitioners. The contention is that, if the course suggested be not followed, the petitioners are called upon to pay an award without deduction on account of the minor's own support. It is settled that the deduction of an amount equivalent to the sum used in the minor's own support is proper and necessary. Federal Mutual Liability Ins. Co. v. Ind. Acc. Comm., 186 Cal. 517, 199 P. 796; Great Western Power Co. v. Ind. Acc. Comm., supra.

[4] This deduction was made, and the result was to properly measure the amount of the average annual earnings devoted by the deceased to the support of his mother. When that amount has been determined, the petitioners cannot be heard to complain because the earnings from a coemployer were taken into consideration in computing the amount of such contribution. Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390.

[5, 6] It is urged that the two employments of the deceased were dissimilar and that, therefore, the rule laid down in the last case cited should not apply. The commission was required, under the statute, to award "a death benefit, which shall amount to three times the annual amount devoted by the deceased to the support of the person or persons so partially dependent." Section 9 (c) (2), Stats. 1917, p. 840. We find no sound basis for a distinction between employments which are similar and those which are dissimilar. The apparent hardship which is imposed on the employer, in whose service the deceased was engaged at the time of his death, exists as much in the one case as in the other. It is readily apparent that the construction placed on the statute in Western Metal Supply Co. v. Pillsbury, supra, makes the amount devoted to the dependent the measure of the award and imposes the full burden on the death-causing employment. Whatever perplexities might attend the solution of the problem, if it were a new one, we are not disposed to place a different construction on the statute at this time. The case of Western Metal Supply Co. v. Pillsbury, supra, was de-

cided in March, 1916, and during the intervening years the Legislature has not seen fit to change the rule by statutory provision.

The award is affirmed.

We concur: LAWLOR, J., Acting C. J.; SEAWELL, J.; RICHARDS, J.; LENNON, J.; WASTE, J.; HOUSER, Justice pro tem.

---

197 Cal. 126

POWERS v. RAYMOND. (L. A. 8135.)

(Supreme Court of California. Sept. 28, 1925.)

1. Negligence ⟸121(2)—Presumption of negligence held not raised.

Mere fact of injury by fall, caused by defective boardwalk through grounds of defendant's hotel, *held* not to raise presumption of negligence under circumstances shown.

2. Negligence ⟸136(7)—Question for court and jury on evidence.

Whether negligence can be inferred from evidence is question of law for court, but whether it should be inferred is question for jury.

3. Master and servant ⟸88(1)—One injured before employment began held not employee at time.

One injured on hotel grounds before employment in hotel began was not employee at time of injury, which therefore did not arise out of or in course of employment, though she was residing in hotel at owner's invitation.

4. Master and servant ⟸89(1)—Master not bound to protect employee on private excursion outside place of work.

Employer's duty toward employee is limited to furnishing reasonably safe place to work, with proper facilities for ingress and egress, and does not extend to her protection while on private excursion outside such place.

5. Innkeepers ⟸8—One residing in hotel before employment therein began held not guest.

One residing in hotel at owner's invitation before employment therein began *held* not a guest, entitled to recover for injuries sustained during such time because of defective boardwalk through hotel grounds.

6. Negligence ⟸32(3)—Invitee not within scope of invitation is mere licensee.

Hotel owner, within scope of his invitation to occupy room and use premises before beginning of invitee's employment therein, was obliged to exercise ordinary care for her safety, which included duty to maintain premises in reasonably safe condition, but if her occupancy and use of portion of premises on which injured was not within scope of invitation, she was mere licensee, to whom owner owed no duty except to abstain from willful or wanton injury.

7. Negligence ⟸32(3)—Resident of hotel pending commencement of employment therein held not impliedly invited to use dark pathway through grounds.

One to whom hotel accommodations were extended, pending commencement of her employment therein when hotel was opened to public, was entitled to make such use of building and premises as was reasonably necessary for her comfort and convenience while they were being made ready for accommodation of guests, but was not impliedly invited to enter and use dark pathway through grounds to railroad station, where owner provided safe and lighted roadway to such station.

8. Negligence ⟸52—Hotel owner held not bound to place warning sign at entrance to dark bypath through grounds.

Hotel owner *held* to owe no duty to one extended accommodations of hotel, pending commencement of her employment therein when opened to public, to place warning sign or obstruction at entrance of dark bypath through hotel grounds to railroad station, impenetrable darkness being sufficient warning.

9. Negligence ⟸32(2)—Hotel owner not bound to keep dark pathway through grounds in repair for safety of licensee.

One extended accommodations of hotel pending commencement of her employment therein being mere licensee until such time, it was not duty of hotel owner to keep dark pathway through grounds, parallel to well-lighted roadway, in repair for her accommodation and safety.

10. Negligence ⟸71—One using dark pathway instead of well-lighted way held negligent.

One who had never used and did not know of dark pathway through grounds of hotel, in which she was residing pending commencement to employment therein, *held* contributorily negligent as matter of law in using such pathway instead of well-lighted roadway parallel thereto.

In Bank.

Appeal from Superior Court, Los Angeles County; John Perry Wood, Judge.

Action by Anna M. Powers against Walter Raymond. Judgment for defendant, and plaintiff appeals. Affirmed.

Leonard L. Riccardi and Ticknor, Carter & Webster, all of Pasadena, for appellant.

G. A. Gibbs and Elliot Gibbs, both of Pasadena, for respondent.

SHENK, J. Action for damages for alleged negligence of the defendant. From a judgment on a directed verdict in favor of the defendant, the plaintiff appeals.

The defendant is the owner and proprietor of the Raymond Hotel in Pasadena. The hotel and grounds surrounding the same and used in connection therewith occupy about 80 acres of land. In the vicinity of the hotel buildings are roadways leading to and from public highways to the north and west.

The roadway to the north runs toward the Raymond Hotel station of the Santa Fé Railway, extending a distance of about 300 feet through the hotel grounds. The remaining distance from the hotel grounds to the station is for pedestrian and vehicular traffic by way of a city street. Paralleling the northerly roadway, and about 50 feet easterly therefrom, is a narrow pathway maintained for the use of the guests of the hotel during the season when the hotel is in operation. For a certain distance in this pathway, at the time of the injury complained of, three 12 inch boards were laid side by side lengthwise the walk. The regular hotel season for the year of 1922–23 opened on December 28, 1922, and closed on April 12, 1923. By special arrangement, however, the accommodations of the hotel were made available to an Eastern football team from December 24th to and including the 1st day of January following, but the hotel was not open to the public until December 28th.

Prior to December 21st the plaintiff had been living in Denver. She had been engaged by the defendant to serve as a waitress at the hotel but upon learning that she was an experienced hairdresser and manicurist and desiring to obtain the services of some one to act in that capacity, the defendant entered into a contract with her to take charge of the hairdressing department during the forthcoming season. Under the terms of the contract she was to receive as her compensation 65 per cent. of the gross receipts from her department and her board and room. She was notified that if the football team were to be entertained at the hotel it would be agreeable to the defendant to have her present and presumably ready for duty on December 22d or 23d. By telegraphic message she agreed to start from Denver on the 22d. However, she arrived in Pasadena on the 21st, went immediately to the hotel and was assigned to her room. Certain persons who had been engaged to serve in various capacities during the hotel season in question and who were friends of the plaintiff were expected to arrive from the east on the evening train of the 22d. The train was late, and did not arrive until 11.26 p. m. In company with two of her friends who had also been engaged to act as employees of the defendant, the plaintiff left the hotel about 11 o'clock on the night of the 22d for the purpose of meeting the incoming train. This she did of her own volition, and in nowise at the direction or suggestion of the defendant, nor as a part of her contract of employment either present or prospective.

The main roadway through the hotel grounds toward the station was easily and safely traversable, and had been well lighted for the particular accommodation of those who were to arrive on said train. The parallel pathway was unlighted, and it was impossible for any one passing along the same in the darkness at that time of night to discern whether or not it was passable. This condition attending the pathway was observed by the plaintiff at the time. The lighted roadway was also plainly observable. The pathway was unlighted because it was not then in use, was under repair and was not to be used until the regular season opened. Instead of following the main well-lighted roadway, the plaintiff entered the dark pathway. She testified that in proceeding along the same she "couldn't see at all because it was so dark." She said she took the pathway at the suggestion of her companions, who she understood, had used the same before. No question of their negligence in making the suggestion nor of the responsibility of the defendant because of their action in that behalf is here raised. After the plaintiff had proceeded a short distance along the dark pathway her "foot went into a big hole," which may be assumed to have been a defective portion of the boardwalk. She fell and suffered a severe injury to her knee. The defendant paid the plaintiff's bills for hospital service and medical attention and provided for her care for several months and until she was able to move about. It was for pain and suffering and alleged permanent disability that this action was brought.

[1, 2] The foregoing facts were undisputed and constituted the evidence upon which any judgment in favor of the plaintiff would depend. On those facts two questions present themselves for consideration: First, was the defendant guilty of negligence toward the plaintiff at the time of the injury? and, second, if such negligence was shown, was the plaintiff guilty of contributory negligence as a matter of law? As bearing on the first question it may be said that the mere fact of the injury under the circumstances here shown did not raise a presumption of negligence. Depons v. Ariss, 182 Cal. 485, 188 P. 797; Sappenfield v. Main Street, etc., R. R. Co., 91 Cal. 48, 27 P. 590; 19 Cal. Jur. 707. Whether negligence can be inferred from the evidence is a question of law for the determination of the court, but whether it ought to be inferred is a question for the jury. Pacheco v. Judson Mfg. Co., 113 Cal. 541, 45 P. 833; 19 Cal. Jur. 724.

[3] The extent of the responsibility of the defendant toward the plaintiff depends on their relationship at the time of the injury. There is much discussion in the briefs as to whether the plaintiff at that time was an employee, a guest, an invitee or a mere licensee, the plaintiff contending that she was an employee and guest, and the defendant contending that she was a mere licensee. It is alleged in the complaint "that the plaintiff entered into the employ of the said defendant, and at the invitation of the defendant took up her residence on the premises on

the 21st day of December, 1922." It is not alleged that she was an employee of the defendant at the time of the injury, and the proof clearly shows that she did not bear that relationship to the defendant at that time. She arrived at the hotel in advance of the time when she agreed to arrive, and the term of her employment had not yet commenced. The payroll was not started until some days thereafter.

[4] It is not claimed and of course could not properly be asserted that, under the evidence, the accident arose out of or in the course of the alleged employment. But assuming, as the plaintiff claims the evidence discloses, that she was an employee of the defendant at the time of the injury, then the duty of the defendant to her was limited to furnishing her a reasonably safe place in which to perform her duties, with proper facilities for ingress and egress, and did not extend to her protection while she was on a private excursion outside of those limits and taken solely on her own account. Kennedy v. Chase, 119 Cal. 637; 52 P. 33, 63 Am. St. Rep. 153; Jacobson v. Northwestern Pacific R. R. Co., 175 Cal. 468, 166 P. 3.

[5, 6] It is not alleged that the plaintiff was a guest at the particular time in question, and under the evidence it may not rightly be said that she was a guest at that time. Fay v. Pacific Imp. Co., 93 Cal. 253, 26 P. 1099, 28 P. 943, 16 L. R. A. 188, 27 Am. St. Rep. 198; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; 14 Cal. Jur. 319; 32 C. J. 533. The proof was directly responsive to the allegation in the amended complaint, namely, that the plaintiff took up her residence on said premises on December 21st at the invitation of the defendant. The allegation was in conformity with the facts as developed during the course of the trial. The question is therefore narrowed to this: What was the scope of the invitation extended by the defendant to the plaintiff to occupy the premises at the particular time? For within the scope of that invitation the defendant was obliged to exercise ordinary care for her safety. This would include the duty to maintain the premises on which the plaintiff was expressly or impliedly invited in a reasonably safe condition. Giannini v. Campodonico, 176 Cal. 548, 169 P. 80. But when it was made to appear that the occupancy and use of the portion of the premises on which the plaintiff was injured could not under any rational view of the evidence be within the scope of the invitation, she became a mere licensee, to whom the defendant owed no duty except to abstain from willful or wanton injury. Means v. Southern California Ry. Co., 144 Cal. 473, 77 P. 1001, 1 Ann. Cas. 206; Giannini v. Campodonico, supra; 16 Cal. Jur. 282, and cases cited.

[7] When the evidence before us is viewed in a light most favorable to the plaintiff, it cannot be said that she was invited either expressly or impliedly to enter and use the dark pathway on the night in question. Upon her arrival the accommodations of the hotel for her board and room were extended to her in anticipation of and pending the commencement of her service as an employee. Such accommodations would no doubt include such use of the building and premises as would be reasonably necessary for the comfort and convenience of herself and others similarly situated during the period prior to the opening of the hotel to the public, and during the time when the hotel and premises were being made ready for the accommodation of guests. It may be granted that proper and safe means of ingress and egress to and from the railway station would be included in the accommodations which the defendant had invited the plaintiff to enjoy. These means were amply provided by the defendant by way of the admittedly safe and well-lighted roadway leading to the station, but the use of the unlighted bypath was not extended to the plaintiff under the circumstances here shown.

[8] Much stress is laid by the plaintiff on the claim that it was the duty of the defendant to place some sign or obstruction at the entrance of the dark bypath to warn those who might choose to enter, but we think the impenetrable darkness was in itself a sufficient warning, even to those who had used the path before, not to use the same except at their own risk.

[9, 10] Since we conclude that at the time of the injury the plaintiff was a mere licensee, there was therefore no duty on the part of the defendant to keep the said pathway in repair for her accommodation and safety. Furthermore, the evidence shows that the plaintiff was unfamiliar with the pathway, had never used it before, and, in fact, did not know that it existed. Under such circumstances, if it be assumed that negligence on the part of the defendant was shown, the conclusion would be impelled that the plaintiff was at the time guilty of contributory negligence as a matter of law. Under any view of the evidence the action of the trial court in directing a verdict for the defendant should not be disturbed.

The judgment is affirmed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; WASTE, J.; SEAWELL, J.; LENNON, J.; HOUSER, Justice pro tem.

197 Cal. 164

STACEY BROS. GAS CONST. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION OF STATE OF CALIFORNIA et al.

PACIFIC GAS & ELECTRIC CO. v. SAME.

(S. F. 11590, 11591.)

(Supreme Court of California. Sept. 28, 1925. Rehearing Denied Oct. 26, 1925.)

1. Master and servant ⟸417(7)—Findings of Industrial Accident Commission on evidence conclusive.

Findings of the Industrial Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof.

2. Master and servant ⟸361—Essentials of relation of special employer and employee stated.

To establish legal relation of special employer and special employee, it must appear that, either by terms of contract or during course of its performance, employee of alleged independent contractor came under control and direction of other party to contract, and suffered injury as result of such direction and control.

3. Master and servant ⟸361—Test to determine whether employee is servant of original master or third party stated.

In determining whether an employee is servant of his original master, or of party to whom he has been furnished, test is whether in particular service which he is engaged to perform he continues to be liable to direction and control of his master, or becomes subject to that of party to whom he is lent or hired.

4. Master and servant ⟸405(2) — Evidence held to show lineman was under control of original master.

Evidence *held* to show that method of doing work in taking down derrick when lineman was killed was under direction and control of decedent's original master, through its general superintendent of linemen, and its foreman.

5. Master and servant ⟸361—Lineman held not special employee of contractor so as to render it liable for compensation for death.

Lineman, who while in employ of original master and as member of a linemen's crew was directed to dismantle a derrick erected by master at request of contractor, and who was at all times during course of work under direction and control of original master through its foreman, *held* not a special employee of contractor so as to render it liable for compensation for his death.

In Bank.

Separate applications for certiorari by the Stacey Bros. Gas Construction Company, by the Federal Mutual Liability Insurance Company, and by the Pacific Gas & Electric Company to review an order of the Industrial Accident Commission awarding compensation for death of E. A. Smith to Alma M. Smith and others. Award against the Federal Mutual Liability Insurance Company annulled, and the award against the Pacific Gas & Electric Company affirmed.

In S. F. No. 11590:

R. P. Wisecarver, of San Francisco, for petitioners.

Warren H. Pillsbury, of San Francisco, for respondents.

In S. F. No. 11591:

Thos. J. Straub, J. J. Briare, and L. H. Susman, all of San Francisco, for petitioner.

Warren H. Pillsbury, of San Francisco, for respondents.

LENNON, J. Certiorari, directed to the Industrial Accident Commission, to review an award to Alma M. Smith and her children against the Pacific Gas & Electric Company and the Federal Mutual Liability Insurance Company, for the death of her husband, A. E. Smith, who died from injuries sustained in and arising out of the course of his employment. The Federal Mutual Liability Insurance Company, the insurance carriers for the Stacey Bros. Gas Construction Company, and the Pacific Gas & Electric Company, who are self-insurers, were both directed to pay the award. The Federal Mutual Liability Insurance Company, on behalf of the Stacey Bros. Gas Construction Company, and the Pacific Gas & Electric Company, on its own behalf, are the petitioners for the writ. Both petitioners seek exemption from the liability imposed by the award of the Industrial Accident Commission, and claim that the Commission acted without and in excess of its power in entering the award against each of petitioners, respectively, in that the findings are not sustained by the evidence.

Generally stated, the facts as revealed by the record returned by the respondents are these: The Pacific Gas & Electric Company let a contract to the Stacey Bros. Gas Construction Company for the erection of a gas holder in the city of Santa Rosa. In the course of the construction of this gas holder it became necessary for the Stacey Company to erect a derrick in the center of said gas holder. The Stacey Company had neither the necessary tools nor the skilled labor required to do this part of the work, and the Pacific Gas & Electric Company was requested to furnish the necessary timbers and its pole construction crew to erect the derrick and remove same when its purpose had been accomplished. The Pacific Gas & Electric Company undertook to furnish the necessary poles, to erect them and remove them, charging the Stacey Company for the actual cost of the labor and the materials used and bill the same to them, less a credit for the value of the poles returned. The Pacific Gas & Electric Company have a printed form known as the "D & C Tag" (deliver and charge), which is used when the company performs construction work on request for its patrons or oth-

ers, such as running power lines, which the company does not furnish in the ordinary course of its service. This tag is used by officials of the company in directing their foremen to do the work requested. It was customary for the Pacific Gas & Electric Company to do such work on request. It does not appear, however, that the particular crew of linemen directed to erect the derrick for the Stacey Company had ever before done this kind of work. The Pacific Gas & Electric Company superintendent gave one of the so-called "D & C tags" to the foreman of its linemen's crew, directing him to erect the derrick. This foreman reported with his crew at the place where the gas holder was being constructed and erected the derrick. The work was done, it appears from the record, under the direct supervision of the Pacific Gas & Electric Company's foreman. There was no direction by the Stacey Company as to the method of doing the work, nor did the Stacey Company exercise any control over the crew of linemen employed in the doing of the work. There were, however, a few general directions given by McPeake, the superintendent of the Stacey Company, concerning where the poles were to be erected, the number of clamps to be used, and that the cable should be "dead ended" to insure the safety of the derrick. These suggestions were accepted by the Pacific Gas & Electric Company's foreman, who directed the means of accomplishing the desired result. The method of erecting the poles and all the details incident thereto were under the complete control at all times during the course of the work, of said Pacific Gas & Electric Company's foreman.

When the construction work was almost completed so that there was no further need of the derrick, the Stacey Company notified the Pacific Gas & Electric Company to have the poles removed. By means of a similar "D & C tag," as was used in directing the foreman to erect the derrick, the Pacific Gas & Electric Company superintendent directed the foreman of the linemen's crew to dismantle the derrick. Under the direction of this foreman the said crew of linemen proceeded to take down the derrick. When the superintendent of the Stacey Company, McPeake, arrived and saw the dismantling in progress, he stopped the work for a few minutes, as he was not decided where the poles should be placed when this work should be accomplished. After conferring with his foreman, McPeake notified the Pacific Gas & Electric Company foreman to "go ahead" and complete the job. McPeake then left the scene where the dismantling of the derrick was taking place. He took no further part in this work. The work of dismantling, which had been commenced under the immediate supervision and control of the Pacific Gas & Electric Company foreman, was continued in the same manner without any interference by any one in behalf of the Stacey Company. The method of doing the work was left entirely to his discretion. During the course of the work of dismantling the derrick, Smith, the deceased, was killed. He was in the employ of the Pacific Gas & Electric Company, and was a member of the linemen's crew directed to dismantle the derrick. He was, at all times during the course of the work, under the direction and control of said company through its foreman.

The findings of the Industrial Accident Commission, material to the issues here presented, are: That at the time of his death the said A. E. Smith was employed by the Pacific Gas & Electric Company, his general employer, and by the Stacey Bros. Gas Construction Company, his special employer; and that the injuries sustained occurred in the course of and arising out of his employment and caused his death. There is no dispute as to the correctness of the finding of the Commission that Smith's injuries were sustained in the course of and arising out of his employment.

Petitioner Federal Mutual Liability Insurance Company, on behalf of the Stacey Company, contends that the finding that the said company was the special employer of said Smith is not supported by the evidence. Respondent Industrial Accident Commission, in answer to this contention, urges that the arrangement between the Pacific Gas & Electric Company and the Stacey Company was a mere loan by the former of its men and materials to the latter for the latter's accommodation, and that the Stacey Company assumed such direct and immediate control and supervision over the linemen's crew as to establish the relation of special employer and special employee between it and said Smith. With this contention petitioner Pacific Gas & Electric Company concur, but endeavor to escape liability by interposing the contention that, inasmuch as the Stacey Company was a special employer, it should be held solely liable for the death of Smith.

[1] This contention seems to postulate the very issue in controversy, and is obviously predicated upon the finding of the Industrial Accident Commission of the special employment of Smith. Thus we are confronted, at the outset, by the question of whether or not the evidence adduced upon the hearing before the Industrial Accident Commission warrants and supports the finding of the relation of special employer and special employee as between the Stacey Company and Smith, the deceased. Of course, it goes without saying that the findings of the Industrial Accident Commission are subject to review only in so far as they have been made without any evidence whatever in support thereof. Southern Pac. Co. v. Industrial Acc. Com., 177 Cal. 378, 170 P. 822; Dearborn v. Industrial Acc. Com.,

187 Cal. 591, 203 P. 112; Pruitt v. Industrial Acc. Com., 189 Cal. 459, 209 P. 31. In short, if the facts show substantially without conflict that there is no evidence to support the finding, the Commission was without jurisdiction to make the same.

There must be some evidence upon which the finding of special employment is predicater sufficiently showing that there was an exercise of the right of direction to the employee by the alleged special employer as to the manner and method of doing the desired work based upon the latter's right of control not only of the work to be done but of the man or men employed in the doing of the work.

[2, 3] To establish the legal relation of special employer and special employee it must appear that either by the terms of the contract or during the course of its performance the employee of the alleged independent contractor came under the control and direction of the other party to the contract, and suffered injury as the result of such direction and control. Famous Players Lasky Corp. v. Industrial Acc. Com., 194 Cal. 134, 228 P. 5, 34 A. L. R. 765; Employers' L. A. Corp. v. Industrial Acc. Com., 179 Cal. 432, 177 P. 273; Pruitt v. Industrial Acc. Com., 189 Cal. 459, 209 P. 31; Federal Insurance Co. v. Industrial Acc. Com., 190 Cal. 97, 210 P. 628. And when determining whether, in any given case, an employee is the servant of his original master or of a party to whom he has been furnished, "the test is whether, in the particular service which he is engaged to perform, he continues liable to the direction and control of his master or becomes subject to that of the party to whom he is lent or hired." Coughlan v. Cambridge, 166 Mass. 268, 44 N. E. 218; Scribner's Case, 231 Mass. 132, 120 N. E. 350, 3 A. L. R. 1178; Employers' L. A. Corp. v. Industrial Acc. Com., supra. Shortly stated, the real test of what constitutes special employment may be said to be found in the character of the control and supervision exercised by the alleged special employer over the work and the employee engaged in the doing of the same.

The Pacific Gas & Electric Company undoubtedly was the general employer of Smith, the deceased, at the time of his death. It had hired Smith in the first instance and was paying his wages at the time he was engaged in assisting in the work of erecting the derrick. It had sent him with other members of its crew of linemen under the direction and control of its own foreman to do a particular piece of work which it had engaged to do for the Stacey Company. There was no contract of employment, express or implied, between the Stacey Company and Smith. True it is the superintendent of the Stacey Company, at the inception of the work, indicated to the foreman of the crew of linemen what was to be done. Beyond this he did not go, and aside from this there is no evidence that he ever attempted to control or assume control of the progress and completion of the work or of the men employed to do the same. This control, the evidence shows, was vested entirely in the Pacific Gas & Electric Company's foreman. The members of the linemen's crew, so far as the work of erecting the derrick was concerned, were at all times and in all respects under the immediate supervision and control of this foreman. The superintendent of the Pacific Gas & Electric Company, Reuss, testified that it was Smith's duty to do what his foreman, the Pacific Gas & Electric Company's foreman, told him to do. One Evans, foreman of said crew of linemen during the course of dismantling the derrick testified that Smith was directly under his charge the morning of the injury and prior to that time, and that he would not have permitted any one other than his superiors in the Pacific Gas & Electric Company to interfere with or to direct Smith, the deceased. One Harris, foreman for the Pacific Gas & Electric Company and at intervals in charge of the said linemen's crew while the derrick was being erected, testified that McPeake, superintendent of the Stacey Company, "* * * told us how he wanted it done. He told us the results he wanted but he didn't tell us how to get those results. * * * Several times he came to me and said: 'Be careful not to drop anything on that floor.' That is the thing he impressed upon me. * * * He told us he didn't want anything dropped. It was up to me to see that nothing was dropped."

Further testimony was given by Harris showing that he was acting under the direction and control of the Pacific Gas & Electric Company, and that at no time did he recognize the Stacey Company as having the power or the right to direct him as to the method and the details of the work. When a doubt came to his mind concerning the strength of the cable to be used he did not consult with McPeake. In this behalf Harris testified as follows:

"At the time we had some little discussion about the weight this mast was supposed to carry, and I went to Mr. Reuss (superintendent of the Pacific Gas & Electric Company). I told him I didn't know about this, but I did not feel that I wanted to be responsible if anything should break. He said, 'You better put in heavy enough the stuff we furnish, so if anything breaks, it will be Mr. McPeake's stuff that will break.' I discussed with Mr. McPeake how much strain was going to be on it, so I used my own judgment, and put in our stuff three times as strong as any strain that would come on it."

[4] This testimony, we think, shows that the method of doing the work was under the direction and control of the Pacific Gas & Electric Company, through its general superintendent of the linemen and its foreman. It

is apparent, from the evidence adduced upon the hearing before the Commission, that the foremen in charge of the linemen's crew understood that they were at all times under the supervision and control of Reuss, superintendent of the Pacific Gas & Electric Company, and not McPeake. It is true that McPeake, superintendent of Stacey Company, stopped the progress of the work of dismantling the derrick for a few moments merely for the purpose of determining where the poles of the derrick should be placed when it was dismantled, but this fact will not suffice to warrant the inference that he assumed the direction and control of the actual work of dismantling the derrick, or that he assumed to direct and control the operations of the linemen's crew engaged in doing that work. Nor is the fact that certain general directions may have been given by the person desiring the work to be done, concerning the location and the character of the work, sufficient in and of itself to show the right or an assumption of the right to control and direct the work and the workmen employed thereon, and consequently it cannot be held that such fact, standing alone, will suffice to establish the relation of special employer and special employee. The fact remains that neither the individual members of the linemen's crew nor their foremen surrendered their "own judgment" to the direction and control of the Stacey Company's superintendent.

[5] This review of the evidence adduced upon the hearing before the Industrial Accident Commission, as disclosed by the record before us, compels the conclusion, we think, that there was no evidence to support the finding of the Commission of the existence of a special employment between the Stacey Company and Smith, the deceased. The facts thus disclosed bring this case, it seems to us, well within the rule enunciated in the case of Western Indemnity Co. v. Industrial Accident Commission, 172 Cal. 807, 159 P. 721, where this court said:

"The test of 'control,' however, means 'complete control.' * * * 'It is well settled that, where one person is performing work in which another is beneficially interested, the latter may exercise over the former a certain measure of control for a definite and restricted purpose, without incurring the responsibilities, or acquiring the immunities, of a master, with respect to the person controlled.' * * * but in weighing the control exercised we must carefully distinguish between authoritative control and mere suggestion as to detail or the necessary co-operation where the work furnished is part of a larger undertaking."

The complete and exclusive control and supervision over the linemen's crew having been here exercised by the Pacific Gas & Electric Company, it must be held solely responsible for the death of Smith, the deceased.

Respondents contend that the previous decisions of this court sustaining an award against both general and special employer were based "upon circumstances almost identical" with those of the instant case. We are unable to appreciate the force of this contention. Those cases relied upon in this behalf are not in point, and may be readily differentiated from the situation presented by the facts set forth in the record before us. The substantial distinction is that in the instant case there was no assumption of direct control and supervision, while in the cases cited by respondents there was such a direct, affirmative assumption of control and supervision over the workmen of the general employer so as to make them the special employees of the party exercising the control. In the case of Employers' L. A. Corp. v. Industrial Acc. Com., supra, the facts were these: The Riverside Portland Cement Company, engaged in the manufacture of cement, contemplated the installation of certain machinery. The plans and specifications for such work were made by the engineers of the cement company. The Wellman-Lewis Company was engaged in the business of installing and handling of large machinery, and had in its employ experienced and skilled men who could do this work. An arrangement was made between the cement company and the Wellman-Lewis Company whereby the latter furnished to the former its employees, under a foreman, also in its employ, to do the required work. The cement company furnished all the materials and had the direction and control of the employees furnished, including the foreman; it kept account of the time of all such employees, who were obliged to use the time clock of said company; it had the right to require the furnishing of such additional employees as it should deem necessary and to cause the discharge of any employees whom it might regard as undesirable. This court affirmed the finding of the Industrial Accident Commission holding both parties as special and general employer, respectively, liable for the reason that the finding of the Commission was based upon the joint control by the general and special employer upon evidence which clearly showed the existence of such joint control. The evidence in the case at bar, as we have previously indicated, shows no such direction and control. In Pruitt v. Industrial Acc. Com., supra, it appears that one Conklin died as the result of injuries he received when the truck he was driving was struck by a train. Several trucks with drivers, among whom was Conklin, were hired by Pruitt to the firm of Graham Bros. The drivers were under the entire control and direction of Graham Bros., who gave orders as to how and where the materials were to be hauled and the trucks otherwise used. Furthermore, there was a special agreement between Pruitt and Conklin by which the latter was to retain 25 per cent. of the wages paid to him by Graham Bros., and

he was to be charged for the upkeep of the truck, which he kept at his own home; while Pruitt was to pay for repairs and for the oil and gasoline used in its operation. In affirming the award made by the Commission against Graham Bros. and annulling the award made against Pruitt, the court said:

"There is neither evidence nor finding to show that petitioner ever exerted, or had the right to exert, the slightest degree of control over Conklin in connection with his employment in the service of Graham Bros. Yet to uphold an award against him it must so appear."

In Insurance Co. v. Industrial Acc. Com., supra, the American Stevedoring Company, organized by certain lumber dealers to furnish lumber handlers, under an arrangement with the lumber companies, sent crews of lumber handlers to a company, as requested, to perform the required work. The men were hired by, paid by, and discharged by the stevedoring company, but were under the full control and direction, as to the method of doing the work, of the company for whom they happened to be working. The lumber companies some time subsequent, when the purpose of the establishment of the stevedoring company had been practically accomplished, hired the men and placed them on the pay roll of the stevedoring company. The decedent was hired by the stevedoring company, and was sent to the Pope & Talbot Company yards, where, while acting under the complete control and direction of this lumber company, he was injured. The finding of the Commission holding both special employer and general employer liable was affirmed. The court said:

"Nor can it be questioned that he was a special employee of Pope & Talbot. The evidence shows he worked in its yard exclusively, subject to its entire direction and control in the performance of his duties."

The control and direction exercised by the special employer in that case clearly differentiates it from the instant case. In Famous Players Lasky Corp. v. Industrial Acc. Com., supra, two pilots were furnished by the Williams Aircraft Corporation to the Lasky company to be used in producing a motion picture. The only directions given to the pilots were that they were to fly to a certain place and there report to the Lasky corporation for instructions. The pilots, upon arriving on the lot where the picture was to be filmed, were directed by the representatives of the Lasky corporation to look through the camera to get its range of vision and to direct their flight so as to come within the picture. A flight was made, but being too high the pilots were directed to fly closer to the ground. After some demurring between themselves, the pilots complied with this direction, and in the course of the flight the accident occurred in which one of the pilots was injured. Although two representatives of the Williams Aircraft Corporation were present during all the time when the directions were given to the pilots by the representatives of the Lasky corporation, they interposed no objection and exercised neither control nor direction over either of the pilots. All of the instructions to the pilots as to the time, place, and method of their flight were given to them by the Lasky corporation representatives. The direction and control exercised by the Lasky corporation was never present in the instant case. The two Industrial Accident Commission decisions, in which petitions for a writ of review were denied, cited by respondents in support of their contention are, also, beside the point presented by the instant case and are clearly distinguishable. In both cases, Fidelity & Casualty Co. v. Industrial Acc. Com., L. A. No. 2754, and Gordon and Harrison v. Industrial Acc. Com., L. A. No. 8323, there was such an exercise of direction and control as to establish the special employment found by the Commission.

The conclusion we have reached upon the principal point in the case renders unnecessary a discussion of whether or not the award should be made against the insurance carrier to whom the premium for the insurance of the deceased has been paid.

The award against the Federal Mutual Liability Insurance Company is annulled, and the award against the Pacific Gas & Electric Company is affirmed.

We concur: LAWLOR, J., Acting C. J.; WASTE, J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; HOUSER, Justice pro tem.

---

197 Cal. 215

DEPARTMENT OF PUBLIC WORKS OF CALIFORNIA, DIVISION OF WATER RIGHTS et al. v. SUPERIOR COURT IN AND FOR SISKIYOU COUNTY et al. (Sac. 3670.)

(Supreme Court of California. Sept. 30, 1925.)

1. Certiorari ⊜35—Jurisdiction of superior court of petition for writ of review conferred by Constitution, and is to be exercised as provided by Code of Civil Procedure.

Jurisdiction of superior court of petition for writ of review, commonly known as certiorari (Const. art. 6, § 5; Code Civ. Proc. §§ 1067–1077), of act of state water commission in issuing under Water Commission Act, § 12, certificate dividing water rights, is conferred by Constitution, and is to be exercised as provided in Code of Civil Procedure.

2. Certiorari ⊜1—When issuance of warrant for writ of review, commonly known as certiorari, warranted, stated.

To warrant issuance of a writ of review, inferior tribunal, board, or officer must exer-

cise a judicial function in matter sought to be reviewed, and must have exceeded its jurisdiction therein, and there must be no appeal from action complained of, nor any plain, speedy and adequate remedy, and application must be made on verified petition of a party beneficially interested, in view of Code Civ. Proc. §§ 1068, 1069.

3. Certiorari ⟸24—Superior court held without jurisdiction of petition for writ of review of action of state water commission in issuing certificate dividing water rights.

Superior court *held* without jurisdiction of petition for writ of review of action of state water commission in issuing certificate for division of water rights under Water Commission Act, § 12; function exercised therein being administrative, or ministerial and not judicial, in view of Const. art. 6, § 1, not authorizing Legislature to vest judicial power in commission and Water Commission Act, §§ 12, 15, 18, 19, and section 1b (as added by St. 1923, p. 162, § 2), and sections 36b, 36f (as added by St. 1917, pp. 236, 238, §§ 15, 19), indicating that no right of review exists in the courts.

4. Constitutional law ⟸56—Waters and water courses, ⟸128—Water Commission Act held not violative of organic law.

Water Commission Act, § 12, defining authority of state water commission, manifests an intention not to confer any judicial power on commission, and hence is not violative of the organic law.

5. Prohibition ⟸3(5)—Writ held to lie to restrain superior court from taking jurisdiction of petition for review of action of state water commission in issuing certificate dividing water rights.

Prohibition *held* to lie to restrain superior court from taking jurisdiction of petition for review of action of state water commission in issuing certificate dividing water rights, where superior court could make no valid disposition of petition except to dismiss it, and petitioners' remedy by appeal not being plain, speedy, and adequate.

In Bank.

Application for writ of prohibition by the Department of Public Works of the State of California, Division of Water Rights and others, directed against the Superior Court of the State of California in and for the County of Siskiyou, and Hon. Walter E. Herzinger, as Judge presiding therein. Writ granted.

Spencer Burroughs, of Sacramento, for petitioners.

Robert D. Duke, of San Francisco, and C. F. Holland, of Los Angeles, for respondents.

PER CURIAM. This is an application for a writ of prohibition to restrain the respondents from proceeding with the hearing and determination of a petition for a writ of review pending in the respondent court.

It is alleged in the petition that Frank and Carl Langford, on the 12th day of September, 1908, duly posted a notice of appropriation of the running water of the Klamath river to the extent of 500,000 inches, measured under a 4-inch pressure (10,000 second feet), and on the 18th day of the same month recorded a copy of the notice in the office of the recorder of Siskiyou county; that said appropriation was maintained according to law, and was, on July 21, 1922, transferred to Electro Metals Company, a trust organization, which is the present owner and holder thereof; that on November 17, 1922, the said Electro Metals Company filed an application under section 12 of the Water Commission Act (Stats. 1913, p. 1012) in the office of the division of water rights in the department of Public Works for a certificate prescribing the time within which the full amount of its acquired water appropriation should be applied to a useful and beneficial purpose; that, after due investigation, the division of water rights found that said applicant and its predecessors in interest had proceeded with due diligence in proportion to the magnitude of the project, to carry on the work necessary to put 3,000 cubic feet per second of the water of the Klamath river to beneficial use under said notice of appropriation, and for good cause shown, and as provided by law, duly issued, under date of July 19, 1923, a certificate to said Electro Metals Company prescribing the time for the complete application of the 3,000 cubic feet of water per second theretofore appropriated to beneficial use for hydroelectric power purposes; that on the 18th day of August, 1923, a petition for a writ of review was filed in the respondent court, entitled "The Klamath River Packers' Association, a corporation, Plaintiff v. The Department of Public Works, Division of Water Rights, Defendant," and wherein the action of the defendant therein named in issuing the said certificate was sought to be reviewed; that the respondent court issued the writ of review, fixing a time and place for the return thereof; that a copy of the writ was served on petitioners, at whose instance a motion to quash the writ, duly noticed, was, on November 6, 1923, heard by the respondent court and denied. Following the denial of the motion to quash, the petition herein was filed. An alternative writ was issued. On behalf of the respondent a general demurrer to the petition and an answer were filed at the same time.

The sole question for determination is whether the respondent court has jurisdiction to entertain and determine a petition for a writ of review affecting the action of the division of water rights in issuing a certificate under section 12 of the Water Commission Act. That section, so far as pertinent here, provides:

"The state water commission shall have authority to, and may, for good cause shown, upon the application of any appropriator or

user of water under an appropriation made and maintained according to law prior to the passage of this act, prescribe the time within which the full amount of the water appropriated shall be applied to a useful or beneficial purpose; provided, that said appropriator or user shall have proceeded, with due diligence in proportion to the magnitude of the project, to carry on the work necessary to put the water to a beneficial use; and in determining said time said commission shall grant a reasonable time after the construction of the works or canal or ditch or conduit or storage system used for the diversion, conveyance or storage of water; and in doing so said commission shall also take into consideration the cost of the application of such water to the useful or beneficial purpose, the good faith of the appropriator, the market for water or power to be supplied, the present demand therefor, and the income or use that may be required to provide fair and reasonable returns upon the investment and any other facts or matters pertinent to the inquiry. Upon prescribing such time the state water commission shall issue a certificate showing its determination of the matter. For good cause shown, the state water commission may extend the time by granting further certificates. And, for the time so prescribed or extended, the said appropriator or user shall be deemed to be putting said water to a beneficial use. * * *"

Following its consideration of the matters involved in said section 12, and pursuant to said application, the division of water rights, which is the successor of the state water commission, issued the following certificate:

"This is to certify that the division of water rights has considered the work done by the Electro Metals Company of San Francisco, California, in appropriating three thousand (3,000) cubic feet per second of the waters of the Klamath river for hydroelectric purposes under a notice of appropriation dated September 12, 1908, and recorded in book 6 of Water Rights at page 340 of the Records of the county recorder of Siskiyou County, California, and as the division of water rights has determined that such works have been prosecuted with due diligence it hereby fixes the time within which the full amount of water appropriated shall be applied to a useful or beneficial purpose as ending August 1st, 1929."

[1, 2] It is contended by the petitioners herein that the respondent court has no jurisdiction to entertain and determine the writ of review, for the reason that section 12 contains no provision for such a review by the court. It is pointed out that numerous other sections of the act provide specifically for a review by or relief in the courts after action taken by the division of water rights, and it is urged that because the Legislature has omitted to provide for a review of the action under section 12 the rule of expressio unius est exclusio alterius should be applied, and the respondent court be denied jurisdiction in the matter pending before it. It is the position of the respondents that, in entertaining an application pursuant to section 12 and issuing a certificate thereunder, the petitioners were exercising a judicial function, and that therefore the respondent court has jurisdiction to entertain the proceeding for a writ of review here brought in question. In order clearly to understand these contentions, it is necessary to define the nature of the review proceedings which each party has in mind. It is undeniable that the writ of review pending in the respondent court and to prohibit the determination of which the present proceeding was brought is a proceeding such as is authorized by the Constitution and statutes and commonly known as certiorari. Const. art. 6, § 5; Code Civ. Proc. §§ 1067–1077. On the other hand, the writ of review in the respondent court, which the petitioners claim the Legislature has impliedly denied or not provided for in section 12, is a statutory review under the Water Commission Act. As to the former, the jurisdiction of the superior court is conferred by the Constitution and is to be exercised as provided in the Code of Civil Procedure. The constitutional provision, together with the sections of the Code referred to, are but an affirmance of the common-law jurisdiction of the court in certiorari. 4 Cal. Jur. 1020. Certain essentials to the proper exercise of the power to issue and determine such a writ must concur. Quinchard v. Board of Trustees, 113 Cal. 664, 45 P. 856. Under section 1068, Code of Civil Procedure, the inferior tribunal, board, or officer must exercise a judicial function in the matter sought to be reviewed, and must have exceeded its or his jurisdiction in such matter. Also, there must be no appeal from the action complained of, nor, in the judgment of the court, any plain, speedy, and adequate remedy. By section 1069, the application must be made on the verified petition of a party beneficially interested.

[3] It is apparent that at least one of those essentials is and was not present when the respondent court issued the writ of review, namely, the exercise by the petitioners of a judicial function. This is true, for the reason that it was not within the power of the Legislature to vest judicial power in the petitioners. Their authority under the Water Commission Act is statewide. Under section 1 of article 6 of the Constitution:

"The Legislature would be without authority to give judicial power to any general state board or tribunal. Except for local purposes the section disposes of the whole judicial power of the state and vests all of it in the courts expressly named therein, leaving none at the disposal of the Legislature." Pacific Coast Casualty Co. v. Pillsbury, 171 Cal. 319, 153 P. 24; Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, 156 P. 491, Ann. Cas. 1917E, 390.

See, also, concurring opinion of Mr. Chief Justice Shaw in Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874.

And in no other section of the Constitution do we find authority in the Legislature to

vest judicial power in the petitioners under the Water Commission Act. The cases of Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780, and other cases of like import and relied on by the respondents are not in point, because they involved the scope or validity of judicial powers exercised by local tribunals, boards, or officers whose jurisdiction was limited to incorporated cities, towns, townships, counties, or cities and counties, and did not involve the authority of any tribunal, board, or officer exercising judicial powers and having statewide jurisdiction.

The respondents insist that the petitioners act judicially when they determine under section 12 that "due diligence" and "good faith" have been exercised by an appropriator, and that there has been "good cause shown" for the issuance of the certificate. In a certain sense the determination of those matters involves the weighing of facts and arriving at conclusions from those facts, and, while such matters are common in a judicial proceeding, we think their determination under that section is of an administrative or ministerial character only. The section provides for no notice to parties interested, contains no provision for a hearing or for procedure looking to the adjudication of the rights of any one. The conclusions which the petitioners arrive at under whatever investigation they may see fit to make pursuant to the application are merely for their own guidance in the administration of their duties under the section. Their conclusions and determinations in that respect are ineffectual for any other purpose, and their action under the section does not constitute a hearing and a determination of a controversy in a judicial sense. French v. Cook, 173 Cal. 126, 160 P. 411. To hold that section 12 confers any judicial power on the petitioners would, of course, be tantamount to holding said section unconstitutional to that extent. We think it was not intended by the legislative branch in the enactment of that section to confer any judicial power on the petitioners, and therefore conclude that the section is not violative of the organic law. As the petitioners do not, and could not under the Constitution as now framed, exercise judicial functions, it follows that the proceeding for the writ of review pending in the respondent court lacks one of the elements essential to its proper determination.

The review, which the petitioners contend the legislative branch has impliedly denied to the respondent court, is such a review as is provided for in other sections of the Water Commission Act. Such, for instance, as is provided in section 1b, wherein any person interested in an application for a permit to appropriate water or any party protestant may obtain a review of the action of the commission in issuing or refusing to issue a permit for such appropriation. This section was added in 1923 (St. 1923, p. 162, § 2), after the decision by this court in the case of Tulare Water Co. v. State Water Commission, supra, wherein it was held that the consideration of an application for an appropriation of water under section 15 of the act did not call for the exercise of a judicial function, and that mandamus would lie to compel the issuance of the permit. Again, in section 18, a court review is provided for in connection with an order revoking the approval of an application for a permit to use unappropriated water or water which, having been appropriated, has found its way back into the stream, lake, or other body of water; also, a court review is provided for in section 19, where the commission has determined that work performed by the holder of a permit has not been completed in conformity with law; and still again section 36b (St. 1917, p. 236) provides for a court review of a determination by the commission of the rights of various claimants of the waters of a stream based upon prior appropriations. Section 36f (St. 1917, p. 238) provides that the commission shall have authority, after notice and a hearing, to fix a time limit for the completion of an appropriation of water, where such rights of appropriation were initiated prior to the adoption of the Water Commission Act. A review of a determination under section 36f is provided for, but such review is confined to the procedure outlined in section 36b of the act. The powers of the commission, under sections 12 and 36f, are similar in this, that both sections authorize the commission to fix a time limit for the completion of appropriations of water made prior to the adoption of the act, but admittedly the application involved in the proceeding pending in the respondent court was made under section 12. No court review is there provided for, and no proceedings for such a review elsewhere found in the act can be made applicable thereto. It may here be said that, if and when a judicial review is provided for in the act itself, it has been held, under similar constitutional and statutory provisions, that the action of the state officers made reviewable is not determinative of property rights. Their function is similar to that of a referee whose determination is not binding except upon approval of the court. Stuart v. Norviel (Ariz.) 226 P. 908. Reference to other sections of the Water Commission Act and to the right of review thereunder has been made merely for the purpose of indicating that under section 12 there is no right of review in the courts and the omission to provide for such review must be deemed to have been intended.

[4, 5] It must therefore be concluded that no right to a review of the action of the petitioners under a section 12 application is provided for in the Water Commission Act. It must also be concluded that the proceed-

ing in certiorari pending in the respondent court is and will be ineffectual as a basis either for affirming or modifying or annulling the action of the petitioners in the premises. While it is true that the respondent court, in exercising its constitutional jurisdiction in certiorari, would have the power to decide in the first instance whether or not any one of the elements essential to the proper determination of the proceeding were present, we think that when it appears as a matter of law on the face of the record before us, and it does so appear, that the respondent court could make no valid disposition of the proceeding before it except to dismiss the same, we are disposed to issue the writ to the end that the petitioners be not put to the expense and annoyance of perfecting a voluminous return and attending what would undoubtedly be a protracted hearing in Siskiyou county, a county far removed from their headquarters. Under such circumstances we are satisfied that the remedy by appeal would not be plain, speedy, and adequate. Davis v. Superior Court, 184 Cal. 691, 195 P. 390; Consolidated, etc., Co. v. Superior Court, 189 Cal. 92, 207 P. 552; A. G. Col Co. v. Superior Court (Cal. Sup.) 238 P. 926.

The demurrer to the petition is overruled. The answer raises no issues of fact which, if resolved in respondents' favor, would justify a denial of the writ. Let the peremptory writ of prohibition issue.

197 Cal. 795

DEPARTMENT OF PUBLIC WORKS of the State of California, DIVISION OF WATER RIGHTS, and W. F. McClure, as Director of Public Works, and H. A. Kluegel, as Chief of the Division of Water Rights, Petitioners, v. SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF SISKIYOU, and Hon. Walter E. Herzinger, as Judge Presiding Therein, Respondents. (Sac. 3671.)

(Supreme Court of California. Sept. 30, 1925.)

In Bank. Application for writ of prohibition prayed to be directed to the Superior Court of Siskiyou County, Walter E. Herzinger, Judge, to restrain action in a proceeding of certiorari to review an order affecting water rights. Writ granted.

Spencer Burroughs, of Sacramento, for petitioners.

Robert D. Duke, of San Francisco, and C. F. Holland, of Los Angeles, for respondents.

PER CURIAM. This is an application for a writ of prohibition to restrain the respondents from taking any further action in a proceeding for a writ of review pending in the respondent court. The questions involved herein are the same as those considered and disposed of in the case of Department of Public Works et al. v. Superior Court (Sac. No. 3670) 239 P. 1076, this day decided, except that in this proceeding the state board of fish and game commissioners is the applicant for a writ of review in the superior court. Because of our determination that the petitioners herein do not exercise a judicial function in acting on an application under section 12 of the Water Commission Act (St. 1913, p. 1018), it is unnecessary to determine whether or not the state board of fish and game commissioners is a party beneficially interested in the certiorari proceedings in the superior court.

On the authority of the case above referred to and this day decided the demurrer is overruled. Let the peremptory writ of prohibition issue.

197 Cal. 200

PEOPLE v. GARBUTT. (Cr. 2753.)

(Supreme Court of California. Sept. 30, 1925. Rehearing Denied Oct. 29, 1925.)

1. Criminal law ⊂665(1)—Motion to exclude witnesses not testifying at time addressed to sound discretion of court, and exclusion of principal witnesses only was not an abuse of discretion.

In a prosecution for murder, a motion to exclude witnesses not testifying at time, under Code Civ. Proc. § 2043, is addressed to sound discretion of court, and where court excluded each of the two principal witnesses while the other was testifying, and there were no accommodations elsewhere for other witnesses, there was no abuse of discretion.

2. Criminal law ⊂1153(4)—Witnesses ⊂240(2)—Allowing leading questions within discretion of court, and discretion deemed abused only in exceptional case.

In a prosecution for murder, the matter of allowing leading questions is within discretion of court, and it is only in exceptional cases that trial court will be held to have abused its discretion.

3. Criminal law ⊂706, 730(3)—Question assuming fact of murder not reversible error, where used in connection with time of act only, and duly admonished by court.

In a prosecution for murder, question put to a witness, "Was that after murder?" is prejudicial as impressing jury with fact of murder prior to such a conviction, but where used by prosecutor in relation to time only, and court gave an admonitory instruction promptly, it is not reversible error.

4. Criminal law ⊂730(3)—Statement of prosecutor as to correctness of grand jury transcript and refusal to have it read held not error under the circumstances.

In a prosecution for murder, statement by prosecutor as to correctness of statements of witness made before grand jury, and refusal to have witness read grand jury transcript before it was shown to be correct, was not preju-

dicial error, where court instructed jury not to regard prosecutor's statement as evidence and witness was fully questioned as to such testimony.

5. Homicide ⟸287—Evidence held sufficient to warrant instruction as to robbery as motive for homicide.

In a prosecution for murder, evidence *held* sufficient to warrant inference that motive of homicide was robbery, and to support an instruction by the court as to robbery.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Crail, Judge.

Harry Garbutt was convicted of murder, and he appeals. Affirmed.

Kenneth K. Scott and Moses C. Davis, both of Los Angeles, for appellant.

U. S. Webb, Atty. Gen., John W. Maltman, Deputy Atty. Gen., and John L. Flynn, of Los Angeles, for the People.

LAWLOR, Acting C. J. An indictment returned by the grand jury of the county of Los Angeles and filed September 25, 1924, charged the defendant with the murder of Mrs. Dorothy Lee Hunn in the city of Pasadena. He was tried upon the charge and found guilty of murder in the first degree, the verdict calling for the death penalty. Subsequently a motion for a new trial was interposed on behalf of defendant and denied. The appeal is by the defendant from the judgment of conviction and from the order denying his said motion for a new trial.

We will first outline a portion of the evidence leading up to and connected with the homicide. The appellant came to California from an eastern state in December, 1923. Upon his arrival he took up his abode with his aunt in Los Angeles—a Mrs. Fannie Moorhouse—and remained there for some time. During his residence in Los Angeles he was known under the alias name of Harry Connors, it appearing that he had recently been released from Joliet penitentiary after serving a term for burglary. Shortly after Christmas, 1923, appellant met the deceased at his aunt's residence. According to the evidence he had called at the deceased's residence several times before his final visit on September 19, 1924, when she met her death. She was a married woman, who had reached middle age, and resided at 90 North Madison avenue, Pasadena, with an adopted daughter, Virginia Lee Hunn, who was 10 years of age. The husband of the deceased resided in Chicago. She had some means and owned considerable jewelry, which she frequently, if not habitually, carried upon her person.

It was about 4:30 o'clock in the afternoon of September 19, 1924, when appellant called at the residence of the deceased. He was admitted by one Frederick R. Gibson, who was known as a cousin of the deceased, and who seems to have spent considerable time in her company. As the dinner hour approached appellant was invited by the hostess to remain to dine. He accepted the invitation. In the meantime the child, Virginia, came into the house. The party, consisting of the deceased, the child, Frederick R. Gibson and the appellant, sat down to dinner shortly after 6 o'clock. At the completion of the meal the child was taken by the deceased to her room and put to bed. This was about 7 o'clock. From this point there is a divergence in the testimony as to the succeeding events. Gibson relates that he retired to the bathroom, leaving appellant and the deceased, who had returned after putting the child in bed, in the kitchen alone; that he was in the bathroom a very brief period when he heard a scuffle or commotion in the kitchen; that he left the bathroom and was unable to gain entrance to the kitchen, as the door leading thereto was either locked or held by some one on the opposite side; that he then went to a neighbor's house to secure aid, and while returning to the residence he noticed appellant going down the other side of the street; that he (Gibson) and the neighbor, whose assistance he had enlisted, found the body of the deceased lying in a small runway or court to the rear of the residence; that they carried the body into the house; that they observed wounds on her head and a bullet wound in her chest, from all of which the blood was issuing profusely, and that medical and police aid was summoned and the deceased pronounced dead. This version of Frederick R. Gibson is corroborated in certain particulars by the child who, as she testified, had witnessed some of the actions of appellant and Gibson from her room where she was lying in bed. The similarity in the testimony of Gibson and the child will later appear.

Appellant, on the other hand, after his arrest, gave a version at variance in important particulars with that given by Gibson as well as the child. He stated, in substance, that when the deceased went with the child to the latter's room he arose, retired from the kitchen, and went to the bathroom just as the deceased returned to the kitchen; that Gibson and the deceased were alone there; that while in the bathroom he heard a scuffling in the kitchen; that he returned thereto, and as he entered found Gibson striking the deceased on the head and face with an instrument of some sort; that he intervened to stop the attack upon the deceased; that Gibson thereupon raised the hand with which he was holding the weapon of attack; that he (appellant) warded off the blow with one hand, reached into his inside coat pocket, pulled out a gun and pressed it against Gibson; that the latter

shoved or struck the hand holding the gun, causing it to discharge; that Gibson then fled from the house and he (appellant), not knowing that the bullet had struck the deceased, followed in pursuit of Gibson, but that when he reached the street Gibson was not in sight; that he then realized he was in a bad predicament because he was an "ex-con"; that he therefore walked down the other side of the street and away from the scene; that after he had gone some distance he telephoned for a taxicab and drove to the Rosslyn Hotel in Los Angeles, which he entered by the main entrance and left by a side exit without paying his cab fare; that he then repaired to the Hayward Hotel where he was living with one Irene Kirkoff; that he changed his clothes, whereupon he and the woman left, and that they stayed at the Earl Hotel that night. His subsequent movements are sufficiently set forth in the summary of the testimony later appearing.

I. It is claimed by appellant that the shooting of the deceased was accidental, and for which he was in no way legally responsible. But it is not contended that the evidence was insufficient as matter of law to support the verdict of a felonious killing; indeed it is conceded that "the statement set forth by the Attorney General is very fair and to the point, * * *" wherein, among other things, the Attorney General asserted that "the appellant on this appeal has not questioned the sufficiency of the evidence. * * *"

[1] II. It is contended by the appellant that:

"The court committed error prejudicial to the substantial rights of * * * the appellant herein, to a fair and impartial trial guaranteed him under the Constitution and laws of the state, * * * especially in refusing to grant the motion of the defendant at the beginning of the trial to exclude all witnesses in the case from the courtroom, so as to prevent the persons so excluded from hearing the testimony of witnesses under examination, and in enforcing the exclusion only as to one witness, viz., Virginia Lee Hunn, during the examination of Frederick R. Gibson. * * * Applying the doctrine as laid down by Mr. Wigmore, this honorable court will see, by reading the evidence given by Clifford R. Hunn, Frederick R. Gibson, Franklin W. Latham, Mrs. F. W. Latham, Miss Marceline Keiser, Mrs. Georgia Keiser, Virginia Lee Hunn, Irene Kirkoff, Robert E. O'Rourke, and Mrs. Lucretia Kemper, that all of these witnesses testified more or less to the occurrences immediately before and after the death of Dorothy Lee Hunn. And counsel state that effective cross-examination of Mr. and Mrs. Latham, Miss and Mrs. Keiser, and Mrs. Lucretia Kemper was prevented by their being present and hearing the testimony of the witnesses Frederick R. Gibson and Virginia Lee Hunn. Miss Keiser and Mrs. Keiser testified as to Mr. Gibson's actions following the noises which they claimed to have heard in the Hunn house. Mr. and Mrs. Latham testified as to Mr. Gibson's actions immediately after he left the Hunn house and after he got in touch with the Lathams. * * *

"All of these facts were known to the district attorney before the trial came up, but they were not, and could not, be known to the defendant, as many of these witnesses did not testify before the grand jury; so that the apparent frankness of the district attorney was very misleading and most prejudicial to the defendant. * * *"

The following statement of the Attorney General is supported by the record:

"An examination of the record will show that the most vital testimony introduced by the prosecution was that of Virginia Lee Hunn and F. R. Gibson, the two persons present in the house at the time of the homicide. As to these two witnesses the court did exercise its discretion in excluding one from the courtroom while the other was testifying."

Appellant moved for the exclusion of the witnesses before any of them were examined. We quote from the record:

"Mr. Scott: At this time, if the court please, we desire to invoke the rule for the exclusion of witnesses.

"Mr. Dennison: Well, I don't know of any rule; it is a discretionary matter addressed to the court, and, of course, it is proper to do it when it is convenient for the witnesses. In our courtroom the only convenience we have for witnesses is out of the courtroom. In preliminary hearings that is arbitrary, but the rest is directed to the sound discretion of the court and exercised wherever there is provision made for witnesses. We haven't any special room for them.

"Mr. Davis: Due to the importance of this case, we want a fair and impartial trial; we move the rule be invoked and the witnesses be excluded from the courtroom during the testimony of the witness on the stand.

"The Court: Well; I would be willing to do that for those witnesses whom you claim will testify to the same transaction, but not as to the others.

"Mr. Scott: As we understand it, we think we would be entitled to it for all the witnesses; that the court would exclude all witnesses, under the rule.

"The Court: I don't understand that you have a right to exclude the witnesses as an arbitrary matter.

"Mr. Scott: It is a matter of the sound discretion of the court.

"The Court: As I say, I would be glad to exclude those witnesses, where there are two or more who testify regarding the same transaction, the same conversation."

Section 2043, Code of Civil Procedure, provides in part:

"If either party requires it, the judge may exclude from the courtroom any witness of the adverse party not at the time under examination, so that he may not hear the testimony of other witnesses. * * *"

It was held in People v. Ong Git, 23 Cal. App. 148, 152, 137 P. 283, 285, cited by the respondent, involving a charge of murder:

"The exclusion of a witness, however, is not a matter of absolute right in every case. A request for such exclusion is addressed to the discretion of the trial judge, the exercise of which must be controlled largely by the circumstances of the individual case. People v. Garnett, 29 Cal. 622; People v. Sam Lung, 70 Cal. 515 [11 P. 673]."

For a further statement of the rule see People v. McCarty, 117 Cal. 65, 48 P. 984; People v. Nunley, 142 Cal. 441, 76 P. 45; People v. Gasser, 34 Cal. App. 541, 168 P. 157. That this is a matter within the discretion of the trial court is thus conceded by the appellant:

"And we agree with the conclusion that the exclusion of witnesses is within the sound discretion of the court."

It cannot be held, in view of the fact that the court excluded the child and Frederick R. Gibson, the two principal witnesses, when the other was testifying, considered in connection with the absence of accommodations elsewhere for the witnesses, that the court did not exercise a sound discretion in the premises.

[2] Nor do we perceive any ground for the asserted misconduct on the part of the district attorney in connection with this motion. The appellant next contends that:

"As a further evidence that the district attorney misconducted himself so as to prevent a fair trial of the case, the court erred in allowing the district attorney to lead witnesses, notwithstanding the repeated objections of defendant's counsel."

Many excerpts from the transcript are included in the brief to illustrate the occasions upon which it is claimed that the district attorney, over appellant's objections, misconducted himself by leading the witnesses. In answer to appellant's contention, the Attorney General argues that "it is a well recognized rule that leading questions are within the discretion of the trial court"—citing section 2046, Code of Civil Procedure; People v. Nunley, 142 Cal. 441, 445, 76 P. 45; People v. Brown, 130 Cal. 591, 593, 62 P. 1072; People v. Bannon, 59 Cal. App. 50, 59, 209 P. 1029; and People v. Hinrich, 53 Cal. App. 186, 199 P. 1058, adding:

"Though we have briefly answered counsel under this assignment of error we are mindful that the requisite affirmative showing of such an error does not appear."

It is declared in People v. Nunley, supra:

"Two questions asked by the prosecution were objected to as leading. If it be conceded that they were leading, the answer is, that this is a matter within the discretion of the trial court, and no abuse of that discretion is apparent."

And what is said in the following excerpt from People v. Brown, supra, may be regarded as an answer to the contention here:

"At the same time, it is only in very exceptional cases that we will declare the trial court to have abused its discretion in allowing an attorney to ask leading questions. The motives for the action of the trial court in matters of this kind are often of the character that the printed record brought before us but poorly discloses, and for this reason alone a wide range is given it in governing the conduct of attorneys in the examination of witnesses."

[3] As an additional assignment of misconduct upon the part of the district attorney exception is taken to this question put to a witness: "Q. Was that after the murder?" It is contended by appellant that:

"If the defendant had no further objections to urge, counsel feel that the above statements alone would be sufficient ground for reversal of the case, as it shows such malicious misconduct on the part of the district attorney, and we feel sure that the ruling of the court on page 61, line 4: 'The Court: The jury will understand that question relates to time and is not an effort to introduce evidence which will prove, which will determine whether or not murder was committed, that particular question'—was not sufficient to cure the prejudice thus put into the minds of the jury. The impression of '*murder*' placed in the minds of the jury by the statements and the conduct of the district attorney, and especially by the manner in which he brought out the word '*murder*,' was very prejudicial to the defendant, for up to this time there had been *no conviction of murder;* and such an impression should not have been made upon the minds of the jury."

In reply the Attorney General cites People v. Daily, 135 Cal. 104, 106, 67 P. 16, and claims that "a reading of the two preceding questions shows that the district attorney was attempting to elicit from the witness the time when he first saw the hammer with relation to the homicide. It is to be further noted that upon objection to such use of the word the court instructed the jury"—then follows the instruction above quoted. It is true, of course, that the killing should not have been characterized as "murder" in advance of a verdict so finding. But we do not think, in view of the connection in which the word was used by the district attorney, and the admonitory instruction promptly given by the court, that the jury was influenced thereby.

[4] Again it is insisted by the appellant that:

"The district attorney further misconducted himself in testifying as to the correctness or incorrectness of the statements made by the witness Virginia Lee Hunn as transcribed by the grand jury reporter and set forth in the reporter's transcript of the proceedings before the grand jury."

Under this contention there is set forth a statement by the district attorney objecting to the action of appellant's counsel in seeking to have the child read her grand jury testimony before testifying to it upon the

ground that the transcript thereof contained "considerable clerical errors." In other words, that counsel for appellant should show the transcript to be correct before eliciting the testimony.

The incident is assigned as prejudicial error. If the district attorney intended to clear the transcript of the asserted errors, a better course perhaps was either to have called attention to the discrepancies as they were reached in the presentation of the testimony or developed them on cross-examination. The point to the contention is that so characterizing the transcript was calculated to weaken in the minds of the jury the testimony sought to be elicited. But, here, too, the court admonished the jury, evidently to avoid any possible prejudice, as follows:

"I am sure the jurors all understood that what Mr. Dennison said was not evidence and not offered as evidence, but merely as an explanation of his part in replying to the remarks made by Mr. Davis, after you had heard what Mr. Dennison had to say, or words to that effect. The jury understands that it is not evidence. You are now instructed it is not evidence, what Mr. Dennison said, but was merely a statement, of course. The motion is overruled."

Moreover, as was said in People v. Putman, 129 Cal. 258, 262, 61 P. 961, 962:

"Counsel's conduct must reach a course of proceedings militating against justice and the fair and orderly conduct which should characterize a judicial proceeding in criminal cases before error can be predicated on it. People v. Ward, 105 Cal. 340, 38 P. 945; People v. Wong Chuey, 117 Cal. 630, 49 P. 833."

See, also People v. Smith, 143 Cal. 597, 77 P. 449. And it is to be kept in view that the child was fully interrogated as to such testimony, and it does not appear that any injury resulted. Nor do we think any harm was done by repeating in rebuttal a question put to the child and answered on her examination in chief, notwithstanding it was clearly not proper rebuttal.

III. It is next contended that:

"The court erred in overruling certain objections of the defendant, made at the time of the trial, to the admission of evidence taken and received at the trial."

Several pages of the transcript are then quoted, which it is unnecessary to set forth here. We have examined the rulings complained of, and do not find any prejudicial error in any of them.

IV. Hereunder it is urged that:

"The court erred in sustaining objections of the district attorney to evidence brought out by the defendant on cross-examination, and refusing to admit such evidence and testimony."

It is apparent from the record that many of the questions were improper, and in our opinion the court exercised a reasonable control over the entire examination. Section 2044, Code Civ. Proc.

[5] 5. In conclusion it is urged that:

"Defendant's counsel are of the opinion that the court misinstructed the jury in matters of law in giving them any instruction as to robbery. As an abstract proposition of law, the instruction may be right, but in this case there is no evidence to warrant the court in instructing the jury that the killing occurred in the perpetration, or an attempt to perpetrate, the crime of robbery. Of course, the district attorney advanced the theory, or in other words, created an atmosphere, that there was a motive for the crime; but there was no evidence in this case to show that Harry Garbutt had any motive for committing this act. There were innuendoes and insinuations, and there was some talk about diamonds and money disappearing; but there was no evidence at any time to show that Harry Garbutt took any diamonds or money from Dorothy Lee Hunn, or from any person in the Hunn house."

The theory of the prosecution was that the motive for the homicide was robbery; and though it may be conceded there is no direct evidence that a robbery was committed or actually attempted, nevertheless an instruction on robbery finds support in the record. For instance, there is evidence from which it might be inferred that, notwithstanding appellant's claim concerning the possession and disappearance of the $285, he was without funds the day of the homicide; and that his sudden departure from the bungalow was due in part to the apprehension that Frederick R. Gibson might return at any moment and find some of deceased's jewelry or other property on him; furthermore, he did not pay the cab driver who drove him to the Rosslyn Hotel, nor his bill at the Hayward Hotel before he and Irene Kirkoff left there.

In addition to what we have said concerning the asserted errors it will be seen that in any event no prejudice could have resulted, as the following condensed statement of the evidence surrounding the killing abundantly shows:

Frederick R. Gibson testified that after having eaten dinner he repaired to the bathroom, where he remained from 3 to 5 minutes, leaving the deceased and appellant alone in the kitchen; that the child had previously been put to bed; that while he was in the bathroom he heard "a great commotion, moving of chairs and so forth"; that he heard a shot and an outcry; that he went to the kitchen door but could not open it as it was "being held"; that he then went out the front door looking for help; that he went to the bungalow of a neighbor named Latham; that he and Latham went back and found the body of deceased in the runway and brought it into the house; that the police were summoned; that he could not see appellant when he heard the "commotion" and attempted to return to the kitchen; that he next saw him

walking down the other side of Madison avenue and away from the residence of the deceased; that deceased had always worn and kept considerable jewelry about the house. On cross-examination he stated that he thought he saw a hammer on the floor.

C. D. Boaz, a hardware merchant, testified that on September 19, 1924, appellant purchased a hammer from him similar to the one exhibited by the district attorney and which was found in the home of the deceased after her death; that he thought he wrapped it in a newspaper; that a copy of the "Southwestern Retailer," of which he was a subscriber, which was shown to him as having been found in deceased's residence, was similar to the paper in which he wrapped the hammer.

Warren Olds, a taxi driver, testified that on September 19, 1924, he answered a call at the "Ice Company" about 8 o'clock in the evening of that day; that the passenger he picked up was appellant; that he took him to the Rosslyn Hotel; and that appellant entered the hotel without paying the fare and did not return.

Franklin W. Latham testified that he owned the property at number 90 North Madison Avenue; that deceased was a tenant of his; that he saw Gibson shortly after 7 o'clock on the evening of September 19, 1924; that upon being called by his wife he went with Gibson to the residence of deceased and found her body lying in a passageway close to her kitchen door; that there was blood on her head and face; that he and Gibson picked her up and took her into the living room; that he then attempted to restore her, thinking she had fainted; that a doctor was summoned; that in loosening deceased's clothing he noticed a bullet hole in her chest; that on examining the kitchen he found blood spots on the floor and on the refrigerator door; that the hammer exhibited to him he saw for the first time when the child handed it to him as he was stooping over the body of the deceased; that he picked up a piece of paper, similar to that shown him, and gave it to one of the officers; that deceased usually wore considerable jewelry, even at the time of her death. The witness' testimony was corroborated by that of his wife.

Marceline Keiser testified that she lived with her mother in a bungalow adjoining the Hunn residence; that they were home on the evening of September 19, 1924; that she heard a commotion in the kitchen of deceased's house; that she, her mother, and grandmother went out to their front porch; that Gibson rushed across their lawn and inquired if they had a man in the house; that he then ran to Latham's residence; that her mother went toward the passageway where the deceased was found lying; and that she went to the front door and was admitted by the child.

Georgia Keiser, mother of the preceding witness, gave corroborative testimony. Dr. Frederick A. Bonthius testified that having been summoned he went to the Hunn residence; that the deceased was dead when he arrived; that he found two scalp wounds, also a bullet hole in her chest; that, in his opinion, the deceased died from the bullet wound. Fanny E. Moorhouse, testified she was the aunt of appellant; that she introduced appellant to the deceased shortly after Christmas, 1923; that in a conversation he remarked to her that some "crook" would get the deceased's diamonds, because she "displayed" them so much.

Virginia Lee Hunn testified that on September 19, 1924, she came into the house about 6 o'clock in the evening, and there were present at the time "Uncle Frederick and mother and Mr. Garbutt"; that the four dined together; that she went to her room about 7 o'clock to retire; that the deceased accompanied her and later returned to the kitchen; that while she (Virginia) was in bed she saw Gibson go to the bathroom; that she then "heard a bang and a lot of noise out in the kitchen, and I was kind of scared"; that Gibson went from the bathroom toward the dining room; that he came back and went out the front door; that two or three seconds later appellant went to the davenport in the living room, picked up his cap and "ran out the front door"; that she picked up a hammer, partly wrapped, in the kitchen; that she tore the paper off; and that appellant did not go into the bathroom that night.

Paul Ging testified that he was employed at the Baltimore Hotel; that appellant had been a guest of the hotel, and he had met him there; that on a Friday evening, he could not give the exact date, between 10 and 10:30 o'clock, appellant came to where he was working and borrowed $3 from him, leaving an automatic gun as security; that he later turned the gun over to the police and recognized it as the gun shown to him in court.

Irene Kirkoff testified that she and appellant had been living together at the Hayward Hotel; that he came into the room where she was reading in bed after 7 o'clock in the evening of September 19, 1924, and told her to dress and pack as they were leaving because he was unable to pay the hotel bill; that before leaving he changed his suit; that a gun shown to her was similar to one possessed by the appellant; that after leaving the Hayward Hotel they went to the Earl Hotel and remained there Saturday night; that Saturday morning appellant sent her for a newspaper; that on the following night they stopped "at the hotel on Sixth or Seventh street"; that they returned to the Earl Hotel on Monday night, and that appellant was arrested on Tuesday; that on Sunday, preceding his arrest, he directed her to leave the state.

Leon Scheuhl, a detective sergeant, testified that he wrote and transcribed shorthand correctly; that after the arrest of appellant, in the presence of other officers and the district attorney, appellant freely, voluntarily, and without duress or pressure made a statement, which the witness took down in shorthand and transcribed; the witness then read the statement to the jury in which appellant referred to the dinner at the deceased's residence on the evening of her death; stated that he went to the bathroom and while there heard a commotion in the kitchen; that he returned to the kitchen and found Gibson beating the deceased about the head with some instrument; that he interfered to stop the trouble; that he reached for a gun in his pocket; that Gibson grabbed his hand, causing the gun to discharge; that he was not aware the bullet struck the deceased; that Gibson fled; that he followed after him to the street, but he was lost to view; that being an "ex-con" he became "panicky," and for that reason walked rapidly away from the scene of the scuffle; that he called a cab; that he rode to the Rosslyn Hotel; that he entered the hotel without paying his fare and left by a side exit; that he repaired to the Hayward Hotel, changed his suit, and went to the Earl Hotel for the night. The statement went on to detail his other movements up to the time of his arrest. A "joint" statement of Gibson and appellant, made at the deceased's residence in the presence of each other and the police officers, was read, in which each related the highly contradictory versions already set forth.

Robert E. O'Rourke, a police officer, testified that he arrested appellant on September 23, 1924, as he emerged from a rooming house; that upon his arrest he gave the name of "Hanson"; that on the way down the street, he stated, "Well, I am Harry Connors;" that he found a couple of pawn tickets in a bill folder in the possession of appellant; that in another conversation appellant said that on the evening of the homicide in pulling the gun out of his pocket he lost $285; that this sum had been "slipped" to him by the deceased the day of the homicide because he delivered to her a small package of diamonds which he received from a "fellow" in San Diego.

The appellant, appearing as a witness on his own behalf, told a story substantially in accord with the "statement" read into the record by Officer Scheuhl. He admitted that the statement, as read, was "substantially true," and that there was nothing in it he desired to "correct"; that from the time he arrived in California until the death of the deceased he had not been employed; that the story he told Officer O'Rourke concerning the $285 was false, and that, in fact, he had received the $285 from a "bootlegger," with whom he had "invested" $300, and that he told this falsehood to protect the "bootlegger."

It is apparent from the evidence that the jury must have discarded appellant's account of the murder, and, in view of our disposition of the asserted errors, there is no merit in the appeal.

The judgment and order appealed from are hereby affirmed.

We concur: HOUSER, Justice pro tem.; RICHARDS, J.; WASTE, J.; SHENK, J.; SEAWELL, J.; LENNON, J.

197 Cal. 245

POULTRY PRODUCERS OF CENTRAL CALIFORNIA, Inc., v. NILSSON.
(Sac. 3117.)

(Supreme Court of California. Oct. 1, 1925.)

1. Agriculture ⟸6—Term "hens" in stock subscription agreement construed as including hens and pullets.

In a subscription agreement, whereby plaintiff agreed to purchase stock on the basis of one share for every 1,000 hens owned by him, a finding by the trial court that for the purposes for which the corporation was organized the term "hens" included hens and pullets was correct.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Hen.]

2. Corporations ⟸81—Subscription to entire capital stock ordinarily not necessary to fix liability of subscribers, but where incorporation is conditioned on subscription to certain amount, unauthorized subscriptions cannot be counted.

Ordinarily, it is not a condition precedent to the liability of subscribers that entire capital stock be first subscribed, but where organization of corporation is made conditional on securing a certain amount of subscriptions, unauthorized subscriptions cannot be counted in making up required amount.

3. Agriculture ⟸6—Stock subscriptions by holders of minority fraction of 1,000 hens held proper under subscription agreement.

A provision in a subscription agreement for purchase of one share of stock for every 1,000 hens or a majority fraction of 1,000 owned by each subscriber, the minimum subscription in any event being one share where corporation was organized to include every producer in marketable quantities of hens, refers to basis for issuance of stock, and is not a limitation on those entitled to subscribe, so that subscriptions by holders of minority fractions of 1,000 hens were proper.

4. Agriculture ⟸6—Condition of produce sale agreement attached to stock subscription agreement as to number of signers necessary held complied with.

Condition in produce sale agreement attached to subscription agreement, requiring

corporation to secure contracts from owners of at least 1,000,000, hens is complied with where sufficient number signed subscription agreement, though owners of less than 1,000,000 signed the produce sale agreements, since subscription signers, being under a duty to sign such produce sale agreements, they are regarded as signed under maxim laid down in Civ. Code, § 3529.

5. Agriculture ⇐6—Objection that produce sale agreement differed from one agreed to be signed held too late.

Where defendant who had agreed to sign a produce sale agreement was sent a copy which differed somewhat from the one attached to his subscription agreement, but to which no objections were made during the negotiations, he cannot raise such objection for the first time at the trial, since if made timely it could have been cured.

In Bank.

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Suit by the Poultry Producers of Central California, Inc., against J. Leonard Nilsson. From a decree granting specific performance and awarding damages for breach of contract, defendant appeals. Modified and affirmed.

Dozier & Dozier, J. E. Pemberton, and Dozier, Kimball & Dozier, all of San Francisco, for appellant.

Sapiro, Neylan & Ehrlich, Sapiro, Levy & Hayes, and Sapiro & Hayes, all of San Francisco, for respondent.

WASTE, J. The defendant has appealed from a judgment in favor of plaintiff, decreeing specific performance and awarding damages for violation of a contract. Plaintiff was a nonprofit association organized and incorporated for the purpose of fostering and promoting the business of raising poultry and marketing eggs and poultry by co-operative methods. Defendant signed a preliminary subscription agreement with a large number of other poultry producers, providing for the organization of the association, and agreed to purchase 4 shares of its capital stock, at a price of $10 per share, and on the basis of one share for every 1,000 hens, or a majority fraction of 1,000 hens, owned by him. At the time he signed the subscription agreement he paid $10, representing 25 per cent. of the price of the stock subscribed for, which advance payment in accordance with the terms of the agreement, was to be credited on the purchase price of the stock when the organization of the association was completed. There was attached to the subscription agreement, when signed by the defendant and the other subscribers, a form of "produce sale agreement," by the terms of which it was provided that, in consideration of the mutual obligations therein contained and of the agreements by each of the parties thereto to be performed and in pursuance of the preliminary [subscription] agreement, the association agreed to purchase and market, and the subscriber agreed to sell and deliver to it such of the eggs and poultry produced by him during the years 1917, 1918, and 1919 as the defendant intended "to sell or market in any event," under the conditions thereinafter set out.

Among other provisions contained in the form of the proposed produce sale agreement was one to the effect that, as it would be impracticable and extremely difficult to determine the actual damage resulting to the buyer association should the seller fail to deliver to it the eggs and poultry agreed to be delivered, the seller agreed to pay to the buyer 5 cents for each dozen eggs, and $1 for each dozen commercial poultry sold, consigned or marketed by or for him and not delivered to the buyer, as liquidated damages for the breach of the produce sale agreement in that regard.

The plaintiff association was subsequently incorporated, and commenced carrying on the business for which it was formed; but the defendant refused to sign the produce sale agreement when requested to do so, and thereafter sold 27,690 dozen eggs in violation of its terms. The association thereupon commenced this action to compel the defendant to execute the produce sale agreement and to specifically perform the same, and for liquidated damages for its breach. It alleged generally and specifically that it and the other subscribers had fully performed all the conditions of the subscription agreement and of the produce sale agreement, which the defendant had agreed to execute. The various allegations of the complaint being controverted by the defendant in his answer, trial was had, at the conclusion of which judgment was entered in favor of the plaintiff, and requiring the defendant to forthwith execute and deliver to the plaintiff duplicate copies of the produce sale agreement, and to specifically perform the same. It was further ordered that an injunction issue restraining the defendant from selling any eggs produced by him to persons other than the plaintiff association, and that plaintiff recover the sum of $1,384.50 liquidated damages for violation of the terms of the produce sale agreement, and the further sum of $30 unpaid balance due on the defendant's stock subscription. From that judgment, and the whole thereof, the defendant has appealed.

The action was tried and decided before the decision of this court in the case of Poultry Producers of Southern California v. Barlow, 189 Cal. 278, 208 P. 93, and of the District Court of Appeal in Poultry Producers, etc., v. Murphy, 64 Cal. App. 450, 221 P. 962. The appellant contends, and the respondent admits, that the decision in the Barlow Case is con-

trolling as to, and overrules that portion of the judgment in the present case which decrees specific performance of the produce sale agreement, and permanently enjoins the defendant from delivering eggs produced by him to others than the association. Respondent concedes that there must be a reversal of that portion of the judgment of the trial court, and it will be so ordered.

In Poultry Producers v. Barlow, supra, this court held that, although the plaintiff was not entitled to specific performance of the produce sale agreement there under consideration, and which had been signed by the subscriber, either directly or indirectly, it was entitled to judgment for damages suffered by it by reason of the breach of the defendant. Subsequently the identical contract in controversy here was considered by the District Court of Appeal in Poultry Producers, etc., v. Murphy, supra. In that case, as in this, the subscriber for the stock of the association refused to sign the produce sale agreement, and sold eggs in violation of its terms. The court in that case, following the decision of this court in the Barlow Case held that the promise of the defendant to sign the produce sale agreement was valid and enforceable, and affirmed the judgment of the lower court directing defendant to sign the same, awarding the plaintiff liquidated damages for failure to deliver eggs in accordance with the terms of such agreement, and for the balance due on the subscription for the stock. See, also, Anaheim Citrus Fruit Ass'n v. Yeoman, 51 Cal. App. 759, 197 P. 959; Co-operative Egg, etc., Co. v. Taylor, 122 Wash. 466, 210 P. 806; Tobacco Growers' Co-op. Ass'n v. Jones, 185 N. C. 265, 117 S. E. 174, 33 A. L. R. 231. Questions are raised on the appeal in this case, however, which were not advanced or considered in any of the above decisions.

Appellant's primary contention is that bona fide subscriptions of stock to the amount of $10,000, subject to the express conditions of the subscription agreement, were not procured before the respondent corporation was organized. By the terms of the subscription agreement, the signers agreed to purchase shares of stock in the association to be formed at the rate of one share for every 1,000 hens, or a majority fraction of 1,000 hens, owned by such subscribers, respectively, the minimum subscription in any event being one share. It was further provided that when bona fide subscribers to the capital stock of the corporation to the amount of $10,000 of stock should be procured, subject to the conditions in the agreement stated, the market director of the state of California should notify all the subscribers, and the subscription agreement should thereupon go into full force and effect, and the corporation should thereupon be immediately organized by the subscribers, who agreed to execute "at the proper time to be determined by the directors of the corporation agreements with the corporation for the sale of their products by the said corporation, in terms substantially the same as those set forth in the form of agreements" attached to the subscription agreement. There was a final provision in the subscription agreement that if bona fide subscriptions to the stock of the corporation to the total amount of $10,000 should not be procured by January 1, 1917, the obligation of the subscribers should cease and terminate, and all expenditures necessarily or properly incurred in the preliminary work of organizing the corporation should be prorated between the subscribers in their respective proportions, and the balance divided and returned to them.

[1, 2] Following the stipulated facts, the trial court found that subscribers who owned only a *minority fraction* (italics are ours) of 1,000 hens, laying pullets, and nonlaying pullets, were permitted to subscribe for one share of stock each, and that the total subscriptions to the stock of the corporation were sufficient to allow for its organization on October 30, 1916. Appellant first offers the suggestion that subscriptions for stock were limited to the owners of "hens," and that "pullets" should not have been included in arriving at the number of "hens" a subscriber had. Considerable evidence was introduced on the subject, from which the trial court might well conclude that, for the purposes for which the corporation was organized, the term "hens," as used in the provisions of the subscription contracts, included hens and pullets. We are satisfied to accept the trial court's finding on that subject. The contention that the terms of the subscription agreement were violated when the owners of "minority fractions" of 1,000 hens were permitted to become stockholders in the respondent corporation presents a more vital question. "Ordinarily it is not a condition precedent to the liability of subscribers that the full sum should be first subscribed, where there is nothing in the agreement to that effect; nor is it ordinarily a condition precedent to the formation of the corporation or consummation of the contract of membership that the entire capital provided by the articles or charter be subscribed. But conditions may be inserted in the contract making the organization of the proposed corporation conditional upon the securing of subscriptions for a certain amount. In such cases, unauthorized subscriptions cannot be counted in making up the requisite amount to be subscribed before organization." 6 Cal. Jur. p. 766, par. 172.

[3] The exact provision in the subscription agreement, following the clause wherein the producers agree to subscribe for the capital stock of the corporation, is as follows:

"It is further understood and agreed that we and each of us will purchase and we do hereby subscribe to and agree to purchase said shares of such stock at the rate of one share

for every thousand hens or a majority fraction of a thousand hens owned by each subscriber, the minimum subscription in any event being one share."

Were it not for the concluding phrase, "the minimum subscription in any event being one share," and our understanding of the purposes for which the corporation was formed, we would be inclined to accept the view of appellant that only those producers owning at least a "majority fraction" of 1,000 hens were to become shareholders in the corporation. His argument finds some support in the finding of the trial court that, preliminary to the organization of the respondent, investigation by the State Market Commission and the organization committee of poultry producers established that the marketing of the products of at least 1,000,000 hens would be essential before the corporation could secure for the producers, who were about to become members, the substantial benefits of collective marketing and co-operative methods of handling eggs and poultry products. From this fact as a premise, appellant attempts to show that the sale of shares of stock to the amount required by the agreement, to producers owning at least a "majority fraction" of 1,000 hens, based on the "law of averages," would probably result in securing subscriptions and produce sale agreements from the owners of 1,000,000 hens. The condition in the agreement was therefore a limitation, appellant contends, under which producers having less than 500 hens were not eligible to become stockholders, and the phrase, "the minimum subscription in any event being one share," means that a share could not be divided into fractions.

It is respondent's contention that this clause is to be interpreted as merely referring to the rate or basis for the issuance of stock, and is not a limitation upon those who are entitled to subscribe; and that the contract taken as a whole should be interpreted to mean that those who own hens up to the number of 1,000 are entitled to subscribe for and receive one share of stock, and that those who own hens in excess of 1,000, to the extent of a majority fraction thereof, shall be entitled to subscribe for an additional share or shares of stock. The essential objects underlying the formation of the poultry producers into a co-operative association in this case, if we are to judge from the findings, were the inclusion, so far as practicable, of every producer in marketable quantities of the particular product in the vicinity, and a resultant control and stabilization of the market for their products. We may readily assume that these objects might be seriously interfered with if there were any considerable number of producers owning 500 hens, or less, in the neighborhood. We may infer, therefore, as the trial court must have done, that it was the purpose of the promoters of the enterprise to include within the organization the smaller producers as well as the larger owners of poultry, the "minimum subscription in any event being one share," and the larger subscriptions being based on the number of hens the particular subscriber owned. The subscription contract is susceptible of an interpretation which would conform to these essential purposes. It contains no provision expressly limiting subscribers to those who own 1,000 hens or at least a majority fraction of that number. The trial court, whose duty it was in the first instance to construe the provision, has accepted the view placed on the agreement by the respondent, and we are not disposed to hold that its interpretation of the contract was incorrect. It follows, therefore, that the contention of appellant that bona fide subscriptions to the stock of the respondent corporation were not procured pursuant to the provisions of the subscription agreement cannot be sustained.

[4] Appellant advances another reason why he should not be held in damages for his failure to sell his poultry products to the respondent in keeping with the provisions of the produce sale agreement. His contention rests upon the fact that the owners of at least 1,000,000 hens did not sign the produce sale agreement by January 1, 1917. In the proposed form of that agreement, attached to and forming a part of the subscription agreement, it was provided that, in the event the respondent failed to secure by January 1, 1917, contracts similar in terms from the owners of at least 1,000,000 hens, the sales contract should be null and void, and no obligation should be enforceable thereunder. The trial court found that while the producers who executed the subscription agreement were the several owners, collectively, of 667,284 hens, 169,052 laying pullets, and 169,052 nonlaying pullets, making a total of 1,005,388 hens, laying pullets, and nonlaying pullets, and actually subscribed for capital stock of the corporation to the amount of $10,000, the owners of approximately only 200,000 fowls actually and physically signed and executed produce sale agreements prior to the 1st day of January, 1917. The owners of some 600,000 fowls signed after that date, and the owners of about 200,000 have never executed the agreements. Respondent contends that, as producers owning more than 1,000,000 hens, including pullets, signed the subscription agreement before January 1, 1917, the condition contained in the draft of the proposed produce sale agreement had been met. That is not physically and literally the fact, but the situation existing was, so far as the record discloses, due to no fault of the respondant, but was due entirely to the failure of the defendant and other subscribers to perform their duty of signing the sales contracts. The trial court found that if they had so performed that duty the association would have had by January 1, 1917, contracts from the

owners of 1,000,000 hens. It is a maxim of jurisprudence that "that which ought to have been done is to be regarded as done, in favor of him to whom, and against him from whom, performance is due." Civ. Code, § 3529. Equity looks upon things agreed to be done as though they were actually performed, "the true meaning of which is that equity will treat the subject-matter as to collateral consequences and incidents in the same manner as if the final acts contemplated by the parties had been executed exactly as they ought to have been." Daggett v. Rankin, 31 Cal. 321, 327; Beverly v. Blackwood, 102 Cal. 83, 91, 36 P. 378; Poultry Producers v. Murphy, supra. The produce sale agreement which appellant agreed to sign, by which he contracted to sell his products to respondent, was a valid one. If it had been executed, and its terms breached, respondent would have been entitled to damages suffered by it by reason of the breach—in this case the liquidated damages fixed by the agreement itself. Poultry Producers, etc., v. Barlow, supra. The produce sale agreement ought to have been signed. It may now be regarded in equity as having been properly executed.

[5] Appellant has offered, in defense of his refusal to sign the produce sale agreement, the contention that the terms of the agreement he was asked to sign were not "substantially the same" as those set forth in the form of agreement attached to the subscription agreement. When respondent was ready to begin transacting business, its secretary notified the defendant to that effect some time prior to January 1, 1917, and requested payment of the balance due on his stock subscription, at the same time sending him, and requesting that he sign, what purported to be substantially a reprint of the original produce sale agreement. The provision relating to the securing of similar contracts from the owners of 1,000,000 hens was omitted from the draft, and in a few minor details it otherwise differed from the original. In response to the demand appellant went to San Francisco, some time after the first of the year, and met representatives of the respondent in conference over the matter. At that meeting he offered no objection to the manner in which the subscriptions had been secured, or the corporation formed, or to the form of the instrument offered for his signature. He declined to execute the produce sale agreement, assigning as his sole reason for such refusal that it called for the sale to the corporation of all eggs and poultry produced by him, when he had in fact, he contended, only agreed to sell to it any surplus of such products as he might desire to dispose of after selling to others. Claiming to have contracts with others for the sale of his poultry products, he offered to sell to the corporation any surplus he might have after supplying his customers, a proposition he repeated in his answer filed in this action. At some time during the negotiations he tendered, and offered to pay respondent the unpaid balance of the purchase price of the stock. The trial court found against the contention that the agreement did not embody appellant's real contract with the respondent for the sale of his products to it. As to the objection first made during the trial that the contract differed in other particulars from the one attached to the subscription agreement, appellant should have made those objections when the instrument was offered to him for execution. It is too late for him to now seek to take advantage of matters which, assuming the objections to have been good if timely made, could have been easily cured at the time.

The judgment is modified by striking therefrom the portion decreeing specific performance of the produce sale agreement and granting an injunction to prevent the breach of its terms. In all other respects the judgment is affirmed.

We concur: LAWLOR, Acting C. J.; RICHARDS, J.; SHENK, J.

---

197 Cal. 176

HUNTER v. McKENZIE et ux. (L. A. 8061.)

(Supreme Court of California. Sept. 28, 1925. Rehearing Denied Oct. 26, 1925.)

1. Contracts ⟸136—Fraud of plaintiff held not to deprive him of cause of action in contract for exchange of property; doctrine of "pari delicto" applying only to contracts intrinsically illegal or contrary to public policy.

In action for deceit growing out of an exchange of property, where the defendant elected to stand on the contract, constructive fraud of plaintiffs in including in exchange property he had theretofore sold to another *held* not to deprive him of a cause of action under doctrine of pari delicto, preventing recovery, where both parties are guilty of fraud, since such doctrine applies only to contracts intrinsically illegal or contrary to public policy.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, In Pari Delicto.]

2. Fraud ⟸25—Damage essential element.

In action for deceit answer setting up fraud of plaintiff with no showing that defendant has been damaged by such fraud is not a defense.

3. Fraud ⟸36—Set-off and counterclaim ⟸34(3)—Fraud of plaintiff may be set up as counterclaim in mitigation, but not as bar.

Where both parties to a contract for exchange of properties have been guilty of fraud, the defendant may set up the plaintiff's fraud as a counterclaim, or by way of set-off or recoupment, but not as a bar to plaintiff's cause of action.

4. Fraud ⊂⊃21—Fraudulent representation held intended to induce wife as well as husband, though not made directly to her.

In action for deceit by plaintiff and as administrator for his wife, evidence that false representations were made in presence of both plaintiff and wife, who was a necessary party, though not participating, warranted inference that representations were intended as inducement to her to make exchange of property, under rule that false representations need not be made directly to party relying thereon to support an action for fraud.

5. Fraud ⊂⊃58(4)—Requested instruction there was no evidence of reliance on false representation properly refused.

In action for deceit by plaintiff and as administrator for his wife, where evidence warranted inference that wife, in joining in exchange of property, relied on false representations of defendant, a requested instruction that in absence of evidence of reliance by wife to find against her was properly refused, under rule that such reliance may be inferred from surrounding circumstances.

6. Fraud ⊂⊃65(1)—Instruction on executed contract proper, where executory contract became executed by defendants' action.

In action for deceit in inducing exchange of property, instruction that measure of damages is difference between actual value of property and value represented is not objectionable as being for an executed, not an executory, contract, where contract, though executory in its inception, became executed by partition proceedings instituted by defendant.

7. Trial ⊂⊃255(9)—Failure to instruct as to allowance to defendants for expenditures in removing incumbrances held not error, where not requested, and some evidence of payment by plaintiff.

In action for deceit in exchange of property, failure to instruct that allowance is to be made for money expended by defendant in releasing incumbrances on property transferred by plaintiff was not error, where no request for such instruction was made, and there was evidence showing incumbrances to have been paid by plaintiff.

8. Appeal and error ⊂⊃1011(1)—Finding by jury, under proper instructions, as to circumstances of signing of paper in which plaintiff's admitted satisfaction precluded its consideration on appeal.

In action for deceit in exchange of property, where evidence was in dispute as to how a signed statement by plaintiffs to the effect that they had examined the property and were satisfied, was obtained, and court instructed that burden of proof was on plaintiffs, and if defendant's evidence were true to find for defendant, a finding by jury for plaintiffs precludes a further consideration on appeal.

In Bank.

Appeal from Superior Court, Los Angeles County; Paul J. McCormick, Judge.

Action by Lewis C. Hunter, individually and as administrator with the will annexed of the estate of Alma J. Hunter, deceased, against William E. McKenzie and wife, for damages for false representations. From a judgment for plaintiff, defendants appeal. Affirmed.

Meserve & Meserve, of Los Angeles, for appellants.

Victor T. Watkins and Anderson & Anderson, all of Los Angeles, for respondent.

LENNON, J. This is an action for damages for deceit. It arises out of an agreement for the exchange of real properties. Briefly stated, the facts pleaded in plaintiff's complaint are these: In June, 1920, at Detroit, Mich., the plaintiff, Lewis C. Hunter, and his wife, Alma J. Hunter, who has since died, entered into a written contract with the defendants, William E. McKenzie and his wife, Minnie B. McKenzie, for the exchange of several parcels of real property owned by the Hunters, situated in the city of Detroit, for a one-half interest in improved real property, situated in the city of Los Angeles, owned by the McKenzies and known as the Fowler apartments. Upon the consummation of the agreement, the Hunters took possession and assumed full control of the said Fowler apartments. Certain false representations as to the value of the property situated in Los Angeles and the income thereof, the value of the furniture therein, the cost of operating the same, and the amount of the taxes levied and assessed against the said property were made by the defendant, William E. McKenzie, acting for himself and as the agent of his wife, to the plaintiff, Lewis C. Hunter, and his wife, Alma J. Hunter, for the purpose of inducing the Hunters to make the exchange. Such representations were known by the defendants to be false at the time they were made. At the time of the negotiation and execution of the contract in controversy, Hunter and his wife were in very poor health and desired to come to California. Prior to the negotiation and execution of the contract of exchange, the plaintiff, Lewis C. Hunter, and his wife had known the defendant, William E. McKenzie, for many years and they relied upon his representations and statements concerning the property in suit and believed him to be a man of honesty and integrity. The Hunters relied wholly upon the representations of the defendant, McKenzie, and the said representations were the inducing cause which prompted the Hunters to enter into the contract. Aside from the representations of the defendant, William E. McKenzie, the Hunters had no knowledge of property values in the state of California, nor any knowledge of the value and condition of the particular property situated in Los Angeles and which was proffered in exchange by the defendants. The property conveyed to the defendants by the Hunters in consummation

of the contract was of the fair and reasonable value it was represented by them to be when the contract was being negotiated. The plaintiffs have paid to the defendants all sums due and payable upder the terms of the contract of exchange and have been ready and willing at all times to perform all of the terms and covenants of said contract.

The answer of the defendants denies all of the material allegations of the complaint, and as a special defense alleges, in substance, that the plaintiff, Lewis C. Hunter, and his wife signed a written statement subsequent to the consummation of the contract, to the effect that they had examined the Los Angeles property and found the same to be as represented by the defendants and that they were perfectly satisfied with the transaction; that the plaintiff had represented that all of the properties situated in Detroit, which were conveyed to defendants in consummation of the contract, were owned by the plaintiff and were free of incumbrances, whereas, in truth and in fact, one lot or parcel of land included in said Detroit property prior to the negotiation and consummation of the contract had been conveyed to another person; that title to said lot was not in the plaintiff, Hunter, nor his wife immediately before and at the time of the consummation of the contract. Defendants' answer further alleged in support of the pleaded special defense, and by way of counterclaim, that certain abstracts had not been furnished, as required by the contract, and that some of the property conveyed by the Hunters was incumbered by unsatisfied mechanics' liens and tax liens. Finally it was alleged upon behalf of the defendants that on August 15, 1920, there was a full settlement and adjustment of the differences existing between the parties to the contract, with full knowledge at that time, on the part of the Hunters, concerning the actual value and condition of the property proffered in exchange by the defendants. The defendants prayed that the plaintiff take nothing by the action, and that the defendants have judgment against the plaintiff for the sum needed to release the mechanics' and tax liens, which rested upon a part of the Detroit property conveyed to the defendants.

The cause was tried before a jury. Much evidence was adduced pro and con in response to the issues made by the pleadings. There is a substantial conflict in the evidence adduced upon the whole case concerning the value and income of the Los Angeles property. And the evidence is likewise in conflict concerning the settlement which was alleged to have been made prior to the filing of the suit, and so is the evidence in conflict as to what was said and done by all of the parties to the contract subsequent to its consummation and subsequent to the arrival of the Hunters in Los Angeles. The evidence shows, however, without conflict that the Hunters, prior to the time of the negotiation and consummation of the contract, conveyed by grant deed a certain lot of land, of the approximate value of $800, to certain persons, viz., A. W. and J. J. Shupe. Said lot was included in the several parcels of land situated in Detroit which had been conveyed by the Hunters to the defendants in exchange for the latters' property in Los Angeles. At the time the exchange was consummated, the Hunters did not have title to this particular lot of land. It was explained, however, by the plaintiff, Lewis C. Huntter, who had been called as a witness in his own behalf and when testifying upon cross-examination, that he had inadvertently failed to note the transfer of the lot in question to the Shupes on the map of lands, which he owned in Detroit; that the said lot ever since then has been assessed to him; that at all times since then he paid the taxes thereon and that at the time he entered into the negotiations with the defendants for the exchange, and at the time of the exchange, he had forgotten the transfer to the Shupes. Upon the verdict of the jury in favor of the plaintiff in the sum of $25,000, which impliedly found the pleaded and evidentiary facts of the plaintiff's case to be true, judgment was entered for the plaintiff, from which the defendants have appealed.

[1] The primary point presented in support of the appeal is that the trial court refused, at the request of the defendants, to charge the jury, in effect, that the Hunters, at the time they were negotiating the exchange in question, were bound to know, and in law were conclusively presumed to know, that they had theretofore conveyed one of the lots of land involved in the exchange to the Schupes, and that their failure to advise the defendant, William E. McKenzie, of that fact, coupled with the fact that they had included said lot in the list of properties which they proffered for exchange, was, as a matter of fact, a fraud, concealment, and deceit which deprived the plaintiff of a right of action for damages arising out of the facts pleaded in the plaintiff's complaint, and that because of the making of the conveyance of said lot to the Shupes the verdict of the jury must be for the defendants and against the plaintiff. Three other instructions similar in purpose and effect were requested by the defendants and refused by the trial judge. Conceding without deciding that the proposed instructions correctly stated the law upon the subject of fraud and concealment resulting from misrepresentations negligently and carelessly, even though innocently, made, they were not applicable to the situation presented by the pleadings and proof in the instant case. The plaintiff's cause of action, as pleaded, was one for damages arising out of false and fraudulent representations alleged to have been made by the defendants, and which it was alleged were the inducing cause of the Hunters entering into the contract. The plaintiff was not seeking a rescission of the contract, but rather

was standing upon the contract and seeking only damages resulting from the fraud which induced its making. The defendants, it will be noted, were likewise standing upon the contract and did not, by any pleading, appropriate or otherwise, seek a rescission of the contract. Their defense as pleaded was, in substance and effect, merely that the plaintiff and his wife had perpetrated a fraud upon them by misrepresentations concerning their title in and to one of the lots of land which they had proffered in exchange for the defendants' Los Angeles property, and that therefore, even though they had perpetrated the pleaded fraud upon the Hunters, all of the parties to the transaction were in pari delicto in the consummation of a fraudulent transaction, and consequently the law would not afford relief to any of the parties, but would leave them where it found them.

[2] Moreover, while the alleged fraud of the Hunters was pleaded as a defense to the action, there was no allegation in the answer of the defendants nor was there any showing in the proof adduced by the defendants upon the trial of the case that they were in anywise damaged by the misrepresentations of the Hunters, and fraud without damage is not a defense. Holton v. Noble, 83 Cal. 7, 23 P. 58. The numerous cases cited by counsel for appellants do not sustain their contention that the doctrine of pari delicto has application to the situation presented by the pleadings and the evidence in the instant case. It is needless to enter upon a detailed discussion of those cases. It will suffice to say that those cases, generally speaking, may be segregated into two classes, viz.: Those which deal with the doctrine of pari delicto only where the parties to a contract, intrinsically illegal, are shown to be equally at fault in the making of the contract; or where the contract in suit is based upon considerations contrary to public policy. The contract in question here, obviously, was one which the parties thereto might lawfully enter into and, clearly, no question of the violation of public policy was involved in its making. The question, consequently, of whether or not the parties to the contract are in pari delicto is not pertinent to the case in hand. McDonald v. Pacific Debenture Co., 146 Cal. 667, 80 P. 1090.

[3] We have, then, before us a case in which the pleadings and the proof show merely an action for damages resulting from the alleged fraudulent representations of the defendants which was met by the defendants, without repudiating the contract, by the defense, imperfectly pleaded, that the Hunters were also guilty of a fraudulent misrepresentation. It is the general rule that if one party to a contract, during the negotiation thereof, perpetrates an actionable fraud upon the other party to the contract concerning the subject-matter of the contract, the latter party, even though he does not seek to exercise his right to repudiate the contract on the discovery of the fraud, may recoup his damages therefor in any action brought by the guilty party for damages resulting from the alleged false and fraudulent representations of the latter party to the contract. 1 Sutherland on Damages, § 179 (4th Ed.); Holton v. Noble, supra; Barbour v. Flick, 126 Cal. 628, 59 P. 122; Chandler v. Childs, 42 Mich. 128, 3 N. W. 297; Carey v. Guillow, 105 Mass. 18, 7 Am. Rep. 494.

Conceding, for the purpose of discussion, that the Hunters' misrepresentation as to their title to one of the lots involved in the exchange was tantamount in law to the perpetration of an actionable fraud upon the defendants, it may be further conceded that if the defendants had properly pleaded that fact as a counterclaim, or by way of set-off or recoupment, they would have been entitled, had they so requested, to an instruction from the trial court directing the jury to take into consideration the claimed fraud of the Hunters and the value of the lot in question, not for the purpose of impairing the plaintiff's right of recovery, but merely in mitigation of the damages, if any, shown to have been suffered by the Hunters as the result of the alleged false and fraudulent representations of the defendants. This much and no more, even though the defense of recoupment had been pleaded and relied upon, was all that the defendants were entitled to in the charge of the court, and not having requested such a charge they will not now be heard to complain.

[4] It is not disputed that the evidence upon the entire case is sufficient to support the verdict and judgment in favor of the plaintiff, Lewis C. Hunter. It is insisted, however, that there is no evidence in the record sufficiently supporting the judgment in favor of said Lewis C. Hunter as administrator, with the will annexed, of the estate of his deceased wife. The answer to this contention is to be found in the record before us, which shows much evidence to the effect that the false representations alleged and relied upon for the plaintiff's cause of action, and upon which the verdict and judgment may be said to be largely rested, were made by the defendant, William E. McKenzie, to the plaintiff, Lewis C. Hunter, in the presence of his wife during the preliminary negotiations which culminated in the contract in controversy. While Mrs. Hunter apparently did not participate in the conversations constituting these negotiations, and while it does not appear that such conversations were directly addressed to her, nevertheless, she was an interested and a necessary party to the negotiations, and it may be fairly inferred from the evidence, adduced upon this phase of the case, that the alleged misrepresentations were addressed to and were intended as a matter of inducement to

her as well as to her husband. While some connection, of course, direct or indirect, between the party charged with making the false representations and the party relying thereon must be shown, it is not essential, however, in support of a cause of action for damages resulting from false representations that the false representations be shown to have been made directly to the party claiming to have relied upon them. Carvill v. Jacks, Adm'r, 43 Ark. 454; Alexander v. Beresford, 27 Miss. 747, 61 Am. Dec. 538.

[5] Upon this phase of the case, it is insisted further that there is no evidence that Mrs. Hunter relied upon the alleged false representations made to her husband in her presence and that, therefore, the cause of action pleaded and prosecuted in her behalf must fail. Of course it is incumbent upon the party seeking to recover in an action for deceit, founded upon false representations, to show that he relied upon and was influenced by them. True, there is no direct evidence showing that Mrs. Hunter relied and acted upon the alleged and found false representations, still it was not essential to a cause of action in her behalf to produce direct evidence that she relied upon such false representations. The fact of reliance upon alleged false representations may be inferred from the circumstances attending the transaction which oftentimes afford much stronger and more satisfactory evidence of the inducement which prompted the party defrauded to enter into the contract than his direct testimony to the same effect. Lucas v. Crippen, 76 Iowa, 507, 41 N. W. 205; Taylor v. Guest, 58 N. Y. 262; Baker v. Hallam, 103 Iowa, 43, 72 N. W. 419; Kline v. Baker, 106 Mass. 61; Hatch v. Spooner, 59 Hun, 625, 13 N. Y. S. 642. We are satisfied that it may be fairly inferred from the evidence concerning the nature of the transaction in suit, the relation of the parties, and the circumstances surrounding the entire transaction as shown by the record before us, that Mrs. Hunter relied upon and was induced to enter into the contract in question by the false representations of the defendant. It follows from what we have just said that there was no error, as is contended on behalf of the defendants, in the refusal of the trial court to give the instruction requested on behalf of the defendants, to the effect that there was no evidence in the case of any kind as to what influenced Mrs. Hunter to enter into the contract of exchange in question and that, therefore, the verdict of the jury, regardless of what it might be as to the plaintiff, Lewis C. Hunter, must be in favor of the defendants as against Lewis C. Hunter as administrator.

[6] The trial court in its charge to the jury instructed, in effect, that the measure of the plaintiff's damages, if any, was the difference between the actual value of the property proffered and passed in exchange to the Hunters by the defendants and its value, had it been as represented by the defendants. It is conceded that the instruction referred to correctly states the law, as enunciated in Hines v. Brode, 168 Cal. 507, 143 P. 729, when applied, in actions for damages for deceit, to executed contracts, but it is insisted that it has no application to the measure of damages in the instant case, because the contract in suit was executory, to the extent that a final payment in the sum of $22,500, which, under the terms of the contract of exchange, was to be made in cash by the Hunters to the defendants, had never been paid by the Hunters. Assuming the contract of exchange to have been executory at its inception, still, in view of the situation developed by the evidence upon this phase of the case, we need not stop to discuss the question of what the measure of damages should be in actions for deceit arising out of executory contracts. In this behalf, the record shows the undisputed fact that, before the filing of the defendants' answer, and more than six months before the case came on for trial, the Fowler apartments had been partitioned and sold, in an action instituted by the defendants against the Hunters, and, at the partition sale, the defendant, William E. McKenzie, became the purchaser at the price of $150,000, of which $75,000 was paid in cash and the balance by the assumption of incumbrances against the property amounting to the sum of $75,000. It further sufficiently appears from the evidence that, as the result of said partition and sale, the defendants received in full the equivalent of the unpaid balance of $22,500, which was due to them from the Hunters under the terms of the contract of exchange.

It will thus be seen that the contract of exchange, even conceding it to have been executory at its inception, ultimately became by the enforced action of the defendants, in legal effect, an executed contract. It follows that the trial court's instruction to the jury concerning the measure of damages was correctly applied to the situation in hand at the time of the trial. That counsel for the defendants acquiesced at the time of the trial in this view is made manifest, we think, by the fact that no instruction concerning the measure of damages was requested upon behalf of the defendants based upon the theory that the contract in suit was executory.

[7] It is further contended, in effect, that the trial court erred to the prejudice of the defendants in failing to charge the jury that, when assessing the plaintiff's damages, they were to make proper allowance to the defendants for the moneys alleged to have been expended by them in releasing certain mortgage incumbrances and tax liens standing against the Detroit property at the time of the consummation of the contract of exchange. In response to this contention it will suffice, we think, to say that there is some evidence in the record, standing apparently undisputed, to the effect that said mortgage incumbrances

and tax liens had been satisfied and this fact, doubtless, explains why counsel for the defendants failed to request an instruction covering the subject-matter of recoupment, and to which the defendants would have been entitled, if said mortgage incumbrances and tax liens had not in fact been satisfied.

[8] It is not disputed that the Hunters, subsequent to their arrival in Los Angeles, signed a statement to the effect that they had examined the Fowler apartments and found the same to be in every respect as represented by the defendant, William E. McKenzie, and that they were perfectly satisfied with the transaction. Supplementing the admission in evidence of said statement is the testimony of a witness for the defendants, who was in charge of the Fowler apartments on July 20, 1920, to the effect that the Hunters in the presence and hearing of the witness looked over the financial reports of the property for the previous month and expressed themselves as satisfied and anxious to take over the property immediately. In this connection, there was also the testimony of the defendant, William E. McKenzie, as to what was said and done at this time tending to support the allegations of the answer of the defendants upon this phase of the case. The testimony of the plaintiff, Lewis C. Hunter, in substance, was that the defendant, McKenzie, when he was about to leave Los Angeles for Detroit, presented the statement in question for the signatures of the Hunters; that Hunter thereupon told McKenzie that he, Hunter, had not had an opportunity to examine the property and because of ill health could not do so, whereupon McKenzie said he just wanted the statement for his files in Detroit and that he would guarantee that the Hunters would find everything to be just as he had represented. Relying upon these assurances, Hunter signed and prevailed upon his wife to sign the instrument in question. Upon this phase of the case, the court instructed the jury, in effect, that if they should find that the statement in question was signed under the conditions as claimed by the defendants in their answer, and as testified to by the witnesses for the defense, then their verdict should be for the defendants. In this connection the trial court also charged the jury that the burden of proof rested upon the plaintiff. The jury having, upon a substantial conflict in the evidence, resolved the issue in favor of the plaintiff, we are, therefore, precluded from a further consideration of the matter upon this appeal.

The remaining points, made in support of the appeal, do not require discussion.

The judgment is affirmed.

We concur: LAWLOR, J., Acting C. J.; RICHARDS, J.; SHENK, J.; SEAWELL, J.; WASTE, J.; HOUSER, Justice pro tem.

74 Cal. App. 247

BRAINARD v. ROGERS (GRADY, Intervener). (Civ. 4852.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1925.)

Garnishment ⊂=34—Interest, under insurance policy after fire, subject to; "owing," "debts."

Under Code Civ. Proc. § 537 et seq., as to attachment, proceeds of fire insurance policy are subject to garnishment by insured's creditor after fire loss but before adjustment, and before proofs of loss necessary for action on the policy; "owing" and "debts" in the statute including immature obligations.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Debt; Owe.]

Appeal from Superior Court, Fresno County; D. A. Cashin, Judge.

Action by G. W. Brainard against Nick Rogers. From a portion of the judgment in favor of W. M. Grady, substituted for W. D. Grady, deceased, intervener, plaintiff appeals. Reversed.

Joseph Kirk, of San Francisco, and Elmore Winkler, of Fresno (Joseph A. Pritchard, of San Francisco, of counsel), for appellant.

W. T. Craig, of Los Angeles, amicus curiæ.

M. K. Harris and James A. Burns, both of Fresno, for respondent.

NOURSE, J. This is an action for goods sold and delivered. It was commenced on September 29, 1921, in a complaint filed against Nick Rogers, defendant. At that time, this defendant had sustained a complete loss by fire of his merchandise, furniture, and fixtures. The property destroyed was covered by two policies of fire insurance amounting to $5,000. When the complaint was filed, a writ of attachment was issued and the proceeds of the fire insurance policies in the hands of the insurers was garnished. Thereafter W. D. Grady intervened in the action and alleged that he was the assignee of the insurance moneys, and that, as such assignee, he had obtained a judgment by stipulation with the defendant Nick Rogers for $2,200 against the insurance company. The trial court rendered judgment in favor of the plaintiff against Nick Rogers in the full sum demanded in the complaint, but adjudged that the intervener was the owner of the insurance moneys garnished by the plaintiff and ordered them discharged from the lien of plaintiff's attachment. From this portion of the judgment in favor of the intervener, the plaintiff appeals, and the appeal is resisted by the intervener alone. The appeal is presented upon a record prepared under the provisions of section 953a, Code of Civil Procedure.

The sole question which is in issue on the appeal is: Are the proceeds of a fire insur-

ance policy subject to garnishment at the instance of the creditor of the insured subsequent to a fire loss, but prior to an adjustment of that loss between the insurer and the insured? Our answer to this question is in the affirmative for the reasons which will follow.

The right to attach or garnish the property or interests of a debtor is purely statutory. The law of this state conferring the right and providing the procedure for the exercise thereof is found in sections 537 and following of the Code of Civil Procedure. In subdivision 5 of section 542, Code of Civil Procedure, where the duties of the sheriff in the execution of a writ of attachment are detailed, it is provided that debts and credits, not capable of manual delivery, must be attached by leaving "with the person owing such debts, or having in his possession, * * * such credits" a copy of the writ. In section 543, relating to the instructions to be given the sheriff by the plaintiff or his attorney, the levy is made to apply to any person who "has in his possession * * * any credits * * * belonging to the defendant, or is owing any debt to the defendant." Section 544, relating to the liability to the plaintiff of a garnishee, uses the language:

"All persons having in their possession * * * any credits * * * belonging to the defendant, or owing any debts to the defendant * * * shall be * * * liable to the plaintiff for the amount of such credits, property, or debts."

Similar language is used in section 545, relating to the procedure for citation to garnishee to appear before a court, where it provides that "any person owing debts to the defendant, or having in his possession, * * * any credits * * * belonging to the defendant, may be required to attend before the court * * * and be examined on oath respecting the same." It will be noted that throughout these sections the expression "belonging to" and "owing" are used in the disjunctive. But one conclusion may be drawn from this and that is that the Legislature intended to authorize the attachment of moneys which were owing the creditor as well as moneys and other properties belonging to the debtor which the garnishee then had in his possession. Looking at the Code sections in this light, it follows that moneys which are owing the debtor, though not yet due, are subject to garnishment, because the term "owing" includes an immature as well as a mature obligation. This is in harmony with what was said in Dunsmoor v. Furstenfeldt, 88 Cal. 522, 529, 26 P. 518, 520 (12 L. R. A. 508, 22 Am. St. Rep. 331), where the Supreme Court say:

"Any kind of obligation of one man to pay money to another is a debt. 'A debt signifies what one owes. There is always some obligation that it shall be paid; but the manner in which * * * it is to be paid, or the means of coercing payment do not enter into the definition.'"

Again in Melvin v. State, 121 Cal. 16, 24, 53 P. 416, 419, the Supreme Court say:

"The term 'debt,' however, has a much broader popular significance than the foregoing technical definition, and includes that which is due from one person to another, whether money, goods or services; that which one person is bound to pay to another, or to perform for his benefit; thing owed; obligation; liability."

In Trow v. Moody, 27 Cal. App. 403, 405, 150 P. 77, 78, in a case involving the interpretation of section 710, Code of Civil Procedure, relating to execution upon moneys due a judgment debtor from a public corporation, the appellate court say:

"The statute permits the filing of such a transcript where 'money is owing to the judgment debtor.' The ordinary rule as applicable to garnishment applies, which is that a garnishment will impound a debt even though the time of payment has not arrived. Drake on Attachment, § 355; Waples on Attachment & Garnishment, p. 264; 2 Shinn on Attachment, § 480."

The respondent contends in support of the judgment that the proceeds of the policy were not subject to garnishment, because at the time of the levy the insured had not filed his proofs of loss. It is true, as stated by the respondent, that the insurance policy specifically provided that no action could be maintained by the insured against the insurer until after proofs of loss had been filed. It is also true that the policy provided that the loss should be payable in 30 days after the amount had been ascertained "either by agreement or by appraisement, but if such ascertainment is not had or made within 60 days after the receipt by the company of the preliminary proof of loss, then the loss shall be payable in 90 days after such receipt." The general rule as to the application of attachment process to moneys so held is found in 12 Ruling Case Law, section 33, page 804, where it is said:

"It may be said to be the general rule that the right which the insured possesses against an insurance company under a policy of insurance on property is subject to garnishment at the suit of creditors of the insured. But it is clear that the creditors of the insured cannot compel payment of the policy by process of garnishment against the insurance company, if the insured himself has forfeited the right to enforce collection by violating conditions contained in the policy. The fact that in order to be entitled to the proceeds of a policy the debtor must perform certain conditions precedent, as furnishing proofs of loss, does not preclude garnishment, but the creditor may make proofs if the insured fails to do so. Nor does the fact that the loss has not been adjusted prevent garnishment."

The reason for the rule is well stated in Girard Fire & Marine Insurance Co. v. Field, Merritt & Co., 45 Pa. 129, 132, et seq., where the court say:

"There is a close affinity between the root and the branches of the remedy by attachment. In the former, as in the latter, unliquidated damages in tort are not within it, nor a claim for damages arising from a mere breach of contract; but I think what was said in Fisher v. Consequa, 2 W. C. C. Rep. 382, in defining the foundation of the process, very well defines also to what it may be applied; that is, to 'a demand arising ex contractu, the amount of which was ascertained, or which was susceptible of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff by affidavit to aver, or a jury to find it, might be the foundation of a proceeding by way of foreign attachment, without reference to the form of action, or the technical definition of debt, the expression used in the law.' True, this was said in regard to the nature of the claim on which foreign attachment may issue, and we held the same thing in Carlin v. Bierne et al., 1 Wright, 228, but the process is evidently founded upon, and operates on, what must be regarded as demands, although not technically debts. Where the matter to be levied on is a chose in action, we think no greater certainty is required, or a more definite standard for its ascertainment is necessary, than that upon which it is founded. Applying that test to a claim like the present, the amount due could be averred on oath, if necessary, and on proof of loss, the amount could be ascertained by reference to the policy stipulating for the amount to be paid in the contingency which has happened. It is true, the value of the property may have to be ascertained, but this is not a serious difficulty, for there exists a standard for property in every community, viz., its market value. It is quite as easy to prove what 100 bushels of wheat are worth which have been lost by fire, as what they would have been worth if sold, and the price claimed on a quantum valebant. The value per bushel being proved, the ascertainment of the amount would be easy. It would depend on calculation only. * * * No one would doubt, on the other hand, but that on a valued policy, after a loss, the amount might be attached. The fact of loss would be the only fact to be established. Like a debt payable on demand, there is but one preliminary to be proved if the instrument be admitted, namely, the demand; and in the former, the loss. So where a risk is taken on a house the amount is fixed, the agreement to pay, and the time and manner are also fixed, and the only thing to be proved is the extent of the loss—the value of the property destroyed; for this, as already said, the value of such property in the market, is a standard sufficiently certain to enable a jury to ascertain it. I cannot allow myself to doubt but that insurance money, after a fire, is strictly personal estate, and is certainly within the term 'effects,' and as such the law gives a remedy to the insured to reduce it to possession."

See, also, Knox v. Protection Insurance Co., 9 Conn. 430, 25 Am. Dec. 33; Sexton v. Phœnix Insurance Co., 132 N. C. 1, 43 S. E. 479; Northwestern Ins. Co. v. Atkins, 3 Bush (Ky.) 328, 96 Am. Dec. 239; Chipman v. Carroll, 53 Kan. 163, 35 P. 1109, 25 L. R. A. 305; and Finch v. Great American Ins. Co., 101 Conn. 332, 125 A. 628.

Respondents cite Early v. Redwood City, 57 Cal. 193, Redondo Beach Co. v. Brewer et al., 101 Cal. 322, 35 P. 896, and Hassie v. G. I. W. U. Congregation, 35 Cal. 378, and Aigeltinger Co. v. Healy-Tibbitts Co., 23 Cal. App. 608, 139 P. 436, 438, all to the effect that moneys were not subject to garnishment which were not due at the time of the levy or upon which the judgment debtor could not have sued the garnishee in assumpsit. The first three cases cited do not hold more than that there must be a debt due and owing the judgment debtor at the time of the attachment, a rule which is strictly in accord with the provisions of the Code which we have cited. In the Aigeltinger Case, the Appellate Court went beyond the rule of these cases and added that in addition to a debt being due "the right to sue at the date of attachment is the true test." In denying a petition to transfer this case to the Supreme Court, the latter court based its denial upon the ground that the case, being within the appellate jurisdiction of the former court, the Supreme Court was bound by the facts stated in that opinion. It was then said (by the Supreme Court):

"On those facts, it appears that there was, at the date of the garnishment, no debt, matured or unmatured, due the plaintiff. This being so, there was clearly nothing subject to attachment. We do not express any opinion on the correctness of the broader declaration of the District Court of Appeal that there must be, at the date of the garnishment, a present right of action; in other words, that a debt which is due, but not yet payable, may not be attached."

The respondent has not directed our attention to any authority in this state, other than the Appellate Court decision in the Aigeltinger Case, which holds that the right to sue at the date of the attachment is the true test, and our own search of the authorities satisfies us that the general rule is that the term "debts," as used in attachment statutes, applies to either a matured or unmatured debt and that the present right to sue is not essential. In this connection we quote from 28 Corpus Juris, page 129, section 171:

"But generally debts contracted, although not presently payable or matured, but which will certainly become payable in the future, may be reached. And this, although the terminology of the statute is that claims or debts 'due' may be garnished, the term 'due' being taken in its larger sense as importing merely an existing obligation, without reference to the time of payment."

Neblett v. Barron (Tex. Civ. App.) 160 S. W. 1167, 1170, states the general rule as follows:

"The term 'due' does not necessarily mean that the debt is immediately payable. In commercial law it is often used as synonymous with

'owing,' and includes all debts, whether payable in praesenti or in futuro, and it is in this latter sense, we think, it is used in the statute under consideration. In other words, in such cases the wages not only 'accrue,' within the meaning of the statute—for the purpose of securing the lien—at the end of the week, but are also then due and payable, regardless of an agreement to the contrary."

Upon the specific question of the application of the attachment statutes to insurance moneys after a loss and before adjustment, we refer to Drake on Attachment (7th Ed.), p. 493, § 549, from which we quote:

"But where under a contract of indemnity a loss has occurred, and the party indemnified has a claim for such loss against him who engaged to indemnify him, the latter may be charged as his garnishee in respect of such loss, if the contract furnish a standard by which the amount of the liability may be ascertained and fixed. Thus, an insurance company may be so charged on account of a loss accruing under a policy of insurance issued by it; for the liability to the insured clearly exists, and the policy furnishes the required standard. This has been held, not only as to adjusted claims for loss, but also as to such claims unadjusted."

The portion of the judgment appealed from is reversed.

We concur: LANGDON, P. J.; STURTEVANT, J.

---

74 Cal. App. 265

STEEN v. SOUTHERN CALIFORNIA SUPPLY CO. (Civ. 5183.)

(District Court of Appeal, First District, Division 2, California. Aug. 27, 1925.)

1. Sales ⟸261(7)—Statement of seller's solicitor held not express warranty of caramel coloring matter.

Statement of seller's solicitor in selling caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, and was as good as anything buyer had used, *held* not to constitute an express warranty.

2. Sales ⟸274—Statement of seller's solicitor, as to caramel coloring matter, held not implied warranty in absence of seller's knowledge of reliance thereon.

Statement of seller's solicitor in sale of caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, *held* not an implied warranty, under Civ. Code, § 1767, where there was no evidence that seller knew that buyer relied on such advice, or that seller knew the existence of any fact concerning thing sold, which would to his knowledge destroy buyer's inducement to buy.

3. Sales ⟸274—Statement of seller's solicitor in sale of caramel coloring matter held not implied warranty, where seller not manufacturer, and no undisclosed defect.

Statement of seller's solicitor in sale of caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, *held* not an implied warranty, under Civ. Code § 1769, where it did not appear that seller manufactured the caramel coloring or that there was any latent defect not disclosed to buyer, arising from process of manufacture, and that any improper materials were used therein.

4. Sales ⟸274—Statement of seller's solicitor in sale of caramel coloring matter held not implied warranty, where not inaccessible to examination.

Statement of seller's solicitor in sale of caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, *held* not an implied warranty, under Civ. Code, § 1771, where merchandise was not inaccessible to examination of buyer, and there was no evidence that it was not sound and merchantable.

5. Sales ⟸274—Statement of seller's solicitor in sale of caramel coloring matter held not implied warranty, in view of absence of markings.

Statement of seller's solicitor in sale of caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, *held* not an implied warranty, under Civ. Code, § 1773, where marking on container did not purport to express quantity or quality thereof, or place where it was produced, manufactured, or prepared.

6. Sales ⟸274—Statement of seller's solicitor in sale of caramel coloring matter, not bought for actual consumption, held not an implied warranty.

Statement of seller's solicitor in sale of caramel coloring matter that it was as good, or perhaps better than any, and would stand up with any coloring matter as far as quality was concerned, *held* not an implied warranty, under Civ. Code, § 1775, where there was no evidence that seller made a business of selling provisions for domestic use, nor that buyer bought for actual consumption, nor that caramel color was not sound and wholesome.

Appeal from Superior Court, Los Angeles County; Walton J. Wood, Judge.

Action by F. B. Steen, doing business under the firm name and style of the Blue Seal Syrup Company, against the Southern California Supply Company. Judgment for plaintiff, and defendant appeals. Reversed.

W. W. Butler, of Los Angeles, for appellant.

McGee & Sumner, of Los Angeles, for respondent.

STURTEVANT, J. The plaintiff commenced an action against the defendant to recover damages alleged to have been caused by reason of the sale and delivery by the defendant to the plaintiff of a quantity of caramel coloring matter. The defendant answered, and a trial was had before the trial court sitting with a jury. The jury brought in a verdict in favor of the plaintiff on which judgment was entered, and from that judgment the defendant has appealed. The appellant makes one point, and that is that plaintiff's recovery may be justified only by reason of an implied or expressed warranty of the caramel color.

[1] Mr. Steen personally made the purchase. He testified that in April or May, 1922, one of the solicitors of the defendant called on him a number of times. He did not remember the name of the solicitor. He stated that Mr. Fish, who was also a solicitor of the defendant, called on him once. Mr. Steen, referring to the solicitor first mentioned, testified that—

"He spoke about sugar coloring being just as good or perhaps better than any, and could furnish it for less money than we were paying, and said, 'Why not patronize home industry?' * * * The salesman said that the coloring matter was all right, that it would stand up with any coloring matter as far as quality was concerned, and was as good as anything we had used. * * *"

Some days later, Mr. Steen went to the store of the defendant and made a purchase of some caramel coloring. At the time the purchase was actually made, it is not claimed that any words were said which constituted a warranty. If an express warranty was made, it must be found in the language quoted above.

In 1 Williston on Sales, § 202, it is said:

"It is not easy to draw the line accurately between affirmation of fact on the one hand and statements of opinion on the other. Several distinctions may be noticed. In the first place, it seems obvious that any statement may be put in the form of a statement of opinion. If the seller says a horse is sound, he affirms a fact; but when he states that he believes him to be sound, the only fact which he asserts is his belief, and if he does in fact believe the horse to be sound, he could not be held liable if the horse were not sound. Again there are some matters which, even though asserted positively, are in their nature so dependent on individual opinion that no matter how positive the seller's assertion, it is not held to create a warranty. Such assertions as that things are fine or valuable, or better than productions of rival makers, are of this sort."

In Maggioros v. Edson Bros. (Sup.) 164 N. Y. S. 377, the court said:

"The letter in which the word 'excellent' is used shows that the defendants were not making any promise or affirmation of fact with reference to the cheese; for, while they said that the cheese that they had on hand was of excellent quality, they proposed to forward a case for the approval of the plaintiffs, and this was done. The following expressions have been held not to constitute an express warranty: 'XX pipe iron' (Dounce v. Dow, 64 N. Y. 411); 'extra fine' peas (Waeber v. Talbot, 43 App. Div. 180, 59 N. Y. S. 396); 'best piece of cloth in the market' (Strauss v. Salzer, 58 Misc. Rep. 573, 109 N. Y. S. 734); 'unsurpassed and unsurpassable' (League Cycle Co. v. Abrahams, 27 Misc. Rep. 548, 58 N. Y. S. 306); 'very fine stock' (Stumpp v. Walker Co. [Stumpp & Walker Co. v. Lynber (Sup.)] 84 N. Y. S. 912); 'suitable and proper for New York City market' (Bartlett v. Hoppock, 34 N. Y. 118, 88 Am. Dec. 428); 'very good condition' (Ginsberg v. Lawrence, [Sup.] 121 N. Y. S. 337); 'very fine reading-matter, fit for anybody to read' (St. Hubert Guild v. Quinn, 64 Misc. Rep. 336, 118 N. Y. S. 582); 'sound corn' (Lawton v. Keil, 61 Barb. [N. Y.] 558); and 'good excellent butter' (Greenthal v. Schneider, 52 How. Prac. [N. Y.] 153 [133]). No particular phraseology is necessary (Oneida Mfg. Co. v. Lawrence, 4 Cow. [N. Y.] 440); but there must be an express and direct affirmation of the kind, character, or description of the goods (Chapman v. Murch, 19 Johns. [N. Y.] 290, 10 Am. Dec. 227), upon which the purchaser relies (Crocker-Wheeler El. Co. v. Johns-Pratt Co., 29 App. Div. 300, 51 N. Y. S. 793)."

In Washburn-Crosby Co. v. Kindervatter, 147 App. Div. 114, 131 N. Y. S. 871, it was held that representations that the flour "would be as good as any made" and that the flour which the buyer had been using would not "be in it," did not constitute express warranties. The language used by the defendant's solicitors did not, therefore, amount to anything more than "puffing talk."

[2] There was no implied warranty under section 1767 of the Civil Code because there was no evidence that the seller knew "that the buyer relies upon his advice or judgment; * * *" and there was no evidence that the seller knew "the existence of any fact concerning the thing sold which would, to his knowledge, destroy the buyer's inducement to buy."

[3] There was no implied warranty under section 1769 of the Civil Code for two reasons. The proof did not show that the defendant manufactured the caramel coloring; and, second, there was no evidence that there was any "latent defect, not disclosed to the buyer, arising from the process of manufacture, * * *" and there was no evidence that any improper materials were used in the manufacture thereof.

[4] There was no implied warranty under section 1771 of the Civil Code because the merchandise was not "inaccessible to the examination of the buyer," and there was no evidence that it was not sound and merchantable.

[5] There was no implied warranty under section 1773 of the Civil Code, because the marking on the can did not purport to ex-

press the quantity or quality thereof, or the place where it was in whole or in part produced, manufactured, or prepared. The marking was as follows: "Invincible S. C. S. C. Brand—The Southern California Supply Company, Incorporated, 812-14-16 East Third Street, Los Angeles, California." That marking merely indicated the brand and the place where the article was on sale. There was no evidence of any breach as to either of those matters.

[6] There was no implied warranty under section 1775 of the Civil Code, because there was no evidence that the defendant "makes a business of selling provisions for domestic use," nor that the plaintiff bought for actual consumption, nor is there any evidence that the caramel color was not sound and wholesome.

Of course, there is evidence in the record to the effect that the particular caramel color was not satisfactory for making ginger ale which was to be held in bottles for two weeks or longer. But there is no evidence in the record that the defendant knew that the purchaser was expecting to use the caramel color in the manufacture of ginger ale or that the ginger ale was to be kept two weeks or longer, or that the defendant made any statement to the effect that the caramel color was fit or proper to use in the manufacture of ginger ale.

We think that the appellant is clearly correct in his contention that the evidence does not sustain the judgment.

The judgment is reversed.

We concur: LANGDON, P. J.; NOURSE, J.

---

74 Cal. App. 225

Ex parte FISHER. (Cr. 1294.)

(District Court of Appeal, First District, Division 1, California. Aug. 26, 1925.)

Health ⟸24—City and county health officer may isolate one afflicted with infectious disease.

While Pol. Code, § 2979a, does not expressly confer on city and county health officer right to take possession or control of body of one afflicted with infectious disease, as it does on state board of health, isolation of one so afflicted is reasonable and proper measure to prevent increase and spread of such disease within powers conferred on such officer by such act, and one so isolated cannot secure release from quarantine under writ of habeas corpus.

Application by Mabel Fisher for writ of habeas corpus to William C. Hassler, as Health Officer of the City and County of San Francisco, to secure release from quarantine. Writ denied.

Ernest B. D. Spagnoli and Walter F. Lynch, both of San Francisco, for petitioner.

TYLER, P. J. Application for writ of habeas corpus. It appears from the petition that on or about August 14, 1925, Dr. Wm. C. Hassler, health officer of the city and county of San Francisco, after an examination, ordered petitioner quarantined at the County Hospital, he having found her to be suffering with a gonococcus affliction.

It is claimed that such detention is unlawful, for the reason that such officer is without authority to control the body of petitioner, such power residing alone in the state board of health.

Section 2979a of the Political Code confers upon health officers of every county or city and county the right to take such measures as may be necessary to prevent the spread of diseases of the character of which the applicant is suffering.

While the section does not in express terms confer upon the officer in question the right to take possession or control of the body of one so afflicted as it does in the case of state board of health, the isolation of one afflicted with an infectious disease is a reasonable and proper measure to prevent the increase and spread thereof. In re Johnson, 40 Cal. App. 242, 180 P. 644.

The petition showing on its face a legal cause of detention, the application is denied.

We concur: KNIGHT, J.; CASHIN, J.

---

74 Cal. App. 171

LEVY v. SUPERIOR COURT OF CALIFORNIA IN AND FOR CITY AND COUNTY OF SAN FRANCISCO. (Civ. 5341.)

(District Court of Appeal, First District, Division 1, California. Aug. 24, 1925.)

1. Insurance ⟸514—No action maintainable on policy indemnifying hospital before final judgment against hospital as provided by policy.

No action can be maintained against an insurance company on a policy insuring a hospital from liability for damages until final judgment is recovered against assured, where policy so provides, in view of Civ. Code, § 2778, subd. 2.

2. Charities ⟸45(2)—Charitable institution exempt from liability cannot become liable by procurement of indemnity insurance.

A charitable institution, not subject to liability for damages by reason of property of charities being held as trust funds, which cannot be depleted by acts of trustee, cannot become liable by procurement of indemnity insurance.

3. Charities ⟸45(2)—Character of hospital as a charity may be shown by methods of transacting its business.

In action for damages against hospital, claimed to be exempt from liability as a charity, such character may be shown, not only by articles of incorporation, but by method of transacting business of hospital.

4. Charities ⟸45(2)—Indemnity insurance not relevant evidence to show character of hospital as noncharitable institution.

In action for damages against hospital, claimed to be exempt from liability as a charity, a policy insuring hospital against liability is not relevant evidence, as basis for inference that officers in procuring insurance were conscious of institution not being a charity, and thereby to prove noncharitable nature of hospital, since such is not the most plain and probable inference from proposed evidence.

5. Witnesses ⟸21—Refusal to produce incompetent evidence or answer irrelevant questions does not constitute contempt and order of contempt reviewable on certiorari.

Refusal by witness to produce writing not competent as evidence, or to answer questions not pertinent to issues, does not constitute contempt of court, and an order adjudging witness in contempt for such refusal is invalid and may be reviewed on certiorari.

Application by Meyer Levy for certiorari to review a judgment of Superior Court in and for the City and County of San Francisco adjudging petitioner guilty of contempt. Judgment annulled.

Chickering & Gregory, of San Francisco, and Charles R. Wayland, of Palo Alto, for petitioner.

Edwin V. McKenzie, of San Francisco, for respondent.

CASHIN, J. A proceeding to review a judgment of the superior court in and for the city and county of San Francisco, adjudging petitioner, Meyer Levy, guilty of contempt of court, the facts as shown by the petition being as follows:

An action was commenced by Mae Kilroy Kane against Mount Zion Hospital, a corporation, and others to recover damages for bodily injuries suffered by plaintiff on June 22, 1923, alleged to have been caused by the negligence of the corporation and its servants in the care and treatment of plaintiff while a patient in the hospital conducted by the corporation. The corporation answered the complaint, denying negligence, and, as a further defense, alleged that at all the times mentioned in the complaint it was organized and existed solely for charitable and nonprofit purposes; that the hospital referred to in the complaint was at all the times mentioned therein operated solely for such purposes; that the facts alleged were known to plaintiff and her husband, who was joined as a party plaintiff in the action, at the time plaintiff entered the hospital; that all the servants of defendant therein were selected with due care, and that at no time did defendant have reason to believe that its servants were otherwise than careful and competent. Whether the services rendered or to be rendered to plaintiff were or were not gratuitous does not appear from the pleadings.

Thereafter plaintiff gave notice to defendants of her intention to take the deposition of petitioner, who was then the secretary of the corporation defendant, before respondent, superior court, the notice being accompanied by an affidavit showing that the proceeding was one within the provisions of section 2021 of the Code of Civil Procedure. A subpœna was issued and served upon petitioner, requiring his appearance before the court at a time fixed, and further requiring him to bring into court a certain policy of indemnity insurance, together with all certificates and indorsements attached thereto, said policy being numbered 1466440, dated March 4, 1920, and issued by the Fidelity & Casualty Company of New York to defendant corporation. Petitioner appeared as required by the subpœna, but, on the advice of counsel representing the corporation defendant, refused to answer questions asked by counsel for plaintiff, though directed so to do by the court, as to whether the witness had brought with him the policy described in the subpœna, whether the corporation carried a policy of indemnity insurance which insured it against the consequences of the negligent acts of its employees, and as to whether the corporation carried a policy in the company above named, a purported copy of which was shown to the witness, and which copy is set forth in the order adjudging petitioner guilty of contempt of court; and refused, in response to the demand of counsel and the order of the court, to produce the original of the purported copy of the policy mentioned above. To the questions asked and the demands for the production of the policy, counsel for defendant corporation interposed the objections that the questions were, and the evidence sought to be elicited would be, incompetent, irrelevant, and immaterial; and it is contended by counsel for petitioner in this proceeding that petitioner could not be adjudged guilty of contempt of court for his failure to answer questions subject to such an objection, or for his failure to produce papers or documents not pertinent to the issues in the case, and that the court acted without jurisdiction in making such order.

As stated by counsel for plaintiff at the time, the purpose of the inquiry was to show that the original of the purported copy made a part of the record herein existed, that it insured defendant against the consequences of the negligent acts of its employees, and that the purported copy was a true copy thereof. The copy mentioned was, in form, a policy of indemnity insurance, issued by the company above named, dated March 4, 1920, and which, in consideration of the maximum premium therein mentioned, by its

terms indemnified Mount Zion Hospital, a corporation, against loss from liability imposed by law for damages on account of bodily injuries or death suffered by any patient or patients at the hospital of the assured in consequence of any malpractice, error, or mistake made within the hospital in the giving of medical, surgical, or hospital treatment by any person employed by the assured in the giving of such treatment, and further provided as follows:

"The company shall not be liable to pay any loss nor shall any action be brought against the company to recover under this policy until a final judgment shall have been recovered against the assured in a suit covered thereby," and that "the insolvency or bankruptcy of the assured shall not release the company from any payment for which it would otherwise be liable under this policy, and if such insolvency or bankruptcy shall occur and an execution on a judgment recovered in a suit against the assured covered by this policy is returned unsatisfied, the judgment creditor shall have a right of action to recover the amount of such judgment against the company to the same extent that the assured would have to recover against the company had the assured paid said judgment, but in no event shall the company's liability exceed the limits expressed in this policy."

Attached to the copy above mentioned was a purported indorsement by the insurer continuing the policy in force from March 4, 1923, to March 4, 1924.

[1] Under a policy containing the above provisions no liability would accrue as an enforceable claim against the insurer until the recovery of a final judgment against the insured; and no action by plaintiff thereon could be maintained. Civ. Code, § 2778, subd. 2; Treloar v. Keil et al., 36 Cal. App. 159, 171 P. 823; Terry v. Southwestern Building Co., 43 Cal. App. 372, 185 P. 212; Fernandez v. Tormey, 121 Cal. 518, 519, 53 P. 1119.

It is urged by counsel for respondent that, assuming the allegations as to the character and purposes of defendant corporation to be true, the rule of exemption from liability for the negligent acts of the employees of a charity has not been adopted as the rule in California, citing Stewart v. Cal. Medical, etc., Ass'n, 178 Cal. 418, 423, 176 P. 46. With this question, however, we are not here concerned, as the facts sought to be proved by plaintiff would be relevant and material only on the assumption that the character and purposes of defendant corporation are material elements in the case. If the latter be immaterial, then the fact of the existence of the policy in question is also immaterial; the only purpose, if any, for which the policy would be competent and relevant being as evidence tending to prove that the character and purposes of the corporation were other than those alleged or as a fact rendering any rule of nonliability otherwise available as a defense inapplicable, it not being contended that the policy would be competent as evidence that the corporation or its servants were guilty of the negligence alleged in the complaint.

[2] It is further contended that, assuming the corporation to be a charity as alleged, the policy in question protects the trust fund against depletion, and that therefore the reason for the rule, if any, exempting the corporation from liability, and based upon the fact of the trust fund, fails.

In jurisdictions where the rule exempting charities from liability has been adopted, and the reason for the rule based upon the trust fund theory, it is held that the charity, whether incorporated or not, is a trustee, and is bound to apply the funds or property in furtherance of the charity and not otherwise, and that the law will not permit the trustee to deplete the fund set aside for charity by using it in paying damages caused by the acts of those engaged in administering the trust. Adams v. University Hospital, 122 Mo. App. 675, 99 S. W. 453; Gable v. Sisters of St. Francis, 227 Pa. 254, 75 A. 1087, 136 Am. St. Rep. 879; Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N. E. 392, 14 A. L. R. 563.

If a liability may be created or an exemption waived by the acts of the trustee of a charity in procuring and accepting the promise of a third person to make good the losses following such liability or waiver, and the trustee thus allowed to accomplish indirectly that which is not permitted to be done directly, the protection afforded by the rule created would be destroyed. No authorities holding in accordance with the argumen of counsel in this behalf have been called to our attention; and it is our opinion that the theory that a charity, not otherwise subject to liability, may become liable by reason of the procurement by those administering it of indemnity insurance cannot be supported in principle. It is further contended that the policy would be admissible as evidence tending to show the character of the corporation and the manner of conducting the hospital.

[3, 4] The character of the defendant is to be determined not alone by the powers and purposes defined in its articles of incorporation but also by the method of transacting the business of the hospital. Stewart v. Cal. Med., etc., Ass'n, supra. As a general rule, any facts having rational probative value would be admissible for that purpose; and it is urged that the policy would be relevant as the basis for certain inferences, in that the act of the officers of the corporation in procuring the insurance policy would be evidence of their consciousness that defendant is not a charity as alleged, and that the hospital was not being conducted for such purposes, but for purposes making necessary or proper the procurement of insurance protect-

ing the corporation from the possible legal consequences of its conduct, and that from such consciousness might be inferred the ultimate fact sought to be shown.

As stated in Wigmore on Evidence, § 267 et seq., there is a large class of cases where consciousness is of service evidentially as forming a second step of inference to some other fact which forms the ultimate object of proof. Conduct is competent and relevant as evidence of consciousness of guilt in criminal proceedings; and the principle has been applied in cases where questions of ownership or employment were in issue, and wherein the fact of the procurement of indemnity insurance was admitted as evidence relevant to such issues. Perkins v. Rice, 187 Mass. 28, 72 N. E. 323; Davis v. North Carolina Shipbuilding Co., 180 N. C. 74, 104 S. E. 82.

In the numerous cases where, from the act of improving the condition of places and objects after the occurrence of an injury alleged to have been caused by such condition, an inference of negligence has been sought to be drawn on the assumption that such act would indicate a consciousness or belief that the injury was caused by the negligence of the owner, such evidence has been generally rejected, the rule of exclusion being applied on the ground that the supposed inference from the act was not the plain and most probable one; and that while on the theory of relevancy the inference sought to be drawn from such fact was fairly possible, and the fact would thus be brought within the general rule as to admissibility, by a rule of policy based upon the possibility that greater weight might be given thereto than could be reasonably justified, or that the fact might be considered as supporting issues to which it would not be relevant, the evidence should be excluded.

A similar situation is presented in the instant case, in that while the evidence offered has indirectly a degree of probative value on the issue as to the character and purposes of defendant corporation, the ultimate conclusion sought to be drawn therefrom is not the plain or most probable one, and the weight which might fairly be given thereto would not overcome the well-settled reasons of policy for the exclusion of evidence of this character; and when the uncertainty as to the rule to be applied to facts such as are alleged in the pleading mentioned, as indicated by the language of the court in Stewart v. Cal. Med., etc., Ass'n, supra, is considered, it appears to us that the act of the corporation in procuring a policy of the character hereinbefore assumed could be the basis for no reasonable inference other that as a prudent trustee, in view of such uncertainty, it deemed such protection necessary and proper, pending action by the Legislature or a final determination of the question by the courts.

[5] The refusal of a witness to produce writings which would not be competent as evidence, or to answer questions not pertinent to the issues of the case, does not constitute contempt; and before a witness can be held to be in contempt it must appear that the evidence sought to be adduced would be competent, relevant, and material under such issues; and an order adjudging a witness guilty of contempt for his failure to produce such writings or to answer such questions is invalid, and such an order may be reviewed on certiorari. Ex parte Zeehandelaar, 71 Cal. 238, 12 P. 259; Hupp v. Superior Court, 22 Cal. App. 162, 133 P. 987; Kimball v. Superior Court, 38 Cal. App. 761, 177 P. 488; Commercial Bank, etc., v. Superior Court, 192 Cal. 395, 220 P. 422.

In the instant case it does not appear from the order that the court considered the policy to be admissible for any purposes other than those urged by counsel for respondent as hereinbefore stated; and it is our conclusion that, as evidence for such purposes, or for any purpose under the issues presented by the pleadings, it would not be admissible; that respondent was therefore without jurisdiction to adjudge petitioner guilty of contempt of court; that the judgment should be annulled; and it is so ordered.

We concur: TYLER, P. J.; KNIGHT, J.

WEST KEY NUMBER SYSTEM

NATIONAL UNIVERSITY LIBRARY
3 1786 10046 8609

NATIONAL UNIVERSITY
LIBRARY SAN DIEGO

NON CIRCULATING